

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 214 and 274a

[CIS No. 2740–23; DHS Docket No. USCIS–2023–0012]

RIN 1615–AC76

### Modernizing H–2 Program Requirements, Oversight, and Worker Protections

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) proposes to amend its regulations affecting temporary agricultural (H–2A) and temporary nonagricultural (H–2B) nonimmigrant workers (H–2 programs) and their employers. This notice of proposed rulemaking is intended to better ensure the integrity of the H–2 programs and enhance protections for workers.

**DATES:** Written comments must be submitted on or before November 20, 2023. The electronic Federal Docket Management System will accept comments prior to midnight eastern time at the end of that day.

**ADDRESSES:** You may submit comments on the entirety of this proposed rulemaking package, identified by DHS Docket No. USCIS–2023–0012 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the website instructions for submitting comments.

Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule and may not receive a response from DHS. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. USCIS is also not accepting mailed comments at this time. If you cannot submit your comment by using <http://www.regulations.gov>, please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721–3000 for alternate instructions.

**FOR FURTHER INFORMATION CONTACT:** 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, MD, Camp Springs, 20746; telephone (240) 721–3000. (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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##### Table of Abbreviations

BLS—Bureau of Labor Statistics  
 CBP—U.S. Customs and Border Protection  
 CFR—Code of Federal Regulations  
 CPI—U—Consumer Price Index for All Urban Consumers  
 DHS—Department of Homeland Security  
 DOJ—Department of Justice  
 DOL—Department of Labor  
 DOS—Department of State  
 DOT—Department of Transportation  
 ETA—Employment and Training Administration  
 FDNS—Fraud Detection and National Security Directorate  
 FY—Fiscal year  
 GAO—Government Accountability Office  
 GDOL—Guam Department of Labor  
 H–2A—Temporary Agricultural Workers Nonimmigrant Classification  
 H–2B—Temporary Nonagricultural Workers Nonimmigrant Classification  
 ICE—U.S. Immigration and Customs Enforcement

INA—Immigration and Nationality Act  
 INS—Immigration and Naturalization Service  
 LCA—Labor condition application  
 MOU—Memorandum of understanding  
 NAICS—North American Industry Classification System  
 NEPA—National Environmental Policy Act  
 NOID—Notice of intent to deny  
 NPRM—Notice of proposed rulemaking  
 OFLC—Office of Foreign Labor Certification  
 OIRA—Office of Information and Regulatory Affairs  
 OMB—Office of Management and Budget  
 OSHA—Occupational Safety and Health Administration  
 PRA—Paperwork Reduction Act  
 RFA—Regulatory Flexibility Act of 1980  
 RFE—Request for evidence  
 SBA—Small Business Administration  
 SSA—Social Security Administration  
 TFR—Temporary final rule  
 TLC—Temporary labor certification  
 UMRA—Unfunded Mandates Reform Act of 1995  
 USCIS—U.S. Citizenship and Immigration Services  
 USAID—U.S. Agency for International Development  
 WHD—Wage and Hour Division

#### I. Public Participation

DHS invites all interested parties to participate in this rulemaking by submitting written data, views, comments, and arguments on all aspects of this proposed rule. DHS also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to USCIS in implementing these changes will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule and may not receive a response from DHS.

**Instructions:** If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. USCIS–2023–0012 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission

you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at <http://www.regulations.gov>.

*Docket:* For access to the docket and to read background documents or comments received, go to <http://www.regulations.gov>, referencing DHS Docket No. USCIS-2023-0012. You may also sign up for email alerts on the online docket to be notified when comments are posted, or a final rule is published.

## II. Executive Summary

### A. Purpose of the Regulatory Action

The purpose of this rulemaking is to modernize and improve the DHS regulations relating to the H-2A temporary agricultural worker program and the H-2B temporary nonagricultural worker program (H-2 programs). Through this proposed rule, DHS seeks to strengthen worker protections and the integrity of the H-2 programs, provide greater flexibility for H-2A and H-2B workers, and improve program efficiency.

### B. Summary of Major Provisions of the Regulatory Action

DHS proposes to include the following major changes:

- Program Integrity and Worker Protections

To improve the integrity of the H-2 programs, DHS is proposing significant revisions to the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H-2A and H-2B workers, including new bars to approval for some H-2 petitions. Further, as a significant new program integrity measure and a deterrent to petitioners that have been found to have committed labor law violations or abused the H-2 programs, DHS is proposing to institute certain mandatory and discretionary bars to approval of an H-2A or H-2B petition. In addition, to protect workers who report their employers for program violations, DHS is proposing to provide H-2A and H-2B workers with “whistleblower protection” comparable to the protection that is currently offered to H-1B workers. Additionally, DHS proposes to clarify requirements for petitioners and employers to consent to, and fully comply with, USCIS compliance reviews and inspections. DHS also proposes to clarify USCIS’s authority to deny or revoke a petition if

USCIS is unable to verify information related to the petition, including but not limited to where such inability is due to lack of cooperation from a petitioner or an employer during a site visit or other compliance review.

- Worker Flexibilities

DHS is also proposing changes meant to provide greater flexibility to H-2A and H-2B workers. These changes include adjustments to the existing admission periods before and after the validity dates of an approved petition (grace periods) so that H-2 workers would receive up to 10 days prior to the petition’s validity period and up to 30 days following the expiration of the petition, as well as an extension of the existing 30-day grace period following revocation of an approved petition during which an H-2 worker may seek new qualifying employment or prepare for departure from the United States without violating their nonimmigrant status or accruing unlawful presence for up to 60 days. In addition, to account for other situations in which a worker may unexpectedly need to stop working or wish to seek new employment, DHS is proposing to provide a new grace period for up to 60 days during which an H-2 worker can cease working for their petitioner while maintaining H-2 status. Further, in a change meant to work in conjunction with the new grace period provisions, DHS proposes to permanently provide portability—the ability to begin new employment upon the proper filing of an extension of stay petition rather than only upon its approval—to H-2A and H-2B workers. Additionally, in the case of petition revocations, DHS proposes to clarify that H-2A employers have the same responsibility that H-2B employers currently have for reasonable costs of return transportation for the beneficiary. DHS also proposes to clarify that H-2 workers will not be considered to have failed to maintain their H-2 status solely on the basis of taking certain steps toward becoming lawful permanent residents of the United States. Finally, DHS proposes to remove the phrase “abscondment,” “abscond,” and its other variations to emphasize that the mere fact of leaving employment, standing alone, does not constitute a basis for assuming wrongdoing by the worker.

- Improving H-2 Program Efficiencies and Reducing Barriers to Legal Migration

DHS proposes two changes to improve the efficiency of the H-2 programs and to reduce barriers to use of those two programs. First, DHS proposes to remove the requirement that

USCIS may generally only approve petitions for H-2 nonimmigrant status for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated as eligible to participate in the H-2 programs. Second, DHS proposes to simplify the regulatory provisions regarding the effect of a departure from the United States on the 3-year maximum period of stay by providing a uniform standard for resetting the 3-year clock following such a departure.

### C. Summary of Costs and Benefits

This proposed rule would directly impose costs on petitioners in the form of increased opportunity costs of time to complete and file H-2 petitions and time spent to familiarize themselves with the rule. Other difficult to quantify costs may also be experienced by certain petitioners if selected for a compliance review, petitioners that face stricter consequences regarding prohibited fees, or for those that opt to transport and house H-2A beneficiaries earlier than they would have otherwise based on the proposed extension of the pre-employment grace period from 7 to 10 days. The Federal Government may also face some increased opportunity costs of time for adjudicators to review information regarding debarment and other past violation determinations more closely, issue requests for evidence (RFE) or notices of intent to deny (NOID), and additional costs for related computer system updates.

The benefits of this proposed rule would be diverse, though most are difficult to quantify. The proposed rule would extend portability to H-2 workers lawfully present in the United States regardless of a porting petitioner’s E-Verify standing, affording these workers agency of choice at an earlier moment in time, which is consistent with other portability regulations and more similar to other workers in the labor force. Employers and beneficiaries would also benefit from the extended grace periods and eliminating the interrupted stay provisions and instead reducing the period of absence out of the country to reset their 3-year maximum period of stay. The Federal Government would also realize benefits, mainly through bolstering existing program integrity activities, possible increased compliance with program requirements, and providing a greater ability for USCIS to deny or revoke petitions for issues related to program compliance.

Table 1 provides a more detailed summary of the proposed provisions and their impacts. The impact of the

costs and benefits described herein are possible given all available information. quantify a given impact, we provide a  
 quantified (and monetized) wherever Where there are insufficient data to qualitative description of the impact.

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS

Provision	Purpose of proposed provision	Expected impact of the proposed provision
8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F) .....	DHS is proposing to add stronger language requiring petitioners or employers to both consent to and fully comply with any USCIS audit, investigation, or other program integrity activity and clarify USCIS’s authority to deny/revoke a petition if unable to verify information related to the petition, including due to lack of cooperation from the petitioner or employer during a site visit or other compliance review.	Cost: <ul style="list-style-type: none"> <li>• Cooperation during a site visit or compliance review may result in opportunity costs of time for petitioners to provide information to USCIS during these compliance reviews and inspections. On average, USCIS site visits last 1.7 hours, which is a reasonable estimate for the marginal time that a petitioner may need to spend in order to comply with a site visit.</li> <li>• Employers that do not cooperate would face denial or revocation of their petition(s), which could result in costs to those businesses.</li> </ul> Benefit: <ul style="list-style-type: none"> <li>• USCIS would have clearer authority to deny or revoke a petition if unable to verify information related to the petition. The effectiveness of existing USCIS program integrity activities would be improved through increased cooperation from employers.</li> </ul>
8 CFR 214.2(h)(20) .....	DHS is proposing to provide H–2A and H–2B workers with “whistleblower protection” comparable to the protection currently offered to H–1B workers.	Cost: <ul style="list-style-type: none"> <li>• Employers may face increased RFEs, denials, or other actions on their H–2 petitions, or other program integrity mechanisms available under this rule or existing authorities, as a result of H–2 workers’ cooperation in program integrity activity due to whistleblower protections. Such actions may result in potential costs such as lost productivity and profits to employers whose noncompliance with the program is revealed by whistleblowers.</li> </ul> Benefit: <ul style="list-style-type: none"> <li>• Such protections may afford workers the ability to expose issues that harm workers or are not in line with the intent of the H–2 programs while also offering protection to such workers (therefore potentially improving overall working conditions), but the extent to which this would occur is unknown.</li> </ul>
8 CFR 214.2(h)(5)(xi)(A), 8 CFR 214.2(h)(5)(xi)(C), 8 CFR 214.2(h)(6)(i)(B), 8 CFR 214.2(h)(6)(i)(C), and 8 CFR 214.2(h)(6)(i)(D).	DHS is proposing significant revisions to the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H–2A and H–2B workers, including new bars on approval for some H–2 petitions.	Cost: <ul style="list-style-type: none"> <li>• Enhanced consequences for petitioners who charge prohibited fees could lead to increased financial losses and extended ineligibility from participating in H–2 programs.</li> </ul> Benefit: <ul style="list-style-type: none"> <li>• Possibly increase compliance with provisions regarding prohibited fees and thus reduce the occurrence and burden of prohibited fees on H–2 beneficiaries.</li> </ul>
8 CFR 214.2(h)(10)(iii) .....	DHS is proposing to institute certain mandatory and discretionary bars to approval of an H–2A or H–2B petition.	Costs: <ul style="list-style-type: none"> <li>• USCIS adjudicators may require additional time associated with reviewing information regarding debarment and other past violation determinations more closely, issuing RFEs or NOIDs, and conducting the discretionary analysis for relevant petitions.</li> <li>• The expansion of violation determinations that could be considered during adjudication, as well as the way debarments and other violation determinations would be tracked, would require some computer system updates resulting in costs to USCIS.</li> </ul> Benefit: <ul style="list-style-type: none"> <li>• Possibly increase compliance with H–2 program requirements, thereby increasing protection of H–2 workers.</li> </ul>

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS—Continued

Provision	Purpose of proposed provision	Expected impact of the proposed provision
8 CFR 214.2(h)(2)(ii) and (iii), 8 CFR 214.2(h)(5)(i)(F), and 8 CFR 214.2(h)(6)(i)(E).	Eliminate the lists of countries eligible to participate in the H–2 programs.	<p>Costs:</p> <ul style="list-style-type: none"> <li>• None expected.</li> </ul> <p>Benefit:</p> <ul style="list-style-type: none"> <li>• Employers and the Federal Government will benefit from the simplification of Form I–129 adjudications by eliminating the “national interest” portion of the adjudication that USCIS is currently required to conduct for beneficiaries from countries that are not on the lists.</li> <li>• Remove petitioner burden to provide evidence for beneficiaries from countries not on the lists.</li> <li>• Petitioners may have increased access to workers potentially available to the H–2 programs.</li> <li>• Free up agency resources devoted to developing and publishing the eligible country lists in the <b>Federal Register</b> every year.</li> </ul>
8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(6)(vii)(A) 8 CFR 214.2(h)(11)(iv) and 8 CFR 214.2(h)(13)(i)(C) .....	<p>Change grace periods such that they will be the same for both H–2A and H–2B Programs.</p> <p>Create a 60-day grace period following any H–2A or H–2B revocation or cessation of employment during which the worker will not be considered to have failed to maintain nonimmigrant status and will not accrue any unlawful presence solely on the basis of the revocation or cessation.</p>	<p>Costs:<sup>1</sup></p> <ul style="list-style-type: none"> <li>• H–2A employers may face additional costs such as for housing, but employers likely would weigh those costs against the benefit of providing employees with additional time to prepare for the start of work.</li> </ul> <p>Benefit:</p> <ul style="list-style-type: none"> <li>• Provides employees (and their employers) with extra time to prepare for the start of work. Provides clarity for adjudicators and makes timeframes consistent for beneficiaries and petitioners.</li> <li>• Provides workers additional time to seek other employment or depart from the United States if their employer faces a revocation or if they cease employment.</li> </ul>
8 CFR 214.2(h)(11)(iv) .....	Clarifies responsibility of H–2A employers for reasonable costs of return transportation for beneficiaries following a petition revocation.	<p>Costs:</p> <ul style="list-style-type: none"> <li>• None expected since H–2A petitioning employers are already generally liable for the return transportation costs of H–2A workers.</li> </ul> <p>Benefit:</p> <ul style="list-style-type: none"> <li>• Beneficiaries would benefit in the event that clarified employer responsibility decreased the incidence of workers having to pay their own return travel costs in the event of a petition revocation.</li> </ul>
8 CFR 214.2(h)(16)(i) .....	Clarifies that H–2 workers may take steps toward becoming a lawful permanent resident of the United States while still maintaining lawful non-immigrant status.	<p>Costs:</p> <ul style="list-style-type: none"> <li>• None expected.</li> </ul> <p>Benefit:</p> <ul style="list-style-type: none"> <li>• DHS expects this could enable some H–2 workers who have otherwise been dissuaded to pursue lawful permanent residence with the ability to do so without concern over becoming ineligible for H–2 status.</li> </ul>
8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(6)(vii), and 8 CFR 214.2(h)(13)(i)(B).	Eliminates the “interrupted stay” calculation and instead reduces the period of absence to reset an individual’s 3-year period of stay.	<p>Costs:</p> <ul style="list-style-type: none"> <li>• Workers in active H–2 status who would consider making trips abroad for periods of less than 60 days but more than 45 days, may be disincentivized to make such trip.</li> </ul> <p>Benefit:</p> <ul style="list-style-type: none"> <li>• Simplifies and reduces the burden to calculate beneficiary absences for petitioners, beneficiaries, and adjudicators.</li> <li>• May reduce the number of RFEs related to 3-year periods of stay.</li> </ul> <p>Transfers:</p> <ul style="list-style-type: none"> <li>• As a result of a small number of H–2 workers at the 3-year maximum stay responding to the proposed shorter absence requirement by working 30 additional days, DHS estimates upper bound annual transfer payment of \$2,918,958 in additional earnings from consumers to H–2 workers and \$337,122 in tax transfers from these workers and their employers to tax programs (Medicare and Social Security).</li> </ul>

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS—Continued

Provision	Purpose of proposed provision	Expected impact of the proposed provision
<p>8 CFR 214.2(h)(2)(i)(D), 8 CFR 214.2(h)(2)(i)(I), and 8 CFR 274a.12(b)(21).</p>	<p>Make portability permanent for H-2B workers and remove the requirement that H-2A workers can only port to an E-Verify employer.</p>	<p>Costs:</p> <ul style="list-style-type: none"> <li>• The total estimated annual opportunity cost of time to file Form I-129 by human resource specialists is approximately \$40,418. The total estimated annual opportunity cost of time to file Form I-129 and Form G-28 will range from approximately \$90,554 if filed by in-house lawyers to approximately \$156,132 if filed by outsourced lawyers.</li> <li>• The total estimated annual costs associated with filing Form I-907 if it is filed with Form I-129 is \$4,728 if filed by human resource specialists. The total estimated annual costs associated with filing Form I-907 would range from approximately \$9,006 if filed by an in-house lawyer to approximately \$15,527 if filed by an outsourced lawyer.</li> <li>• The total estimated annual costs associated with the portability provision ranges from \$133,684 to \$198,851, depending on the filer.</li> <li>• DHS may incur some additional adjudication costs as more petitioners will likely file Form I-129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form.</li> </ul> <p>Benefit:</p> <ul style="list-style-type: none"> <li>• Enabling H-2 workers present in the United States to port to a new petitioning employer affords these workers agency of choice at an earlier moment in time consistent with other portability regulations and more similar to other workers in the labor force.</li> <li>• Replacing the E-Verify requirement for employers wishing to hire porting H-2A workers with strengthened site visit authority and other provisions that maintain program integrity would aid porting beneficiaries in finding petitioners without first needing to confirm if that employer is in good standing in E-Verify. Although this change impacts an unknown portion of new petitions for porting H-2A beneficiaries, no reductions in E-Verify enrollment are anticipated.</li> <li>• An H-2 worker with an employer that is not complying with H-2 program requirements would have additional flexibility in porting to another employer's certified position.</li> </ul> <p>Transfers:</p> <ul style="list-style-type: none"> <li>• Annual undiscounted transfers of \$636,760 from filing fees for Form I-129 combined with Form I-907 from petitioners to USCIS.</li> </ul>
<p>8 CFR 214.2(h)(2)(i)(I)(3) .....</p>	<p>DHS proposes to clarify that a beneficiary of an H-2 portability petition is considered to have been in a period of authorized stay during the pendency of the petition and that the petitioner must still abide by all H-2 program requirements.</p>	<p>Benefits:</p> <ul style="list-style-type: none"> <li>• Provides H-2 workers with requisite protections and benefits as codified in the rule in the event that a porting provision is withdrawn or denied.</li> </ul> <p>Costs:</p> <ul style="list-style-type: none"> <li>• None expected.</li> </ul>

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS—Continued

Provision	Purpose of proposed provision	Expected impact of the proposed provision
<b>Cumulative Impacts of Proposed Regulatory Changes</b>		
DHS proposes to make changes to the Form I-129, to effectuate the proposed regulatory changes.		<p>Costs:</p> <ul style="list-style-type: none"> <li>The time burden to complete and file Form I-129, H Classification Supplement, would increase by 0.3 hours as a result of the proposed changes. The estimated opportunity cost of time for each petition by type of filer would be \$15.28 for an HR specialist, \$34.25 for an in-house lawyer, and \$59.06 for an outsourced lawyer. The estimated total annual opportunity costs of time for petitioners or their representatives to file H-2 petitions under this proposed rule ranges from \$745,330 to \$985,540.</li> </ul>
Petitioners or their representatives would familiarize themselves with the rule .....		<p>Costs:</p> <ul style="list-style-type: none"> <li>Petitioners or their representatives would need to read and understand the rule at an estimated opportunity cost of time that ranges from \$9,739,715 to \$12,877,651, incurred during the first year of the analysis.</li> </ul>

Source: USCIS analysis.

### III. Background

#### A. Legal Authority

The Immigration and Nationality Act (INA or the Act) section 101(a)(15)(H)(ii)(a) and (b), 8 U.S.C. 1101(a)(15)(H)(ii)(a) and (b), establishes the H-2A and H-2B nonimmigrant visa classifications for noncitizens<sup>2</sup> who are coming to the United States temporarily to perform agricultural labor or services or to perform nonagricultural services or labor, respectively.

The Secretary’s authority for this proposed rule can be found in various provisions of the immigration laws. INA sec. 103(a), as amended, 8 U.S.C. 1103(a), provides the Secretary general authority to administer and enforce the immigration laws and to issue regulations necessary to carry out that authority. Section 402 of the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 202, charges the Secretary with “[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States” and “[e]stablishing

national immigration enforcement policies and priorities.” See also HSA sec. 428, 6 U.S.C. 236. The HSA also provides that 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.” HSA sec. 101(b)(1)(F), 6 U.S.C. 111(b)(1)(F).

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.”<sup>3</sup> INA sec. 214(a)(1), 8 U.S.C. 1184(a)(1). See INA secs. 274A(a)(1) and (h)(3), 8 U.S.C. 1324a(a)(1) and (h)(3) (prohibiting employment of noncitizens who are not authorized for employment). And the HSA transferred to USCIS the authority to adjudicate petitions for H-2 nonimmigrant status, establish policies for performing that function, and set national immigration services policies and priorities. See HSA secs. 451(a)(3), (b); 6 U.S.C. 271(a)(3), (b). In addition, under INA sec. 214(b), 8 U.S.C. 1184(b), every noncitizen, with the exception of noncitizens seeking L, V, or H-1B nonimmigrant status, is presumed to be an immigrant unless the noncitizen establishes the noncitizen’s

entitlement to a nonimmigrant status.<sup>4</sup> INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1), establishes the nonimmigrant petition process as a prerequisite for obtaining (H), (L), (O), or (P)(i) nonimmigrant status (except for those in the H-1B1 classification). This statutory provision provides the Secretary of Homeland Security with exclusive authority to approve or deny H-2 nonimmigrant visa petitions after consultation with the appropriate agencies of the Government. It also authorizes the Secretary to prescribe the form and identify information necessary for the petition. With respect to the H-2A classification, this section defines the term “appropriate agencies of [the] Government” to include the Departments of Labor and Agriculture, and cross-references INA sec. 218, 8 U.S.C. 1188, with respect to the H-2A classification.

INA sec. 214(c)(5)(A), 8 U.S.C. 1184(c)(5)(A), requires the employer to provide or pay for the reasonable cost of return transportation if an H-2B worker was dismissed early from employment, *i.e.*, before the end of the authorized period of admission.

<sup>4</sup> This section also precludes officers or employees of any foreign governments or of any international organizations entitled to enjoy privileges, exemptions, and immunities under the International Organizations Immunities Act [22 U.S.C. 288 *et seq.*], or noncitizens who are attendants, servants, employees, or member of the immediate family of such noncitizens from applying for or receiving nonimmigrant visas or entering the United States as immigrants unless they execute a written waiver in the same form and substance as is prescribed by section 1257(b) of this title. This portion of the provision, however, is not relevant to this NPRM.

<sup>1</sup> USCIS does not expect any additional costs to H-2B employers as, generally, they do not have to provide housing for workers. Employers are required to provide housing at no cost to H-2A workers. See INA sec. 218(c)(4), 8 U.S.C. 1188(c)(4). There is no similar statutory requirement for employers to provide housing to H-2B workers, although there is a regulatory requirement for an H-2B employer to provide housing when it is primarily for the benefit or convenience of the employer. See 20 CFR 655.20(b), (c); 29 CFR 531.3(d)(1); 80 FR 24042, 24063 (Apr. 29, 2015).

<sup>2</sup> For purposes of this discussion, DHS uses the term “noncitizen” as synonymous with the term “alien” as it is used in the INA and regulations. See INA sec. 101(a)(3), 8 U.S.C. 1101(a)(3).

<sup>3</sup> Although several provisions of the INA discussed in this NPRM refer exclusively to the “Attorney General,” such provisions are now to be read as referring to the Secretary of Homeland Security by operation of the HSA. See 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1), (g), 1551 note; *Nielsen v. Preap*, 139 S. Ct. 954, 959 n.2 (2019).

INA sec. 214(c)(14), 8 U.S.C. 1184(c)(14), provides the Secretary of Homeland Security with the authority to impose administrative remedies (including civil monetary penalties), and deny petitions for a period of at least 1 but not more than 5 years, if, after notice and an opportunity for a hearing, the Secretary finds that an employer substantially failed to meet any of the conditions of the H-2B petition or engaged in willful misrepresentation of a material fact in the H-2B petition. *See* INA sec. 214(c)(14)(A)(i) and (ii), 8 U.S.C. 1184(c)(14)(A)(i) and (ii). It also authorizes the Secretary to delegate to the Secretary of Labor the authority to determine violations and impose administrative remedies, including civil monetary penalties. *See* INA sec. 214(c)(14)(B), 8 U.S.C. 1184(c)(14)(B).<sup>5</sup> The Secretary of Homeland Security may designate officers or employees to take and consider evidence concerning any matter that is material or relevant to the enforcement of the INA. *See* INA secs. 235(d)(3), 287(a)(1), (b); 8 U.S.C. 1225(d)(3), 1357(a)(1), (b).

### B. Description of the H-2 Nonimmigrant Classifications

#### 1. H-2A Temporary Agricultural Workers

The INA establishes the H-2A nonimmigrant classification for temporary agricultural workers, described as a noncitizen “having a residence in a foreign country which he [sic] has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services.” INA sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a). As noted in the statute, not only must the noncitizen be coming “temporarily” to the United States, but the agricultural labor or services that the noncitizen is performing must also be “of a temporary or seasonal nature.” INA sec. 101(a)(15)(H)(ii)(a).

Current DHS regulations further define an employer’s temporary need as employment that is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year. *See* 8 CFR 214.2(h)(5)(iv)(A). An employer’s seasonal need is defined as employment that is tied to a certain time

of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle and requires labor levels above those necessary for ongoing operations. *Id.* There is no annual limit or “cap” on the number of noncitizens who may be issued H-2A visas or otherwise provided H-2A status (such as through a change from another nonimmigrant status, *see* INA sec. 248, 8 U.S.C. 1258).

#### 2. H-2B Temporary Nonagricultural Workers

Similarly, the INA establishes the H-2B nonimmigrant classification for temporary nonagricultural workers, described as a noncitizen “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary [nonagricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). Current DHS regulations define an employer’s temporary need as employment that is of a temporary nature where the employer’s need to fill the position with a temporary worker generally will last no longer than 1 year, unless the employer’s need is a one-time event, in which case the need could last up to 3 years. *See* 8 CFR 214.2(h)(1)(ii)(D), (h)(6)(ii), and (h)(6)(vi)(D).

Unlike the H-2A classification, there is a statutory annual limit or “cap” on the number of noncitizens who may be issued H-2B visas or otherwise provided H-2B status. Specifically, the INA sets the annual number of noncitizens who may be issued H-2B visas or otherwise provided H-2B status at 66,000, to be distributed semi-annually beginning in October and April. *See* INA sec. 214(g)(1)(B) and (g)(10), 8 U.S.C. 1184(g)(1)(B) and (g)(10). With certain exceptions,<sup>6</sup> up to

<sup>6</sup> Generally, workers in the United States in H-2B status who extend their stay, change employers, or change the terms and conditions of employment will not be subject to the cap. *See* 8 CFR 214.2(h)(8)(ii). Similarly, H-2B workers who have previously been counted against the cap in the same fiscal year that the proposed employment begins will not be subject to the cap if the employer names them on the petition and indicates that they have already been counted. *See* 8 CFR 214.2(h)(8)(ii). The spouse and children of H-2B workers, classified as H-4 nonimmigrants, also do not count against the cap.

Additionally, petitions for the following types of workers are exempt from the H-2B cap: Fish roe processors, fish roe technicians, or supervisors of fish roe processing; and workers performing labor or services in the Commonwealth of Northern Mariana Islands or Guam until Dec. 31, 2029. *See* Section 14006 of Public Law 108–287, 118 Stat. 951, 1014 (Aug. 5, 2004), and Section 3 of the

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>7</sup> If insufficient petitions are approved to use all available 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.

#### 3. Temporary Labor Certification (TLC) Process

H-2 workers may not displace qualified, available U.S. workers who are capable of performing such services or labor. *See* INA secs. 101(a)(15)(H)(ii)(a)–(b), 8 U.S.C. 1101(a)(15)(H)(ii)(a)–(b), and 218(a)(1), 8 U.S.C. 1188(a)(1); 8 CFR 214.2(h)(5)(ii)<sup>8</sup> and (h)(6)(i). In addition, H-2 employment may not adversely affect the wages and working conditions of workers in the United States. *See* INA sec. 218(a)(1)(B), 8 U.S.C. 1188(a)(1)(B) (H-2A); INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b) (H-2B); 8 CFR 214.2(h)(5)(ii) and (h)(6)(i). DHS regulations provide that an H-2A or H-2B petition for temporary employment in the United States must be accompanied by an approved TLC from DOL, issued pursuant to regulations established at 20 CFR part 655, or from the Guam Department of Labor (GDOL) for H-2B workers who will be employed on Guam. *See, e.g.*, 8 CFR 214.2(h)(5)(i)(A), (h)(6)(iii)(A), (C)–(E), (h)(6)(iv)(A), (v)(A). *See generally* INA secs. 103(a)(6), 214(c)(1), 8 U.S.C. 1103(a)(6), 1184(c)(1). The TLC serves as DHS’s consultation with DOL or GDOL with respect to whether a qualified U.S. worker is available to fill the petitioning

Northern Mariana Islands U.S. Workforce Act of 2018, Pub. L. 115–218, 132 Stat. 1547, 1547 (July 24, 2018). Once the H-2B cap is reached, USCIS may only accept petitions for H-2B workers who are exempt or not subject to the H-2B cap.

<sup>7</sup> The Federal Government’s fiscal year runs from October 1 of the prior calendar year through September 30 of the year being described. For example, fiscal year 2023 runs from October 1, 2022, through September 30, 2023.

<sup>8</sup> INA sec. 218 governs the temporary agricultural labor certifications issued by the Department of Labor (DOL). That section is implemented through regulations at 20 CFR part 655, subpart B and 29 CFR part 501. By issuing a temporary agricultural labor certification referenced in 8 CFR 214.2(h)(5)(ii), DOL binds the employer to comply with a variety of program obligations, including the prohibition against the layoff of U.S. workers, and several provisions related to the recruitment and hiring of U.S. workers. *See* 20 CFR 655.135(g); *see also* 20 CFR 655.135(a), (b), (c), (d), and (h).

<sup>5</sup> In 2009, the Secretary delegated to the Secretary of Labor certain authorities under INA sec. 214(c)(14)(A)(i). *See* “Delegation of Authority to the Department of Labor under Section 214(c)(14)(A) of the Immigration and Nationality Act” (Jan. 16, 2009).

H-2A or 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 workers in the United States. *See* INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(5)(ii), (h)(6)(iii)(A), and (h)(6)(v).

#### 4. Current H-2 Petition Procedures

Employers must petition DHS for classification of prospective temporary workers as H-2A or H-2B nonimmigrants. *See* INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1). After receiving an approved TLC, the employer listed on the TLC or the employer's U.S. agent ("H-2 petitioner") must file the H-2 petition with the appropriate USCIS office. *See* 8 CFR 214.2(h)(2)(i), (h)(5)(i)(A), (h)(6)(iii)(E), and (h)(6)(vi). The H-2 petitioner must be a U.S. employer, a U.S. agent meeting the requirements of 8 CFR 214.2(h)(2)(i)(F), or a foreign employer filing through a U.S. agent. *See* 8 CFR 214.2(h)(2)(i)(A), (5)(i)(A) and (h)(6)(iii)(B). The H-2 petitioner may request one or more named or unnamed H-2 workers, but the total number of workers may not exceed the number of positions listed on the TLC. *See* 8 CFR 214.2(h)(2)(ii) and (iii), (h)(5)(i)(B), and (h)(6)(viii). H-2 petitioners must identify by name the H-2 worker if the worker is in the United States or, under current DHS regulations, if the H-2 worker is a national of a country that is not designated as an H-2 participating country. *See* 8 CFR 214.2(h)(2)(iii). Generally, USCIS must approve this petition before the beneficiary can be considered eligible for an H-2A or H-2B visa or for H-2A or H-2B nonimmigrant status.

Once the petition is approved, under the INA and current DHS regulations, H-2 workers are limited to employment with the employer listed on the H-2 petition. *See* INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(1)(i); 8 CFR 274a.12(b)(9). An H-2 petitioner generally may submit a new H-2 petition, with a new, approved TLC, to USCIS to request an extension of H-2 nonimmigrant status for the validity of the TLC or for a period of up to 1 year. *See* 8 CFR 214.2(h)(15)(ii)(C). The H-2 petitioner must name the worker on the new H-2 petition because the H-2 worker is in the United States and requesting an extension of stay. For H-2A petitioners only, in the event of an emergent circumstance, the petitioner may request an extension to continue employment with the same employer not to exceed 2 weeks without first having to obtain an additional approved

TLC from DOL if certain criteria are met, by submitting the new H-2A petition. *See* 8 CFR 214.2(h)(5)(x).

#### 5. Admission and Limitations of Stay

Upon USCIS approval of the H-2 petition and the H-2 worker's admission to the United States or grant of status under the respective H-2 classification, the employer or U.S. agent may begin to employ the H-2 worker(s). USCIS has authority to approve the worker's H-2A or H-2B classification for up to the period authorized on the approved TLC. *See* 8 CFR 214.2(h)(9)(iii)(B). H-2 workers who are outside of the United States may apply for a visa with the Department of State (DOS) at a U.S. Embassy or Consulate abroad, if required, and seek admission to the United States as an H-2 nonimmigrant with U.S. Customs and Border Protection (CBP) at a U.S. port of entry. The spouse and children of an H-2 nonimmigrant, if they are accompanying or following to join an H-2 nonimmigrant, may be admitted into the United States, if they are otherwise admissible, as H-4 dependents for the same period of admission (including any extension periods) as the principal spouse or parent. *See* 8 CFR 214.2(h)(9)(iv). Thus, H-4 dependents of H-2 workers are subject to the same limitations on stay, including permission to remain in the country during the pendency of the new employer's petition, as the H-2 beneficiary, but generally may not engage in employment. *See* 8 CFR 214.2(h)(9)(iv).

In general, a noncitizen's H-2 status is limited by the validity dates on the approved H-2 petition, typically for a period of up to 1 year. *See* 8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(6)(iv)(B), 8 CFR 214.2(h)(6)(v)(B), 8 CFR 214.2(h)(9)(iii)(B), and 8 CFR 214.2(h)(15)(ii)(C). H-2A workers may be admitted to the United States for a period of up to 1 week prior to the beginning validity date listed on the approved H-2A petition so that they may travel to their worksites, but H-2A workers may not begin work until the beginning validity date. H-2A workers may also remain in the United States 30 days beyond the expiration date of the approved H-2A petition to prepare for departure or to seek an extension of stay or change of nonimmigrant status but cannot work during this period. *See* 8 CFR 214.2(h)(5)(viii)(B).

H-2B workers may be admitted to the United States for a period of up to 10 days prior to the beginning validity date listed on the approved H-2B petition so

that they may travel to their worksites, but H-2B workers may not begin work until the beginning validity date. Under current DHS regulations, H-2B workers also may remain in the United States up to 10 days beyond the expiration date of the approved H-2B petition to prepare for departure or to seek an extension of stay or change of nonimmigrant status and also cannot work during this period. *See* 8 CFR 214.2(h)(13)(i)(A). Unless otherwise authorized under 8 CFR 274a.12, H-2A and H-2B workers do not have employment authorization outside of the validity period listed on the approved petition. *See* 8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(13)(i)(A).

The maximum period of stay for a noncitizen in H-2 classification is 3 years (or 45 days in the U.S. Virgin Islands).<sup>9</sup> *See* 8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(13)(iv), and 8 CFR 214.2(h)(15)(C). Generally, once a noncitizen has held H-2 nonimmigrant status for a total of 3 years, they must depart and remain outside of the United States for an uninterrupted period of 3 months before seeking readmission as an H-2 nonimmigrant.<sup>10</sup> *See* 8 CFR 214.2(h)(5)(viii)(C) and (h)(13)(iv).

#### C. H-2 2008 Final Rules

In December 2008, DHS published two final rules providing that H-2 petitioners must meet certain requirements for an H-2 petition to be approved. *See Final Rule Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers*, 73 FR 78104 (Dec. 19, 2008); *Final Rule Changes to Requirements Affecting H-2A Nonimmigrants*, 73 FR 76891 (Dec. 18, 2008) (collectively "H-2 2008 Final Rules"). Those rules addressed a number of issues in the H-2 programs

<sup>9</sup> Any time an H-2 worker spends in the United States under section 101(a)(15)(H) or (L) of the Act, 8 U.S.C. 1101(a)(15)(H), (L), will count towards the 3-year limitation. *See* 8 CFR 214.2(h)(13)(iv). Time spent in H-4 or L-2 status will not count towards the 3-year limitation. *See* USCIS, *Additional Guidance on Determining Periods of Admission for Foreign Nationals Previously Admitted as H-4 Nonimmigrants who are Seeking H-2 or H-3 Status (PM-602-0092)*, [https://www.uscis.gov/sites/default/files/document/memos/2013-1111\\_H-4\\_Seeking\\_H-2\\_or\\_H-3\\_Status\\_PM\\_Effective\\_2.pdf](https://www.uscis.gov/sites/default/files/document/memos/2013-1111_H-4_Seeking_H-2_or_H-3_Status_PM_Effective_2.pdf).

<sup>10</sup> If the H-2 worker's accumulated stay is 18 months or less, an absence of at least 45 days will interrupt the 3-year limitation on admission. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 2 months. *See* 8 CFR 214.2(h)(5)(viii)(C) and (13)(iv); *see also* 8 CFR 214.2(h)(13)(v) (also excepting from the limitations under 8 CFR 214.2(h)(13)(iii) and (iv), with respect to H-2B beneficiaries, workers who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year, as well as workers who reside abroad and regularly commute to the United States to engage in part-time employment).

such as requiring that H-2 petitions be filed with a valid TLC approved by either the DOL or GDOL, as appropriate, prohibiting the imposition of certain fees on H-2 workers, modifying requirements to allow for unnamed H-2 beneficiaries in the petition, and amending the definition of “temporary services or labor,” among other changes.

DHS, through this proposed rulemaking, seeks to modify several requirements implemented by the H-2 2008 Final Rules. The following subsections describe those provisions as they were finalized in the 2008 rules.

#### 1. Prohibited Fees in the H-2 Nonimmigrant Classifications

Under current regulations, USCIS may deny or revoke a petition when the beneficiary pays, directly or indirectly, certain fees that are conditions of H-2A employment or, for H-2B workers, as a condition of an offer of employment. See 8 CFR 214.2(h)(5)(xi) and 8 CFR 214.2(h)(6)(i). The current regulation at 8 CFR 214.2(h)(5)(xi) prohibits the collection of job placement fees or other compensation (directly or indirectly) from the beneficiary at any time as a condition of H-2A employment, including before or after the filing or approval of the petition. The prohibition applies to the petitioner, agent, facilitator, recruiter, or a similar employment service. However, the current regulation permits the collection of the lesser of the fair market value or actual costs of transportation and any government-mandated passport, visa, or inspection fees so long as the payment of such fees is not prohibited by statute or DOL regulations, unless the employer agent, facilitator, recruiter, or similar employment service has agreed with the noncitizen to pay such costs and fees. The current regulation at 8 CFR 214.2(h)(6)(i)(B) contains largely identical language applicable to H-2B petitions, but omits mention of the “Department of Labor.”<sup>11</sup>

Under current DHS regulations, where such prohibited fees have been collected or the petitioner has entered into an agreement to collect such prohibited fees, including through a deduction or withholding from a worker’s wages, an H-2 petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to the filing of the petition, it has reimbursed the

beneficiary in full or, where such fee or compensation has not yet been paid by the beneficiary, that the agreement has been terminated. See 8 CFR

214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1). Generally, the H-2 petition will be denied or revoked if the petitioner knew or should have known that the beneficiary has paid or agreed to pay the prohibited fee as a condition of employment (or, in the H-2B context, as a condition of an offer of employment). See 8 CFR 214.2(h)(5)(xi)(2)–(4) and 8 CFR 214.2(h)(6)(i)(B)(2)–(4).

#### 2. H-2 Eligible Countries Lists

USCIS may generally only approve H-2 petitions for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated through a notice published in the **Federal Register** as countries eligible to participate in the respective H-2A and H-2B programs. See 8 CFR 214.2(h)(5)(i)(F)(1)(i) and 8 CFR 214.2(h)(6)(i)(E)(1). This **Federal Register** notice is effective for 1 year after publication. See 8 CFR 214.2(h)(5)(i)(F)(2) and 8 CFR 214.2(h)(6)(i)(E)(3). In designating countries whose nationals can participate in the H-2 programs, DHS takes into account several factors including, but not limited to: (1) the country’s cooperation with respect to issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest. See 8 CFR 214.2(h)(5)(i)(F)(1)(i) and 8 CFR 214.2(h)(6)(i)(E)(1).

Petitioners who seek H-2 workers from countries that are not designated as eligible to participate in the applicable H-2 program must meet additional criteria showing that it is in the U.S. interest to employ such workers. See 8 CFR 214.2(h)(5)(i)(F)(1)(ii) and 8 CFR 214.2(h)(6)(i)(E)(2). In determining what is in the U.S. interest for purposes of these provisions, the Secretary of Homeland Security has sole and unreviewable discretion to take into account factors including, but not limited to: (1) evidence from the petitioner demonstrating that a worker with the required skills is not available either from among U.S. workers or from among foreign workers from a country currently on the lists described in 8 CFR 214.2(h)(5)(i)(F)(1)(i) and 8 CFR

214.2(h)(6)(i)(E)(1); (2) evidence that the beneficiary has been admitted to the United States previously in H-2 status; (3) the potential for abuse, fraud, or other harm to the integrity of the applicable H-2 visa program through the potential admission of a beneficiary from a country not currently designated as eligible; and (4) such other factors as may serve the U.S. interest. See 8 CFR 214.2(h)(5)(i)(F)(1)(ii) and 8 CFR 214.2(h)(6)(i)(E)(2). Petitions for workers from designated countries and undesignated countries should be filed separately. See 8 CFR 214.2(h)(2)(ii). H-2 petitioners must name the H-2 worker if the H-2 worker is a national of a country that is not designated as an H-2 participating country. See 8 CFR 214.2(h)(2)(iii). USCIS reviews each petition naming a national from a country not on the lists and all supporting documentation and makes a determination on a case-by-case basis.

Subsequent to the publication of the H-2 2008 Final Rules, DHS has published annual notices in the **Federal Register** that designate certain countries as participants in the H-2 programs. In December 2008, DHS first published in the **Federal Register** two notices: *Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A Visa Program*, and *Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2B Visa Program*, which designated 28 countries whose nationals were eligible to participate in the H-2A and H-2B programs. See 73 FR 77043 (Dec. 18, 2008); 73 FR 77729 (Dec. 19, 2008). The notices ceased to have effect on January 17, 2010, and January 18, 2010, respectively. DHS has published a notice each year from 2010 through the present, in which various countries have been added or removed from the lists of countries eligible for participation in the H-2 programs. DHS published its most recent notice on November 10, 2022, and announced that the Secretary of Homeland Security, in consultation with the Secretary of State, identified 86 countries whose nationals are eligible to participate in the H-2A program and 87 countries whose nationals are eligible to participate in the H-2B program for 1 year ending November 9, 2023. See *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, 87 FR 67930 (Nov. 10, 2022).

The notices provide examples of specific factors serving the U.S. interest that are taken into account when considering whether to designate or terminate the designation of a country, which include, but are not limited to:

<sup>11</sup> The regulations at 20 CFR 655.20(o) (H-2B); 20 CFR 655.135(j) (H-2A); and 29 CFR 503.16(o) (H-2B) contain similar prohibited fee provisions for H-2 employers. In addition, the regulations at 20 CFR 655.20(j) and 29 CFR 503.16(j) (H-2B) and 20 CFR 655.122(h) (H-2A) prohibit, with certain limitations, the collection of transportation and visa fees.

fraud (such as fraud in the H–2 petition or visa application process by nationals of the country, the country’s level of cooperation with the U.S. Government in addressing H–2-associated visa fraud, and the country’s level of information sharing to combat immigration-related fraud); nonimmigrant visa overstay rates for nationals of the country (including but not limited to H–2A and H–2B nonimmigrant visa overstay rates); and non-compliance with the terms and conditions of the H–2 visa programs by nationals of the country.

### 3. H–2A Employers Who are Participants in Good Standing in E-Verify

The 2008 H–2A final rule (but not the H–2B final rule) included a provision allowing H–2A workers who are lawfully present in the United States to begin work with a new petitioning employer upon the filing of a new H–2A petition naming the worker, before petition approval, provided that the new employer is a participant in good standing in E-Verify.<sup>12</sup> See 8 CFR 214.2(h)(2)(i)(D) and 8 CFR 274a.12(b)(21). In such a case, the H–2A worker’s employment authorization continues for a period not to exceed 120 days beginning on the “Received Date” on Form I–797, Notice of Action, which acknowledges the receipt of the new H–2A extension petition. Except for the new employer and worksite, the employment authorization extension remains subject to the same conditions and limitations indicated on the initial H–2A petition. The employment authorization extension will terminate automatically if the new employer fails to remain a participant in good standing in E-Verify, as determined by USCIS in its discretion, or after 15 days if USCIS denies the extension request prior to the expiration of the 120-day period.

### D. Importance of the H–2 Programs and the Need for Reforms

DHS recognizes that the H–2A and H–2B programs play a critical role in the U.S. economy, allowing foreign workers to fill temporary jobs for which U.S. workers are not available and qualified. Reflective of their importance, the H–2A and H–2B programs have experienced significant growth since DHS published the H–2 2008 Final Rules. For instance, DOS data indicate that the number of H–2A visas issued has increased by over 365 percent over the last decade, reaching 257,898 visas issued in fiscal year (FY) 2021, compared to 55,384

visas issued in fiscal year 2011.<sup>13</sup> With regard to the H–2B program, because Congress has capped the number of H–2B visas available, the number of H–2B visas issued has not increased at the same rate as H–2A visas. Yet, DOS data indicate that issuance of H–2B visas nearly doubled between fiscal year 2011 (50,826 visas) and fiscal year 2021 (95,053 visas).<sup>14</sup> Because the recent demand for H–2B visas has regularly far-exceeded the statutory cap, Congress has repeatedly provided limited authority to DHS, in consultation with DOL and based on the needs of American businesses, to increase the number of H–2B visas available to U.S. employers over the last several years.<sup>15</sup>

In addition, in recent years the administration has sought to expand interest in the H–2 programs as part of its overall strategy to manage safe, orderly, and humane migration to this country.<sup>16</sup> For instance, the U.S. Agency

for International Development (USAID) conducted significant outreach focused on building government capacity to facilitate access to temporary worker visas under the H–2 programs.<sup>17</sup> These efforts have successfully encouraged increased use of the H–2 programs when there are not sufficient qualified and available U.S. workers.<sup>18</sup>

At the same time, the administration has consistently recognized the need to balance the expanded use of the H–2 programs with greater protections for workers. The National Security Council noted in its *Collaborative Migration Management Strategy* that expansion of access to nonimmigrant work visas “must also address the vulnerability of workers to abusive labor practices.”<sup>19</sup> In guidance promoting implementation of best practices by employers and by governments seeking to increase participation in the H–2 visa programs,

<sup>13</sup> See DOS, *Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards) Fiscal Years 2007–2011*, [https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2011AnnualReport/FY11AnnualReport-Table%20XVI\(B\).pdf](https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2011AnnualReport/FY11AnnualReport-Table%20XVI(B).pdf); DOS, *Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards) Fiscal Years 2017–2021*, [https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21\\_%20TableXVB.pdf](https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21_%20TableXVB.pdf).

<sup>14</sup> See DOS, *Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards) Fiscal Years 2007–2011*, [https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2011AnnualReport/FY11AnnualReport-Table%20XVI\(B\).pdf](https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2011AnnualReport/FY11AnnualReport-Table%20XVI(B).pdf); DOS, *Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards) Fiscal Years 2017–2021*, [https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21\\_%20TableXVB.pdf](https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21_%20TableXVB.pdf).

<sup>15</sup> See Consolidated Appropriations Act, 2017, Public Law 115–31, div. F, sec. 543; Consolidated Appropriations Act, 2018, Public Law 115–141, div. M, sec. 205; Consolidated Appropriations Act, 2019, Public Law 116–6, div. H, sec. 105; Further Consolidated Appropriations Act, 2020, Public Law 116–94, div. I, sec. 105; Consolidated Appropriations Act, 2021, Public Law 116–260, div. O, sec. 105; sections 101 and 106(3) of Division A of Public Law 117–43, Continuing Appropriations Act, 2022, Public Law 117–43, div. A, secs. 101, 106(3); section 101 of Division A of Public Law 117–70, Further Continuing Appropriations Act, 2022, Public Law 117–70, div. A, sec. 101; Consolidated Appropriations Act, 2022, Public Law 117–103, div. O, sec. 204; section 101(6) of Division A of Public Law 117–180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Public Law 117–180, div. A, sec. 101(6); Consolidated Appropriations Act, 2023, Public Law 117–328, div. O, sec. 303.

<sup>16</sup> See Executive Order 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* (Feb. 2, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf>; National Security Council, *Collaborative Migration Management Strategy* (July 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf>.

<sup>17</sup> In addition to other efforts, when exercising the delegated authority Congress granted it under separate legislation noted above to increase the number of H–2B visas available in a given fiscal year, DHS and DOL used that authority to create specific H–2B visa allocations in furtherance of its efforts to address irregular migration. See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 86 FR 28198 (May 25, 2021); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 87 FR 4722 (Jan. 28, 2022); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 87 FR 6017 (Feb. 3, 2022) (correction); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 87 FR 30334 (May 18, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022); and *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers; Correction*, 87 FR 77979 (Dec. 21, 2022) (correction).

<sup>18</sup> See USAID, *Administrator Samantha Power at the Summit of the Americas Fair Recruitment and H–2 Visa Side Event*, <https://www.usaid.gov/news-information/speeches/jun-9-2022-administrator-samantha-power-summit-americas-fair-recruitment-and-h-2-visa> (June 9, 2022) (“Our combined efforts [with the labor ministries in Honduras and Guatemala, and the Foreign Ministry in El Salvador] . . . resulted in a record number of H–2 visas issued in 2021, including a nearly forty percent increase over the pre-pandemic levels in H–2B visas issued across all three countries.”).

<sup>19</sup> See National Security Council, *Collaborative Migration Management Strategy*, <https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf> (July 2021).

<sup>12</sup> See *Changes to Requirements Affecting H–2A Nonimmigrants*, 73 FR 76891, 76905 (Dec. 8, 2008).

DOS, USAID, and DOL emphasized that “[e]xpanding access to [the H–2 programs] and protecting migrant workers’ rights are two aspects of the same agenda.”<sup>20</sup>

Similarly, in proposing this rule, DHS recognizes that stronger protections are needed for the nonimmigrant workers who participate in the H–2 programs.<sup>21</sup> Numerous reports from Federal Government entities, migrant worker advocates, media, and other stakeholders have noted frequent violations of H–2 workers’ rights, both in the United States and prior to admission.<sup>22</sup> For example, a Federal Government report found that workers may experience abuses before and after entering the United States, and during the course of their H–2 employment in the United States.<sup>23</sup> Reports from advocacy groups found that many H–2 workers suffer at least one serious violation of their rights (such as paying prohibited recruitment fees or significant wage violations) or a form of

<sup>20</sup> See DOS, USAID, and DOL, *Guidance on Fair Recruitment Practices for Temporary Migrant Workers* (June 2022), <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2022/06/ILAB20220565.pdf>; see also U.S. Dep’t of Agric., U.S. Department of Agriculture to Invest up to \$65 Million in Pilot Program to Strengthen Food Supply Chain, Reduce Irregular Migration, and Improve Working Conditions for Farmworkers (June 10, 2022) (“Strong working conditions are critical to the resiliency of the food and agricultural supply chain. Through this pilot program, [U.S. Department of Agriculture] will support efforts to improve working conditions for both U.S. and H–2A workers and ensure that H–2A workers are not subjected to unfair recruitment practices.”), <https://www.usda.gov/media/press-releases/2022/06/10/us-department-agriculture-invest-65-million-pilot-program>.

<sup>21</sup> See, e.g., DHS, *DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations* (Jan. 13, 2023), <https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations>.

<sup>22</sup> See, e.g., GAO, *Closed Civil and Criminal Cases Illustrate Instances of H–2B Workers Being Targets of Fraud and Abuse* (GAO–10–1053) (2010), <https://www.gao.gov/assets/gao-10-1053.pdf>; GAO, *Increased Protections Needed for Foreign Workers* (GAO–15–154) (2015), <https://www.gao.gov/assets/gao-15-154.pdf>; Centro de los Derechos del Migrante, Inc. (CDM), *Ripe for Reform: Abuses of Agricultural Workers in the H–2A Visa Program* (2020) (noting prevalence of “systemic violations of [H–2A] workers’ legal rights”), <https://cdmigrante.org/ripe-for-reform/>; Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (2013), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf) (“The current H–2 program. . . is rife with labor and human rights violations committed by employers who prey on a highly vulnerable workforce.”); Daniel Costa, *Temporary work visa programs and the need for reform: A briefing on program frameworks, policy issues and fixes, and the impact of COVID–19*, Economic Policy Institute (Feb. 3, 2021), <https://files.epi.org/pdf/217871.pdf>.

<sup>23</sup> See GAO–15–154 (2015), <https://www.gao.gov/assets/gao-15-154.pdf>.

coercion (such as threats, verbal abuse, and withholding of documents) during their employment in the United States.<sup>24</sup> These reports detail a wide range of violations, from coercion to paying illegal fees; wage theft; receiving false job information;<sup>25</sup> discrimination and harassment;<sup>26</sup> and being housed in crowded, unsanitary, and degrading conditions with limited food and water. Other serious violations include forced labor; being held captive without personal documents; threats of arrest, deportation, and violence toward the workers or their families abroad; kidnapping; sexual abuse; rape; and even death.<sup>27</sup> Recent court cases serve to underscore the range and severity of abuses and exploitation faced by H–2 workers in the United States.<sup>28</sup>

<sup>24</sup> See Polaris, *Labor Exploitation and Trafficking of Agricultural Workers During the Pandemic* 6 (2021) (reporting that available data on likely victims of labor trafficking show that 99 percent experienced some type of coercion), <https://polarisproject.org/wp-content/uploads/2021/06/Polaris-Labor-Exploitation-and-Trafficking-of-Agricultural-Workers-During-the-Pandemic.pdf>; CDM, *Ripe for Reform* 4 (2020) (reporting data showing that every worker interviewed, even those most satisfied with their experience, suffered at least one serious legal violation of their rights), <https://cdmigrante.org/ripe-for-reform/>; Polaris, *Labor Trafficking on Specific Temporary Work Visas* (2022) (reporting that over 68 percent of H–2B workers identified as likely victims of labor trafficking reported experiencing coercion), <https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf>.

<sup>25</sup> See GAO–15–154 (2015), <https://www.gao.gov/assets/gao-15-154.pdf>; CDM, *Fake Jobs for Sale: Analyzing Fraud and Advancing Transparency in U.S. Labor Recruitment* 4 (2019), <https://cdmigrante.org/wp-content/uploads/2019/04/Fake-Jobs-for-Sale-Report.pdf>.

<sup>26</sup> See CDM, *Ripe for Reform* (2020), <https://cdmigrante.org/ripe-for-reform/>. For a report illustrating how women, in particular, disproportionately face discrimination in the H–2B program, see CDM, *Breaking the Shell: How Maryland’s Migrant Crab Pickers Continue to be “Picked Apart”* (2020), <https://cdmigrante.org/wp-content/uploads/2020/09/Breaking-The-Shell.pdf>.

<sup>27</sup> See, e.g., Polaris, *Labor Trafficking on Specific Temporary Work Visas* (2022), <https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf>; CDM, *Ripe for Reform* (2020), <https://cdmigrante.org/ripe-for-reform/>; Polaris, *Labor Exploitation and Trafficking of Agricultural Workers During the Pandemic* 6 (2021), <https://polarisproject.org/wp-content/uploads/2021/06/Polaris-Labor-Exploitation-and-Trafficking-of-Agricultural-Workers-During-the-Pandemic.pdf>.

<sup>28</sup> See, e.g., Department of Justice (DOJ), U.S. Attorney’s Office, Southern District of Georgia, *Three men sentenced to federal prison on charges related to human trafficking: Each admitted to role in forced farm labor in Operation Blooming Onion* (Mar. 31, 2022) (involving forced labor, keeping workers in substandard conditions, kidnapping, and rape, among other abuses), <https://www.justice.gov/usao-sdga/pr/three-men-sentenced-federal-prison-charges-related-human-trafficking>; DOJ, *Three Defendants Sentenced in Multi-State Racketeering Conspiracy Involving the Forced Labor of Mexican Agricultural H–2A Workers* (Oct. 27, 2022) (involving forced labor,

A U.S. Government study found that the structure of the H–2A and H–2B programs may create systematic disincentives for workers to report or leave abusive working conditions.<sup>29</sup> One disincentive is that workers are authorized to work only for the petitioning H–2A or H–2B employer; consequently, the workers cannot freely leave to work for another employer, nor do they feel free to report mistreatment by their employer for fear of retaliation or blacklisting (that is, exclusion from future employment opportunities through the same employer or recruiter)<sup>30</sup> despite existing DOL prohibitions on such retaliation.<sup>31</sup> Losing their jobs means losing their legal status and authorization to remain in the United States, and potentially their ability to work in the United States in the future.<sup>32</sup> According to the GAO, workers also fear reporting violations to law enforcement or government entities due generally to their immigration status and lack of knowledge about their rights.<sup>33</sup> Another significant disincentive identified by the GAO is the workers’ incurrence of prohibited fees or subjection to other recruitment abuses, as workers or their family members may face retaliation from recruiters or other actors in their home countries if they do not repay these debts.<sup>34</sup>

In a study conducted by migrant worker advocates, a majority of H–2

imposing debts on workers, and subjecting workers to crowded, unsanitary, and degrading living conditions), <https://www.justice.gov/opa/pr/three-defendants-sentenced-multi-state-racketeering-conspiracy-involving-forced-labor-mexican>; DOL, *Order Finding Civil Contempt and Imposing Stop Work Order*, No. 1:19-cv-00007 (D. N. Mar. 1. Jan. 21, 2021) (involving extensive wage violations, substandard living conditions, and threats to withhold food if workers stopped working, among other abuses), <https://www.dol.gov/sites/dolgov/files/SOL/files/IP%20-%20Stop%20Work%20Order.pdf>.

<sup>29</sup> See GAO–15–154, at 37–38 (2015), <https://www.gao.gov/assets/gao-15-154.pdf>.

<sup>30</sup> See GAO–15–154, at 37–38 (2015), <https://www.gao.gov/assets/gao-15-154.pdf>; CDM, *Ripe for Reform* 4 (2020), <https://cdmigrante.org/ripe-for-reform/>.

<sup>31</sup> See 20 CFR 655.20(n); 655.135(h); and 29 CFR 503.16(n).

<sup>32</sup> See CDM, *Ripe for Reform* 4 (2020), <https://cdmigrante.org/ripe-for-reform/>; CDM, *Recruitment Revealed: Fundamental Flaws in the H–2 Temporary Worker Program and Recommendations for Change* 22–24 (2018), <https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment-Revealed.pdf>.

<sup>33</sup> See GAO–15–154, at 51 (2015), <https://www.gao.gov/assets/gao-15-154.pdf>.

<sup>34</sup> See GAO–15–154, at 37–38 (2015), <https://www.gao.gov/assets/gao-15-154.pdf>; CDM, *Recruitment Revealed* 22–24 (2018), <https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment-Revealed.pdf>; CDM, *Fake Jobs for Sale*, <https://cdmigrante.org/wp-content/uploads/2019/04/Fake-Jobs-for-Sale-Report.pdf>.

workers reported paying recruitment fees, even though charging recruitment fees to such workers violates current U.S. immigration and labor regulations.<sup>35</sup> These types of fees perpetuate the cycle of exploitation. Reports indicate that many H-2 workers incur substantial debts before they even get to the United States.<sup>36</sup> Some recruiters target individuals already living in impoverished conditions abroad, often from rural or indigenous communities, further heightening the workers' vulnerability to exploitation.<sup>37</sup> Because they incur substantial debts in connection with (or related to) their seeking to come to this country as H-2 workers, these workers face economic hardship, and in many instances, debt bondage when arriving in the United States.<sup>38</sup> As a result, these workers are less able or willing to report or leave

poor working conditions or abusive situations.<sup>39</sup>

While current regulations already contain provisions on prohibited fees intended to protect H-2 workers, DHS recognizes that stronger protections are needed to address many of the reported widespread abuses and make DHS's authority to address these issues explicit. Through this proposed rulemaking, DHS seeks to clarify and strengthen existing provisions on prohibited fees, and furthermore, implement significant new provisions to increase DHS's ability to deter and hold accountable certain employers that have been found to have committed labor law violations and other violations relevant to the H-2 programs, while providing safeguards for workers reporting that they have been subject to payment of prohibited fees.

Aside from prohibited fees, there are other harmful employer, recruiter, or agent behaviors that DHS's current regulations do not address but that are relevant to eligibility and, in some instances, should warrant exclusion from the H-2 programs. Multiple sources have revealed flaws or gaps in the H-2 framework that allow H-2 employers that have committed serious labor law violations to continue using the H-2 programs even after the violations.<sup>40</sup> For instance, a report from an advocacy group highlighted how an H-2 employer that was the subject of over 80 complaints of unpaid wages and violations of employment terms during a single summer season continued using H-2 program to employ H-2 workers.<sup>41</sup> A news article detailed how a company with a history of worker protection violations and vehicle safety violations (including for improper vehicle maintenance and unsafe driving) continued to receive approved TLCs to employ H-2 workers, including within 3 months after it was found responsible for a vehicle crash that killed some of the H-2 workers it employed.<sup>42</sup> A labor

union report listed numerous case studies of H-2 employers that continued to receive approved TLCs despite multitudines of labor violations, some of which were deemed "egregious" and "serious."<sup>43</sup> While these studies focused on available data related to employers' receipt of approved TLCs from DOL, it is apparent to DHS that these and other types of violations can be directly relevant to whether an employer has the ability and intent to comply with DHS's H-2 program requirements. These types of violations should therefore be considered by USCIS in its adjudication of H-2A and H-2B petitions, regardless of whether DOL has taken action on the underlying TLCs. The proposed provisions in this rule, including new bars to approval for prohibited fees as well as for certain findings of labor law and other violations, and holding employers responsible for the actions of their recruiters and others in the recruitment chain, underscore DHS's commitment to addressing aspects of the H-2 programs that may result in the exploitation of persons seeking to come to the United States as H-2 workers.<sup>44</sup>

In addition to providing greater protection for a vulnerable population of workers, the reforms proposed in this rulemaking offer a number of benefits to employers. DHS recognizes the immense importance of the H-2A and H-2B programs to U.S. employers that are unable to fill temporary jobs with qualified and available U.S. workers. The proposed portability provision, in addition to offering flexibility to workers, would assist petitioners facing worker shortages by allowing them to more quickly hire H-2A and H-2B workers who are already in the United States without waiting for approval of a new petition. In addition, as discussed in greater detail below, both the proposed elimination of the eligible countries lists and the proposed revision of the calculation of the maximum period of stay for H-2 workers stand to reduce petitioner

<sup>35</sup> See CDM, *Recruitment Revealed* 4, 16 (2018), [https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment\\_Revealed.pdf](https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf). This study focused on recruitment in Mexico because Mexico is home to the largest number of H-2 workers. The H-2 workers surveyed in this study worked in the U.S. during or after 2006. See also 8 CFR 214.2(h)(5)(xi); 8 CFR 214.2(h)(6)(i); 20 CFR 655.20(o) and (p); and 20 CFR 655.135(j) and (k).

<sup>36</sup> See, e.g., CDM, *Ripe for Reform* 19 (2020), <https://cdmigrante.org/ripe-for-reform/>; CDM, *Recruitment Revealed* 4, 16 (2018), [https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment\\_Revealed.pdf](https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf); GAO-15-154, at 28-29 (2015), <https://www.gao.gov/assets/gao-15-154.pdf>.

<sup>37</sup> See CDM, *Ripe for Reform* 16 (2020), <https://cdmigrante.org/ripe-for-reform/>. This report highlighted how indigenous workers face significant challenges primarily due to their language and cultural differences.

<sup>38</sup> See, e.g., *Changes to Requirements Affecting H-2A Nonimmigrants*, 73 FR 8230, 8233 (Feb. 13, 2008) ("USCIS has found that certain job recruiters and U.S. employers are charging potential H-2A workers job placement fees in order to obtain H-2A employment. . . . USCIS has learned that payment by these workers of job placement-related fees not only results in further economic hardship for them, but also, in some instances, has resulted in their effective indenture."); GAO-15-154, at 30 (2015), <https://www.gao.gov/assets/gao-15-154.pdf>; CDM, *Recruitment Revealed* 4 (2018), [https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment\\_Revealed.pdf](https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf) (many H-2 workers arrive in the United States in debt, which may lead to situations of debt servitude or other abuse); Daniel Costa, *Temporary work visa programs and the need for reform* 20 (2021), <https://files.epi.org/pdf/217871.pdf> ("Many [workers] are required to pay exorbitant fees to labor recruiters to secure U.S. employment opportunities, even though such fees are usually illegal. Those fees leave them indebted to recruiters or third-party lenders, which can result in a form of debt bondage.").

"Debt bondage" is defined in 22 U.S.C. 7102(7) as "the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or those of a person under his or her control as security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined."

<sup>39</sup> See GAO-15-154 (2015), <https://www.gao.gov/assets/gao-15-154.pdf>.

<sup>40</sup> See, e.g., AFL-CIO, *Comprehensive H-2B Recommendations*. See the docket for this rulemaking for a copy of this letter; Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* (2012), <https://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf>; LIUNA, *H-2B Guest Worker Program: Lack of Accountability Leads to Exploitation of Workers*, <https://d3ciwvs59ifrt8.cloudfront.net/b156551f-4cfc-4f0e-ab0f-1c05b2955a44/4d0e38cb-1c2b-4b12-924c-279c4e15ce31.pdf>.

<sup>41</sup> See Farmworker Justice, *No Way to Treat a Guest* (2012), <https://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf>.

<sup>42</sup> See Ken Bensinger, Jessica Garrison, Jeremy Singer-Vine, *The Pushovers: Employers Abuse*

*Foreign Workers, U.S. Says, By All Means, Hire More*, BuzzFeed News (May 12, 2016), <https://www.buzzfeednews.com/article/kenbensinger/the-pushovers>.

<sup>43</sup> See LIUNA, *H-2B Abuse by Construction and Landscaping Companies*, <https://d3ciwvs59ifrt8.cloudfront.net/5ad8299b-5dba-47b2-9544-bd96627e284d/067fa05-659f-4113-8b25-ac60c2060510.pdf>.

<sup>44</sup> See, e.g., DHS, *Response to Senator Ossoff letter* (May 3, 2022), <https://www.ossoff.senate.gov/wp-content/uploads/2022/05/DHS-Response-Blooming-Onion.pdf>; DHS, *For First Time, DHS to Supplement H-2B Cap with Additional Visas in First Half of Fiscal Year* (Dec. 20, 2021), <https://www.uscis.gov/newsroom/news-releases/for-first-time-dhs-to-supplement-h-2b-cap-with-additional-visas-in-first-half-of-fiscal-year>.

burdens such as those associated with information collected at the time of filing and through subsequent RFEs, increase access to workers, and improve program efficiency. Further, with respect to the H-2B program, the proposed regulations are intended to ensure that only those employers who comply with the requirements of the H-2B program will be able to compete for the limited number of available cap-subject visas, by precluding those employers who fail to demonstrate an intent to do so from participating in the H-2B program.

#### IV. Discussion of Proposed Rule

##### A. Program Integrity and Worker Protections

###### 1. Payment of Fees, Penalties, or Other Compensation by H-2 Beneficiaries

As discussed above, despite 2008 regulatory changes providing that USCIS will deny or revoke a petition when a beneficiary pays a fee as a condition of H-2 employment, reports from various sources indicate that the collection of prohibited fees remains a pervasive problem in the H-2A and H-2B programs.<sup>45</sup> Through this rulemaking, DHS is proposing various amendments to strengthen and clarify the existing regulatory prohibitions, to close potential loopholes, and to modify the consequences for charging prohibited fees to H-2 workers.

###### a. Fees, Penalties, or Other Compensation “Related To” H-2 Employment

The intent of the prohibited fee provisions in the 2008 H-2 rules was, in part, to establish measures to help avoid economic hardship for H-2 workers and combat effective indenture and similar abuses against H-2 workers.<sup>46</sup> This

<sup>45</sup> See, e.g., CDM, *Recruitment Revealed 16* (2018), [https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment\\_Revealed.pdf](https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf); CDM, *Ripe for Reform 20* (2020), <https://cdmigrante.org/ripe-for-reform/>; Polaris, *Labor Trafficking on Specific Temporary Work Visas 14* (2022), <https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf>; Polaris, *On-ramps, intersections, and exit routes: A roadmap for systems and industries to prevent and disrupt human trafficking 41* (2018), <https://polarisproject.org/wp-content/uploads/2018/08/A-Roadmap-for-Systems-and-Industries-to-Prevent-and-Disrupt-Human-Trafficking.pdf>; GAO-10-1053, at 4 (2010), <https://www.gao.gov/assets/gao-10-1053.pdf>.

<sup>46</sup> When initially proposing the prohibited fee provisions, DHS explicitly noted these abuses and stated that the provisions were “an effort to protect [H-2] workers from such abuses.” *Changes to Requirements Affecting H-2A Nonimmigrants*, 73 FR 8230, 8233 (Feb. 13, 2008); *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers*, 73 FR 49109, 49112 (Aug. 20, 2008).

proposed rule is intended, among other things, to foreclose claims that because a worker agreed (or appears to have agreed) to pay a prohibited fee, such agreement cannot be considered to be a condition of employment.

To strengthen the prohibited fee provisions and establish substantial uniformity with DOL’s prohibited fee provisions, DHS proposes to modify its provisions to state that fees paid by H-2 workers to an employer, joint employer, petitioner (including to its employee), agent, attorney, facilitator, recruiter, similar employment service, *related to* such workers’ H-2 employment, are prohibited. Although DHS used the phrase “as a condition of” in its 2008 final H-2A and H-2B rules, DOL, in promulgating its 2008 H-2A final rule, used instead the phrase “related to” when addressing which costs and fees associated with recruitment and employment are prohibited.<sup>47</sup> As DOL noted in 2008 and reiterated at the time it updated its 2008 H-2A rule in 2010, the intent of the prohibited fees provisions was to “requir[e] employers to bear the full cost of their decision to import foreign workers [as] a necessary step toward preventing the exploitation of foreign workers, with its concomitant adverse effect on U.S. workers.”<sup>48</sup> DOL affirmed these principles when it updated the H-2A regulations in 2022.<sup>49</sup> Similarly,

<sup>47</sup> Current 20 CFR 655.135(j) (H-2A) and 20 CFR 655.20(o) (H-2B). Notably, with respect to H-2A nonimmigrants, the Department of Labor has explained that, even in the case of otherwise permissible fees, “an employee may only pay such fees if they are for services that are voluntarily requested by the . . . employee. If an employee lacks a meaningful opportunity and an independent choice to refuse or decline the service which requires the payment of the fee,” such fee is prohibited. See U.S. Department of Labor, *Wage and Hour Field Assistance Bulletin 2011-2*, available at <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2011-2> (addressing H-2A fees). Further, DOL has explained that “[t]he signing of a document by a prospective worker stating that he/she has agreed to pay the fee does not, in and of itself, establish that the fee is voluntary.” *Id.* This proposed rule recognizes that the concerns addressed by DOL with respect to the H-2A program apply equally to the H-2B program, and, as in the case of the H-2A program, this rule would intend to foreclose claims that simply because a worker agreed (or appears to have agreed) to a fee, it cannot be considered to be prohibited.

<sup>48</sup> *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6884, 6925 (Feb. 12, 2010); *Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement*, 73 FR 77110, 77158 (Dec. 18, 2008).

<sup>49</sup> *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 FR 61660, 61744 (Oct. 12, 2022) (revisions to 20 CFR 655.135(k) intended to “mak[e] it clear that foreign labor contractors or recruiters and their agents are not to receive remuneration from prospective employees recruited in exchange for access to a job opportunity or any activity related to obtaining H-2A labor certification”).

DOL used the term “related to” rather than “as a condition of” in its 2008 H-2B final rule.<sup>50</sup> By proposing to replace the term “as a condition of” with “related to,” with respect to the scope of the bar on payment of “prohibited fees,” DHS is proposing to modify the language of its H-2A and H-2B prohibited fees rules to substantially conform with DOL prohibited fee regulations. Fees that are “related to” H-2 employment would include, but not be limited to, the employer’s agent or attorney fees, visa application and petition fees, visa application and petition preparation fees, and recruitment costs<sup>51</sup>; however, such fees would not include those that are “the responsibility and primarily for the benefit of the worker, such as government-required passport fees.” See proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B).<sup>52</sup>

DHS also seeks to clarify that the term “prohibited fee” would include any “fee, penalty, or compensation” related to the H-2A or H-2B employment. See proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). A prohibited fee would include those collected either directly (such as, for instance, through a direct payment from the beneficiary to the petitioner or the petitioner’s agent), or indirectly (such as, for instance, through a withholding or deduction from the worker’s wages for a service provided earlier by a third party).

To further strengthen the prohibited fee provisions and establish substantial uniformity with DOL’s prohibited fee provisions, proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) would have new

<sup>50</sup> See former 20 CFR 655.22(j) available at *Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes*, 73 FR 78020, 78060 (Dec. 19, 2008); see also current 20 CFR 655.20(o) and 29 CFR 503.16(o) (both using the term “related to” and clarifying that prohibited fees would broadly include “payment of the employer’s attorney or agent fees, application and H-2B Petition fees, recruitment costs, or any fees attributed to obtaining the approved Application for Temporary Employment Certification”). For readability purposes, this rule refers to all of the H-2B-related provisions of 20 and 29 CFR as “DOL regulations” notwithstanding DHS’s joint issuance of some rules affecting these provisions.

<sup>51</sup> See DOL, *Fact Sheet #78D: Deductions and Prohibited Fees under the H-2B Program*, <https://www.dol.gov/agencies/whd/fact-sheets/78d-h2b-deductions>.

<sup>52</sup> DHS notes, however, that while certain fees are not prohibited under this proposed rule, it is not DHS’s intent to render a worker subject to any unlawful treatment or harassment resulting from the worker’s incurring debt from a petitioner (including a petitioner’s employee), agent, attorney, facilitator, recruiter, or similar employment service, or employer or joint employer, to cover such nonprohibited fees.

references to a petitioner's employee or attorney as part of the list of individuals who may not collect prohibited fees from a beneficiary.<sup>53</sup> As before, it is not the intention of DHS to bar the payment of fees to any agent, attorney, facilitator, recruiter, or similar employment service by the petitioner or employer, provided such fees do not come directly or indirectly from H-2 workers themselves. DHS recognizes the role of recruiters and similar employment services in assisting employers in finding H-2 workers. An employer may hire a recruiter and pay the recruiter out of its own funds, as long as it does not pass this cost directly or indirectly on to the worker(s).

#### b. Clarification of Acceptable Reimbursement Fees

Further, it is not the intention of DHS to pass to petitioners, employers, agents, attorneys, facilitators, recruiters, or similar employment services, the costs of services or items that are truly personal and voluntary in nature for the worker. Despite the phrase *related to*, not all payments made by prospective or current H-2 workers would be considered prohibited fees or payments related to H-2 employment under the proposed rule. Payments made primarily for the benefit of the worker, such as a passport fee, would not be prohibited fees or payments related to the H-2 employment under the rule and would, therefore, permissibly be considered the responsibility of the worker.

The current regulations state that prohibited fees do not include "the lesser of the fair market value or actual costs of transportation and any government-mandated passport, visa, or inspection fees, to the extent that the payment of such costs and fees by the beneficiary is not prohibited by statute or DOL regulations, unless the employer agent, facilitator, recruiter, or employment service has agreed with the [noncitizen] to pay such costs and fees." 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). To simplify the language related to acceptable reimbursement fees and clarify that the exception only applies to costs that are truly for the worker's benefit, DHS proposes to replace the existing regulatory language on this topic with text stating that the provision would not prevent relevant parties "from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as

government-required passport fees." Proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). This proposed language is derived from, and is consistent with, DOL regulations on prohibited fees for H-2B and H-2A workers at 20 CFR 655.20(o), 29 CFR 503.16(o), and 20 CFR 655.135(j). The proposed provision would clarify the existing prohibition on a beneficiary's payment of costs required by statute or regulation to be paid or otherwise incurred by the petitioner (such as certain transportation costs or, in the H-2A context, certain housing costs).<sup>54</sup> Specifically, the proposed language would make clear that the passing of a cost to the beneficiary that, by statute or applicable regulations is the responsibility of the petitioner, would constitute a collection of a prohibited fee by the petitioner. Proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). DHS has proposed the phrase "applicable regulations" to recognize that, in the H-2A context, "applicable regulations" would include DHS and DOL regulations, and in the H-2B context, "applicable regulations" would include DHS, DOL, and GDOL regulations.

#### c. Prohibiting Breach of Contract Fees and Penalties

DHS also proposes to clarify that prohibited fees include any fees or penalties charged to workers who do not complete their contracts. Advocacy groups have reported instances of recruiters forcing, or threatening to force, H-2 workers to pay large "breach" fees of up to thousands of dollars for leaving employment before the scheduled conclusion of work.<sup>55</sup> DHS proposes to explicitly include a "fee or penalty for breach of contract" in the revised prohibited fee provision in order to provide greater clarity for stakeholders, and to emphasize the prohibited nature of such fees. Proposed

8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B).

#### d. Strengthening the Prohibited Fees Provisions

DHS is proposing to amend regulatory language that currently allows petitioners to avoid liability in certain instances despite a USCIS determination that the petitioner collected or planned to collect prohibited fees. Under the current regulations, a petitioner who was found to have collected or entered into an agreement to collect a prohibited fee is not subject to denial or revocation on notice if the petitioner demonstrates that it reimbursed the worker prior to the filing of the petition or, if the fee has not yet been paid by the worker, that the agreement has been terminated. 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1). Similarly, if USCIS determines that the petitioner knew or should have known at the time of filing that its agent, facilitator, recruiter, or similar employment service collected or entered into an agreement to collect prohibited fees, the current regulations include exceptions to the requirement that USCIS deny or revoke on notice if the petitioner demonstrates that such fees were reimbursed, the agreement to collect fees was terminated prior to collection, or, in cases where such payment or agreement was made after the filing of the petition, that the petitioner notified DHS of the prohibited fees or agreement within 2 days of learning of them. 8 CFR 214.2(h)(5)(xi)(A)(2) and (4) and 8 CFR 214.2(h)(6)(i)(B)(2) and (4).

DHS is proposing to eliminate the above-noted exceptions to prohibited fee-related denials or revocations that are based solely on a petitioner's reimbursement, pre-payment cancellation of a prohibited fee agreement, or notification to DHS. Proposed 8 CFR 214.2(h)(5)(xi)(A)(1) and (2) and 8 CFR 214.2(h)(6)(i)(B)(1) and (2). Whereas reimbursement, pre-payment cancellation, or notification to DHS, by itself, currently allows a petitioner to avoid a denial or revocation, DHS is proposing to require the petitioner to take additional, significant steps to prevent the unlawful collection of fees and thus avoid a future denial or revocation and the additional consequences that follow. This change is appropriate because, in such cases, petitioners (including their employees) or their third-party associates (including agents, attorneys, facilitators, recruiters, or similar employment services) have already engaged in wrongdoing by taking actions that violate longstanding

<sup>53</sup> See 20 CFR 655.20(o), which applies to prohibited fees by "[t]he employer and its attorney, agents, or employees."

<sup>54</sup> See 8 CFR 214.2(h)(5)(xi)(A) (acceptable fees exclude fees "to the extent that the passing of such costs to the beneficiary is not prohibited by statute") and 8 CFR 214.2(h)(6)(i)(B) (acceptable fees exclude fees "to the extent that the payment of such costs and fees by the beneficiary is not prohibited by statute or Department of Labor regulations"). See also INA sec. 218(c)(4) ("Employers shall furnish housing in accordance with regulations.") and 20 CFR 655.122(d)(1) ("*the employer must provide housing at no cost to H-2A workers . . .*") (italics added).

<sup>55</sup> These concerns were raised by representatives from Centro de los Derechos del Migrante, Inc. and Farmworker Justice during a listening session held by DHS on May 16, 2022, and were also raised by Migration that Works in a letter to DHS dated May 17, 2022. See the docket for this rulemaking for access to a transcript of the listening session and a copy of the letter.

requirements of the H-2 programs, namely, collecting or taking steps toward collecting prohibited fees. In addition, the collection or agreement to collect a prohibited fee has the potential to harm an H-2 worker even if the fee is later reimbursed or the agreement is cancelled prior to collection, such as by causing the worker to go into debt related to the payment, or anticipated payment, of the fee.<sup>56</sup> DHS emphasizes the importance of petitioners reimbursing a worker who has paid a prohibited fee because it mitigates the harm done to the worker. DHS is therefore proposing to incorporate language in the proposed rule regarding the impact reimbursement could have with respect to the consequences for a determination of prohibited fees, as discussed below.

For situations in which a petitioner itself is found to have collected or entered an agreement to collect prohibited fees, such as when an employee of the petitioner engages in such activity, DHS proposes to hold the petitioner or its successor accountable by denying or revoking its approved petition and thereby making it subject to additional consequences described below, except in rare cases involving extraordinary circumstances beyond the petitioner's control. Proposed 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1). Specifically, a petition filed by a petitioner found to have collected or entered into an agreement to collect prohibited fees would be subject to denial or revocation on notice and the resulting additional consequence of a 1-year to 4-year bar to approval of subsequent petitions. Proposed 8 CFR 214.2(h)(5)(xi)(A)(1), 8 CFR 214.2(h)(5)(xi)(B), 8 CFR 214.2(h)(6)(i)(B)(1), and 8 CFR 214.2(h)(6)(i)(C). That petitioner may only avoid such consequences if it demonstrates, through clear and convincing evidence in response to a USCIS notice of intent to deny or revoke, both that extraordinary circumstances beyond its control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees and that it has fully reimbursed all affected beneficiaries and designees. Proposed 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1). The determination

<sup>56</sup> A study conducted by the advocacy group Centro de los Derechos del Migrante, Inc. noted that some H-2 workers who go into debt to cover pre-employment expenses are vulnerable to predatory lending practices such as high interest rates and exploitative collateral requirements. See CDM, *Recruitment Revealed* 18 (2018), [https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment\\_Revealed.pdf](https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf).

as to whether a petitioner has met this very high standard would be made on a case-by-case basis. As a baseline, a petitioner would need to first demonstrate that the extraordinary circumstances were rare and unforeseeable, and that it had made significant efforts to prevent prohibited fees prior to the collection of or agreement to collect such fees. As the proposed standard would require evidence of the petitioner's significant efforts to prevent prohibited fees, a petitioner would need to demonstrate that it took affirmative steps to prevent its employees from collecting or agreeing to collect such fees. The petitioner's mere lack of awareness of its employee's collection or agreement to collect such fees would not be sufficient.

In addition to the above, a petitioner would further need to establish that it took immediate remedial action as soon as it became aware of the payment of the prohibited fee. Moreover, a petitioner would need to demonstrate that it has fully reimbursed all affected beneficiaries or their designees. The petitioner would need to establish all of the above elements in order to avoid denial or revocation of its petition. While USCIS may determine that denial or revocation is not appropriate in such an extraordinary case, petitioners would still be accountable for reimbursing workers in full irrespective of the circumstances surrounding their own prohibited fee collections or agreements.

To further ensure against a petitioner avoiding liability for prohibited fees, DHS proposes to change the standards under which a petitioner may be held accountable for the prohibited fee-related violations of its agents, attorneys, facilitators, recruiters, or similar employment services. Under current regulations, in order to hold a petitioner liable for such actions, USCIS must make a determination that the petitioner "knew or should have known" about any such prohibited collection or agreement that was made prior to filing the petition, or that any post-filing collection or agreement was made "with the knowledge of the petitioner." 8 CFR 214.2(h)(5)(xi)(A)(2) and (4) and 8 CFR 214.2(h)(6)(i)(B)(2) and (4). This requirement can make it difficult for USCIS to deny a petition, even if there is evidence that prohibited fees were collected. In practice, a petitioner may be able to avoid a denial or revocation based on its lack of knowledge (whether or not as a result of its failure to exercise due diligence) or claimed lack of knowledge of the practices of the third parties with whom it has done business, such as by

submitting evidence that the petitioner's contract with a recruitment service includes a clause forbidding the collection of prohibited fees.<sup>57</sup>

In proposing changes to the above-noted provisions, DHS seeks to clarify and emphasize that it is a petitioner's responsibility to conduct due diligence to ensure that any third-party agent, attorney, facilitator, recruiter, or similar employment service with whom it conducts business will comply with H-2 program requirements, including the prohibition on collection of fees related to H-2 employment. This due diligence obligation applies irrespective of whether the employer is in contractual privity with such third party or whether such third party is located or operating in the United States. Accordingly, DHS is proposing to hold petitioners accountable for any prohibited fee-related violation by these third parties, with only an extremely limited exception.

Specifically, under DHS's proposed provisions, any determination that an H-2 worker has paid or agreed to pay a prohibited fee to the petitioner's agent, facilitator, recruiter, or similar employment service would result in denial of the petition or revocation on notice, "unless the petitioner demonstrates to USCIS through clear and convincing evidence that it did not know and could not, through due diligence, have learned of such payment or agreement and that all affected beneficiaries have been fully reimbursed." Proposed 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2). DHS is also proposing to state that, by itself, a written contract between the petitioner and the third party stating that such fees are prohibited will not be sufficient to meet this standard of proof.<sup>58</sup> While the language of such a contract may be considered, additional documentation must be provided. Relevant documentation could include evidence

<sup>57</sup> See, e.g., International Labor Recruitment Working Group, *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse* 34 (2013) (noting employers' evasion of H-2A and H-2B prohibited fee laws by claiming they are unaware their workers were charged recruitment fees), <https://migrationthatworks.org/reports/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse/>.

<sup>58</sup> DOL already requires employers to contractually forbid third parties whom they engage for the recruitment of workers from seeking or receiving payments or other compensation from prospective employees. See 20 CFR 655.9(a), 20 CFR 655.20(p), and 20 CFR 655.135(k). Accordingly, USCIS's acceptance of such a contract alone as meeting the proposed standard would mean that nearly all petitioners could avoid liability.

of communications showing the petitioner inquired about the third party's past practices and payment structure to ensure that it obtains its revenue from sources other than the workers and/or any documentation that was provided to the petitioner by the third party about its payment structure and revenue sources. DHS seeks input from the public regarding other types of evidence that may be relevant and available to meet the proposed standard.

Finally, DHS is proposing to add that, in addition to petitioners, agents, facilitators, recruiters, and similar employment services, the prohibited fee provision would apply to any joint employers in the H-2A context, including a petitioner's member employers if the petitioner is an association of U.S. agricultural producers, and any employers (if different from the petitioner) in the H-2B context. Proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). The regulations allow an H-2A petition to be filed by either the employer listed on the TLC, the employer's agent, or the association of U.S. agricultural producers named as a joint employer on the TLC. 8 CFR 214.2(h)(5)(i)(A). Similar to a petitioner's responsibility with the listed third parties discussed above, DHS seeks to clarify and emphasize that an association of U.S. agricultural producers named as a joint employer on a TLC and other joint employers bear responsibility to conduct due diligence to self-police and ensure that its member or joint employers will comply with H-2A program requirements. Likewise, in a job contracting scenario in which a petitioner brings in H-2B workers to work for one or more employer-clients,<sup>59</sup> DHS seeks to clarify and emphasize that the petitioner is responsible for ensuring that such employers will comply with H-2B program requirements. Therefore, petitioners would be held accountable for any collection or agreement to collect prohibited fees by any such employers and (for H-2A) joint employers, "unless the petitioner demonstrates to USCIS through clear and convincing evidence that it did not know and could not, through due diligence, have learned of such payment or agreement." Proposed 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2).

<sup>59</sup> H-2B job contractors and employer-clients must meet the requirements of the definition of an H-2 "employer" under 20 CFR 655.5 and 655.19.

#### e. Consequences of a Denial or Revocation Based on Prohibited Fees

Under the current regulations, during the 1-year period following an H-2A or H-2B denial or revocation for prohibited fees, USCIS may only approve a petition filed by the same petitioner for the same classification if the petitioner demonstrates either that each affected beneficiary has been reimbursed in full or that it made reasonable efforts but has failed to locate such beneficiary(ies). 8 CFR 214.2(h)(5)(xi)(C)(1) and 8 CFR 214.2(h)(6)(i)(D). The current regulations specify that reasonable efforts include contacting the beneficiary's known addresses. 8 CFR 214.2(h)(5)(xi)(C)(1) (with respect to H-2A workers, reasonable efforts include "contacting any of the beneficiary's known addresses"); 8 CFR 214.2(h)(6)(i)(D)(1) (with respect to H-2B workers, reasonable efforts include "contacting all of each such beneficiary's known addresses"). DHS is proposing several changes to these provisions to increase the consequences and provide a stronger deterrent against prohibited fee violations, to incentivize reimbursement when such violations occur, and to better ensure that petitioners do not avoid the consequences of a denial or revocation for such violations.

First, DHS is proposing to create a 1-year bar on H-2 petition approvals following an H-2A or H-2B denial or revocation based in whole or in part on prohibited fees, or following the petitioner's withdrawal of an H-2A or H-2B petition if the withdrawal occurs after USCIS issues a request for evidence or notice of intent to deny or revoke the petition on such a basis. Proposed 8 CFR 214.2(h)(5)(xi)(B) and 8 CFR 214.2(h)(6)(i)(C).

During this 1-year period, the petitioner would be barred from approval of any H-2A or H-2B petition, regardless of whether beneficiaries are reimbursed for payment of prohibited fees. Proposed 8 CFR 214.2(h)(5)(xi)(B) and 8 CFR 214.2(h)(6)(i)(C).<sup>60</sup> This proposed provision is meant to reflect the serious nature of prohibited fee violations, which are not only illegal but also harmful to H-2 workers. As advocacy groups have consistently noted, recruitment fees put workers at risk for exploitation because workers who incur debt to cover such fees are vulnerable to predatory lenders and are

<sup>60</sup> USCIS would deny any such petition filed during this period and would not refund the filing fee. See 8 CFR 103.2(a)(1).

at increased risk of debt bondage, human trafficking, and other abuses.<sup>61</sup>

In addition, for the 3 years following the 1-year bar, DHS proposes to allow petition approval only if each affected beneficiary (or the beneficiary's designee(s), if applicable) has been reimbursed in full, with no exceptions. See proposed 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D). Given the serious nature of prohibited fee violations and the significant harm to beneficiaries who are charged such fees, as discussed above, it would not be appropriate to allow a violator to avoid consequences merely by contacting any known addresses of affected beneficiaries or claiming inability to locate affected beneficiaries. Instead, DHS intends the expanded 3-year time period during which reimbursement would be a condition to petition approval, as well as the removal of the exception for failure to locate the beneficiary(ies), to provide a significantly stronger incentive to ensure that beneficiaries or their designees are in fact reimbursed.

The proposed provision would clarify that a petitioner may only provide reimbursement of prohibited fees to a beneficiary's designee if a beneficiary cannot be located or is deceased. Proposed 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1). As this provision is not meant to create a loophole for a petitioner to avoid reimbursement of prohibited fees by not attempting to locate a beneficiary, the petitioner would need to demonstrate

<sup>61</sup> See, e.g., CDM, *Recruitment Revealed* 18 (2018) ("High interest rates on loans put workers at risk of becoming trapped in debt, and exploitative collateral requirements can cause workers to lose essential property, such as their vehicles or even their homes. Moreover, when workers with abusive loans arrive in the U.S. to work, they are faced with an additional pressure to earn back the money they borrowed in their country of origin."), [https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment\\_Revealed.pdf](https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf); CDM, *Ripe for Reform* 21 (2020) ("Our surveys revealed that 26% of workers interviewed were forced to pay recruitment fees as high as \$4,500. This practice makes workers vulnerable to abuse. Charging workers for the right to work is illegal and is a serious risk factor for human trafficking. Workers are less free to leave an abusive environment when they start the job indebted."), <https://cdmigrante.org/ripe-for-reform/>; Polaris, *On-Ramps, Intersections, and Exit Routes* 43 (2018) ("The financial burdens of recruitment fees can be devastating in and of themselves but they are also—ironically—a necessary backdrop for trafficking to occur."), <https://polarisproject.org/wp-content/uploads/2018/08/A-Roadmap-for-Systems-and-Industries-to-Prevent-and-Disrupt-Human-Trafficking.pdf>; Polaris, *Labor Trafficking on Specific Temporary Work Visas* 16 (2022) ("Having paid substantial fees in order to get the job—and often having gone into debt to do so—leaves workers with little choice but to try to recoup their losses regardless of the conditions in which they are working."), <https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf>.

that it made all possible efforts to locate the beneficiary, and then after exhausting such efforts to locate the beneficiary, that it reimbursed the appropriate designee. The proposed provision would clarify that a beneficiary's designee(s) must be an individual(s) or entity(ies) for whom the beneficiary has provided the petitioner or its successor in interest prior written authorization to receive such reimbursement on the beneficiary's behalf, as long as the petitioner or its successor, its agent, any employer (if different from the petitioner) or any joint employer, attorney, facilitator, recruiter, or similar employment service would not act as such designee or derive any financial benefit, either directly or indirectly, from the reimbursement. Proposed 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1). The requirement for "prior written authorization" would better ensure USCIS's ability to determine whether the petitioner in fact reimbursed the appropriate designee. The prohibition against the petitioner or its agent, employer (if different from the petitioner) or any joint employer, attorney, facilitator, recruiter, or similar employment service from acting as the designee or deriving any financial benefit, either directly or indirectly, from the reimbursement would foreclose the possibility that any of these parties could serve as a designee or would use the designee provision as a way to benefit from not reimbursing the beneficiary.

If this provision is finalized, petitioners would be expected, as a matter of best practice, to obtain in writing the beneficiary's full contact information (including any contact information abroad), early on during the recruitment process, and to maintain and update such information as needed, to better ensure the petitioner's ability to fully reimburse the beneficiary, or the beneficiary's designee(s), for any sums the petitioner may be liable to pay the beneficiary. Petitioners would also be expected to inform the beneficiary, in a language the beneficiary understands, of the beneficiary's ability to name a designee, and obtain full designee information, early on during the recruitment process, and to maintain and update such information as needed to ensure that the petitioner has in fact complied with the reimbursement requirement.

Following a denial or revocation (or withdrawal) for prohibited fees under the proposed provisions, the maximum total period that a petitioner's H-2 petitions would be denied if the petitioner failed to fully reimburse its

workers or their designees would be 4 years. DHS believes that this period is sufficient to incentivize compliance with the reimbursement requirement. DHS invites comments as to the proposed maximum 4-year bar to the approval of an H-2A or H-2B petition that would apply if the petitioner cannot demonstrate that it has in fact reimbursed the worker(s) or their designee(s) in full for any prohibited fees paid.

DHS is proposing to apply the above consequences for prohibited fees not only to the violating petitioner, but also to its successor in interest in order to prevent a petitioning entity from avoiding liability by changing hands, reincorporating, or holding itself out as a new entity. Proposed 8 CFR 214.2(h)(5)(xi)(B) and (C) and 8 CFR 214.2(h)(6)(i)(C) and (D). DHS proposes to define a successor in interest as an employer that is controlling and carrying on the business of a previous employer, regardless of whether such successor in interest has inherited all of the rights and liabilities of the predecessor entity. Proposed 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D). DHS proposes to include the term "regardless of whether such successor in interest has succeeded to all of the rights and liabilities of the predecessor entity" in order to prevent the new entity from avoiding liability by intentionally assuming only some of the petitioner's rights and liabilities. Proposed 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D) further list factors that USCIS may consider as relevant when determining whether an entity would be considered a successor in interest. As made clear in the proposed regulatory text, no one factor is dispositive, and USCIS would make a determination as to whether the entity is a successor in interest, and is therefore liable for reimbursement, based on the circumstances as a whole.

These proposed factors are similar, but not identical, to the factors listed at 8 CFR 214.2(w)(1)(xiv) for the CW-1 nonimmigrant program. They are also similar, but not identical, to the factors listed in DOL regulations for the H-2A and H-2B programs. *See, e.g.*, 20 CFR 655.103(b); 20 CFR 655.5; 29 CFR 501.3; 29 CFR 503.4. To the extent that the proposed factors differ from the ones currently in place at 8 CFR 214.2(w)(1)(xiv) and DOL regulations, they generally flow from factors that are currently in place. For example, "Familial or close personal relationships between predecessor and successor owners of the entity" under proposed factor (ix) flows from the current factors on whether the former

management or owner retains a direct or indirect interest in the new enterprise, continuity of the work force, similarity of supervisory personnel, and the ability of predecessor to provide relief. "Use of the same or related remittance sources for business payments" under proposed factor (x) flows from current factors on use of the same facilities, substantial continuity of business operations similarities, and similarities in products, services, and production methods. Furthermore, USCIS's adjudicative experience has shown the proposed factors in (ix)-(x) to be relevant when determining the relationship between entities and/or individuals.

Finally, the proposed bars apply across both H-2 programs, meaning that an H-2B denial or revocation would trigger the bars to H-2A approval under proposed 8 CFR 214.2(h)(5)(xi)(B) and (C), and an H-2A denial or revocation would trigger the bars to H-2B approval under proposed 8 CFR 214.2(h)(6)(i)(C) and (D). Specifically, proposed 8 CFR 214.2(h)(5)(xi)(B) states that the bar would apply within 1 year after the decision denying or revoking on notice "an H-2A or H-2B petition on the basis of paragraph (h)(5)(xi)(A) or (h)(6)(i)(B), respectively, of this section" (emphasis added). Likewise, proposed 8 CFR 214.2(h)(6)(i)(C) states that the bar would apply within 1 year after the decision denying or revoking on notice "an H-2B or H-2A petition on the basis of paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), respectively, of this section" (emphasis added). The additional 3-year bar at proposed 8 CFR 214.2(h)(5)(xi)(C) and (6)(i)(D) would similarly apply to both classifications whether the underlying petition that was denied or revoked for prohibited fees was an H-2A or H-2B petition. DHS is also proposing to apply the bars across both classifications in cases where a petitioner withdraws the petition after USCIS has issued a notice of intent to deny or revoke based on the H-2A or H-2B prohibited fee provisions.

## 2. Denial of H-2 Petitions for Certain Violations of Program Requirements

In this proposed rule, DHS, pursuant to its general authority under INA secs. 103(a) and 214(c)(1), as well as its specific authority under INA sec. 214(c)(14)(A)(ii) with respect to the H-2B program, is proposing to enhance worker protections by introducing a provision that allows for the denial of H-2 petitions for employers that have been found to have committed certain labor law violations or otherwise violated the requirements of the H-2 programs. *See* proposed 8 CFR

214.2(h)(10)(iii).<sup>62</sup> This proposed reform is an important addition in DHS's efforts to improve the integrity of the H-2 programs and to protect H-2 workers by allowing evaluation of a petitioner's past compliance with certain H-2 related laws prior to USCIS approving H-2 petitions. As noted in earlier sections, a worker's H-2 status is tied to the petitioning employer only, and worker advocates have noted that the structure of the programs makes H-2 workers vulnerable to exploitation and abuse. It is necessary, therefore, that USCIS have improved tools to properly identify and vet employers that seek to bring in H-2 workers. The consequences of bad actors participating in the H-2 programs can be extremely harmful.<sup>63</sup> This proposed provision reflects DHS's determination that an employer's past conduct in relation to respecting worker rights, as well as in relation to ensuring the safety and working conditions of its past or current employees, is relevant to petition eligibility as it may inform USCIS of that employer's present intent and ability to comply with H-2 laws and requirements. The phrase "H-2 laws and requirements" includes the obligations and prohibitions specifically outlined in statutes and DHS and DOL regulations. In addition, employers in the H-2 program are required to comply with "all applicable Federal, State, and local employment-related laws and regulations, including health and safety laws."<sup>64</sup>

The Secretary of Homeland Security's authority to deny H-2 petitions for certain past violations of program requirements is derived from the INA and the HSA. Specifically, INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1), states that "the question of importing any

[noncitizen] as a nonimmigrant under subparagraph (H) . . . of section 101(a)(15) . . . in any specific case or specific cases shall be determined by the [Secretary of Homeland Security], after consultation with appropriate agencies of the Government, upon petition of the importing employer."<sup>65</sup> The same provision goes on to state, "The petition shall be in such form and contain such information as the [Secretary of Homeland Security] shall prescribe." In addition, with respect to H-2B petitions in which DHS has found a substantial failure to meet any conditions of the petition or a willful misrepresentation of a material fact, INA sec. 214(c)(14)(A)(ii), 8 U.S.C. 1184(c)(14)(A)(ii), states in part that the Secretary of Homeland Security, "after notice and an opportunity for a hearing"<sup>66</sup> . . . "may deny petitions filed with respect to that employer. . . during a period of at least 1 year but not more than 5 years. . . ."

The proposed provision is an expansion of existing regulatory authority that bars approval of H-2A petitions for 2 years after an employer or joint employer, or a parent, subsidiary, or affiliate is found to have violated INA sec. 274(a), 8 U.S.C. 1324(a) (criminal penalties for unlawfully bringing in and harboring certain noncitizens) or to have employed an H-2A worker in a position other than that described in the nonimmigrant worker petition. *See* 8 CFR 214.2(h)(5)(iii)(B). The existing provision at 8 CFR 214.2(h)(5)(iii)(B) is insufficient to address serious violations that occur in the H-2 programs, as it applies only to the H-2A program and does not include all of the types of violations that can be relevant to H-2 program compliance. DHS proposes to replace this existing provision with a more comprehensive provision, proposed 8 CFR 214.2(h)(10)(iii), that includes both mandatory and discretionary grounds for denial depending on the type or severity of violations, including mandatory denial based on a final determination(s) that the employer violated INA sec. 274(a),

and DHS is therefore proposing to remove and reserve 8 CFR 214.2(h)(5)(iii)(B).

Additionally, under existing DHS regulations at 8 CFR 214.1(k), USCIS may deny for a period of 1 to 5 years any petition filed for nonimmigrant status under INA sec. 101(a)(15)(H) upon the petitioner's debarment by DOL.<sup>67</sup> DHS would retain the provision at 8 CFR 214.1(k) and believes the addition of proposed 8 CFR 214.2(h)(10)(iii) would complement that provision, in part by allowing DHS to address instances of past labor violations that may result in the abuse or exploitation of individuals seeking to come to the United States as H-2 workers, but that may not have resulted in debarment from the H-2 programs by DOL.<sup>68</sup> Further, proposed 8 CFR 214.2(h)(10)(iii) would provide greater clarity to 8 CFR 214.1(k) regarding how the bar under 8 CFR 214.1(k) would be applied to H-2A and H-2B petitions, as discussed below.

Under proposed 8 CFR 214.2(h)(10)(iii), USCIS would have authority to deny H-2 petitions for certain past violations. The proposed provision sets out the conditions which would mandate USCIS denial, as well as instances in which USCIS would evaluate relevant factors to determine whether a discretionary denial is warranted. The violation findings set forth in proposed 8 CFR 214.2(h)(10)(iii)(A) are, by nature, so egregious and directly connected to the H-2 programs that they warrant mandatory denial. In contrast, the conditions set forth in 8 CFR 214.2(h)(10)(iii)(B) could potentially be less egregious in nature or less directly related to the H-2 programs, and therefore, would require additional analysis before determining whether a denial is warranted. These proposed provisions are discussed in more detail in the following subsections. Note that under proposed 8 CFR 214.2(h)(10)(iii), USCIS would or could deny an H-2A petition for a violation that occurred in the H-2B program, and vice versa.

#### a. Mandatory Denial Based on Certain Violations

Proposed 8 CFR 214.2(h)(10)(iii)(A) states that USCIS will deny any H-2A or H-2B petition filed by a petitioner, or the successor in interest of a petitioner as that term is defined in proposed 8 CFR 214.2(h)(5)(xi)(C)(2) and proposed

<sup>62</sup> As previously discussed, numerous studies and news articles have recounted instances of employers continuing to access the H-2 programs despite their respective records of labor law and/or safety violations. *See, e.g., Farmworker Justice, No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* (2012), <https://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf>; LIUNA, *H-2B Guest Worker Program: Lack of Accountability Leads to Exploitation of Workers*, <https://d3ciwvvs59jfrt8.cloudfront.net/b156551f-4cfc-4f0e-ab0f-1c05b2955a44/4d0e38cb-1c2b-4b12-924c-279c4e15ce31.pdf>.

<sup>63</sup> *See, e.g., DOJ, U.S. Attorney's Office, Southern District of Georgia, Three men sentenced to federal prison on charges related to human trafficking: Each admitted to role in forced farm labor in Operation Blooming Onion* (Mar. 31, 2022), <https://www.justice.gov/usao-sdga/pr/three-men-sentenced-federal-prison-charges-related-human-trafficking>. Also see the examples of abuse and exploitation of H-2 workers highlighted in section III.D, Importance of the H-2 Programs and the Need for Reforms.

<sup>64</sup> *See* 20 CFR 655.20(z), 29 CFR 503.16(z); *see also* 20 CFR 655.135(e).

<sup>65</sup> *See also* INA sec. 214(a)(1), 8 U.S.C. 1184(a)(1).

<sup>66</sup> USCIS does not read the phrase "notice and opportunity for a hearing" in INA sec. 214(c)(14) as requiring a formal hearing under 5 U.S.C. 556. USCIS therefore proposes to utilize its existing informal adjudications and appeals processes to satisfy this "notice and opportunity for a hearing" requirement. *See* 8 CFR 103.2, 103.3. *See generally* Michael Asimow, Admin. Conference of the U.S., "Federal Administrative Adjudication Outside the Administrative Procedure Act" (2019) (discussing informal adjudication), at <https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf>.

<sup>67</sup> Exceptions to the bar under 8 CFR 214.1(k) are made for status under INA secs. 101(a)(15)(H)(i)(b1), (L), (O), and (P)(i).

<sup>68</sup> A USCIS decision to deny a petition under proposed 8 CFR 214.2(h)(10)(iii) would not preclude a debarment action by DOL.

8 CFR 214.2(h)(6)(i)(D)(2), that has been the subject of one or more of the three actions discussed below.

First, DHS proposes mandatory denial based on a final administrative determination by the Secretary of Labor under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503, debaring the petitioner from filing or receiving a future labor certification, or a final administrative determination by the GDOL debaring the petitioner from issuance of future labor certifications under applicable Guam regulations and rules, if the petition is filed during the debarment period, or if the debarment occurs during the pendency of the petition. *See* proposed 8 CFR 214.2(h)(10)(iii)(A)(1). The proposed provision is consistent with the existing authority under 8 CFR 214.1(k) to deny petitions based on debarment, but provides greater clarity for H–2A and H–2B petitioners. Specifically, while 8 CFR 214.1(k) states that, upon debarment, USCIS *may* deny a petition “for a period of at least 1 year but not more than 5 years,” proposed 8 CFR 214.2(h)(10)(iii)(A)(1) would clarify that USCIS *must* deny H–2 petitions filed during the specific debarment period set forth by DOL or GDOL, assuming a final administrative determination as specified in proposed 8 CFR 214.2(h)(10)(iii)(A). In addition, the proposed provision clarifies that it applies to successors in interest of the debarred petitioner, as well as in instances when a debarment occurs while a petition is pending before USCIS. The current language at 8 CFR 214.1(k) would continue to govern how DOL debarment of an employer from the H–2 program would affect non-H–2 petition adjudications for petitions filed by that employer under INA sec. 101(a)(15)(H) (except for status under INA secs. 101(a)(15)(H)(i)(b1), (L), (O), and (P)(i)).

As the second basis for mandatory denial, DHS proposes to include denial or revocation of a prior H–2A or H–2B petition that includes a finding of fraud or willful misrepresentation of a material fact during the pendency of the petition or within 3 years before the filing of the petition. *See* proposed 8 CFR 214.2(h)(10)(iii)(A)(2). In order to trigger a denial under this ground, the USCIS decision on the prior petition must explicitly contain a finding of fraud or willful misrepresentation of a material fact, although fraud or willful misrepresentation of a material fact need not be the only ground(s) for denial or revocation. Furthermore, the USCIS decision must be an administratively final decision, meaning there is no pending administrative

appeal or the time for filing a timely administrative appeal has elapsed.<sup>69</sup> Because of the inherently serious and relevant nature of a finding that the petitioner committed fraud or willfully misrepresented information that was material with respect to a prior benefit request in the H–2 programs, it is appropriate to exclude from the program petitioners against whom USCIS has recently made such a finding. As to how recent such a finding must be in order to impact adjudication, DHS is proposing a 3-year timeframe as this period captures an employer’s reasonably recent activity, which is a highly relevant consideration with respect to a petitioner’s current intention and ability to comply with program requirements. The 3-year period generally would be sufficient to ensure that approval of an H–2 petition would not be detrimental to the rights of H–2 workers or the integrity of the H–2 program.<sup>70</sup> DHS seeks public input on the proposed 3-year timeframe as an appropriate length of time to impose.

Third, DHS proposes mandatory denial based on a final determination of a violation under INA sec. 274(a), 8 U.S.C. 1324(a),<sup>71</sup> during the pendency of the petition or within 3 years before filing the petition. *See* proposed 8 CFR 214.2(h)(10)(iii)(A)(3). As noted above, this proposed provision essentially incorporates and replaces the portion of the existing provision at 8 CFR 214.2(h)(5)(iii)(B) that bars approval of H–2A petitions if an employer is found to have violated INA sec. 274(a). It also expands upon 8 CFR 214.2(h)(5)(iii)(B) by making the bar also applicable to H–2B petitions, applying it to successors in interest, and extending the 2-year bar to 3 years to make the length consistent with the length of the other proposed mandatory denial periods. As above, DHS seeks public input on this proposed time period.

In determining whether one of the proposed mandatory grounds for denial listed in proposed 8 CFR 214.2(h)(10)(iii)(A) is applicable to the instant petition, USCIS would not revisit the underlying substantive

<sup>69</sup> *See generally* 8 CFR 103.3 and 8 CFR 103.4 (setting forth the appeal process for petitioners after a decision is issued).

<sup>70</sup> The 3-year period is consistent with the time period set forth in INA sec. 214(c)(14)(A)(ii) with respect to the H–2B classification. Since similar worker protection and program integrity concerns apply to the H–2A program, it is appropriate to use the same timeframe with respect to the H–2A classification.

<sup>71</sup> INA sec. 274, 8 U.S.C. 1324, is titled “Bringing in and Harboring Certain Aliens,” and paragraph (a) covers “Criminal Penalties” within that section. INA sec. 274(a) is separate and distinct from INA sec. 274A, 8 U.S.C. 1324a, which is titled “Unlawful Employment of Aliens.”

determination during adjudication of the petition. That is, USCIS is not proposing to re-adjudicate or make an independent finding on the merits of the underlying final administrative determination, criminal conviction, or civil judgment against the petitioner. Rather, following issuance of a request for evidence or notice of intent to deny the petition and providing an opportunity for the petitioner to respond, USCIS would determine whether such final determination, conviction, or judgment was made against the petitioner or its successor in interest within the specified time period. Upon a determination that any of the proposed mandatory grounds for denial listed in proposed 8 CFR 214.2(h)(10)(iii)(A) were triggered, USCIS would provide notice to the petitioner indicating that the ground had been triggered and that the petition being adjudicated as well as any pending or subsequently filed H–2 petitions (by the petitioner or a successor in interest) will be denied on the same basis during the applicable time period. *See* proposed 8 CFR 214.2(h)(10)(iii)(E)(1). The denial notice would also inform the petitioner of the right to appeal the denial to USCIS’s Administrative Appeals Office (AAO), including the ability to request an oral argument pursuant to 8 CFR 103.3.<sup>72</sup> Providing such notice would inform the petitioner to refrain from filing additional H–2 petitions that would be subject to the mandatory ground for denial, therefore saving the petitioner from paying filing fees.

#### b. Discretionary Denial Based on Certain Violations

In addition to the mandatory denial provision at proposed 8 CFR 214.2(h)(10)(iii)(A), discussed in the preceding subsection, DHS also proposes a provision at 8 CFR 214.2(h)(10)(iii)(B) that would allow USCIS to consider other past violations and authorize discretionary denial in such cases when USCIS determines that the underlying violation(s) calls into question the petitioner’s or successor’s intention or ability to comply with H–2 program requirements. This proposed provision states that USCIS may deny any H–2 petition filed by a petitioner, or the successor in interest of a petitioner as defined in proposed 8 CFR 214.2(h)(5)(xi)(C)(2) and proposed 8 CFR 214.2(h)(6)(i)(D)(2), that has been the subject of one or more of the enumerated actions, after evaluation of

<sup>72</sup> The denial notice would also inform the petitioner of the ability to file a motion to reopen or reconsider under 8 CFR 103.5(a). The filing of a motion would not stay the denial decision. 8 CFR 103.5(a)(1)(iv).

relevant factors listed at proposed 8 CFR 214.2(h)(10)(iii)(C). The final administrative actions listed in proposed 8 CFR 214.2(h)(10)(iii)(B) would be limited to those that have occurred during the pendency of the petition or within 3 years before the filing the petition. DHS is proposing this 3-year period as such a period captures an employer's reasonably recent activity, which is a highly relevant consideration with respect to a petitioner's current intention and ability to comply with program requirements. The 3-year period generally would be sufficient to ensure that approval of an H-2 petition would not be detrimental to the rights of H-2 workers or the integrity of the H-2 program.<sup>73</sup> DHS welcomes public input on this proposed timeframe.

First, DHS proposes to allow USCIS to consider a discretionary denial when the petitioner has been the subject of a final administrative determination by the Secretary of Labor or GDOL with respect to a prior H-2A or H-2B TLC that includes: (1) revocation of an approved TLC under 20 CFR part 655, subpart A or B, or applicable Guam regulations and rules; (2) DOL debarment under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503, or applicable Guam regulations and rules, if the debarment period has concluded before filing the petition; or (3) any other administrative sanction or remedy under 29 CFR part 501 or 503, or applicable Guam regulations and rules, including assessment of civil money penalties as described in those parts. See proposed 8 CFR 214.2(h)(10)(iii)(B)(1). This provision is broader than proposed 8 CFR 214.2(h)(10)(iii)(A)(1) in that it encompasses other administrative actions beyond debarment by the Secretary of Labor or GDOL. With respect to debarment, the timing of the debarment period is what differentiates proposed 8 CFR 214.2(h)(10)(iii)(A)(1) from proposed 8 CFR 214.2(h)(10)(iii)(B)(1)(ii). A debarment period that began during the last 3 years but has already concluded before the filing of the H-2 petition would fall under 8 CFR 214.2(h)(10)(iii)(B)(1)(ii) and trigger a discretionary analysis, while a debarment period that is active when the H-2 petition is filed or while it remains pending *would fall under the*

<sup>73</sup> The 3-year period is consistent with the time period set forth in INA sec. 214(c)(14)(A)(ii) with respect to the H-2B classification. Since similar worker protection and program integrity concerns apply to the H-2A program, it is appropriate to use the same timeframe with respect to the H-2A classification.

*mandatory denial provision* at proposed 8 CFR 214.2(h)(10)(iii)(A)(1).

As the second basis for discretionary denial consideration, DHS proposes to include a USCIS decision revoking the approval of a prior petition that includes one or more of the following findings: the beneficiary was not employed by the petitioner in the capacity specified in the petition; the statement of facts contained in the petition or on the application for a TLC was not true and correct, or was inaccurate; the petitioner violated terms and conditions of the approved petition; or the petitioner violated requirements of INA sec. 101(a)(15)(H) or 8 CFR 214.2(h). See proposed 8 CFR 214.2(h)(10)(iii)(B)(2). Unlike USCIS decisions that include a finding of fraud or willful misrepresentation of a material fact, these revocation decisions could, but would not always, be relevant to a petitioner's intent and ability to comply with program requirements. Inclusion of the phrase "the beneficiary was not employed by the petitioner in the capacity specified in the petition" essentially incorporates the existing provision at 8 CFR 214.2(h)(5)(iii)(B) that bars approval of H-2A petitions for 2 years if an employer is found "to have employed an H-2A worker in a position other than that described in the relating petition" and expands it to include H-2B petitions. However, unlike current 8 CFR 214.2(h)(5)(iii)(B), which imposes a mandatory denial, discretion is warranted when the beneficiary was not employed by the petitioner in the capacity specified in the petition (for instance, the beneficiary was performing different duties or working outside the identified area of employment) because the non-compliance could have occurred for a number of reasons, not all of which would call into question a petitioner's intent and ability to comply with program requirements going forward. In addition, the proposed provision would allow consideration of other bases for revocation as listed above that could potentially relate to a petitioner's intent and ability to comply with program requirements. For instance, a USCIS revocation finding that the statement of facts contained in the petition or on the application for a TLC was not true and correct<sup>74</sup> could be based on a petitioner's confiscation and withholding of its H-2 workers' passports, which is both unlawful and harmful to workers,<sup>75</sup> and therefore

<sup>74</sup> See 8 CFR 214.2(h)(11)(iii)(A)(2).

<sup>75</sup> As part of the TLC application process, petitioners are required to attest that they will comply with relevant laws, including 18 U.S.C.

would be highly relevant to a petitioner's prospective intent and ability to comply with program requirements.

Third, DHS proposes to allow USCIS to consider discretionary denial based on any final administrative or judicial determination (other than one described in 8 CFR 214.2(h)(10)(iii)(A)) that the petitioner violated any applicable Federal, State, or local employment-related laws or regulations, including, but not limited to, health and safety laws or regulations. See proposed 8 CFR 214.2(h)(10)(iii)(B)(3). This catch-all provision is consistent with existing DOL regulations requiring compliance with all such laws,<sup>76</sup> and it recognizes that numerous Federal agencies (such as DOL's Occupational Safety and Health Administration (OSHA), the Department of Transportation (DOT), and Federal courts), State agencies (such as State departments of labor, State departments of transportation, and State courts), and local agencies (such as those involved in setting local housing standards) have authority in areas affecting H-2 employers and workers. While DHS recognizes that proposed 8 CFR 214.2(h)(10)(iii)(B)(3) could be broad in its reach, the key word "applicable" and phrase "may call into question a petitioner's or successor's intention or ability to comply," would limit the scope of final determinations that USCIS may consider relevant. For example, USCIS would likely not consider a single de minimis OSHA violation<sup>77</sup> or a single DOT violation for poor vehicle maintenance that did not result in risk or harm to workers as necessarily relevant to the petitioner's intention or ability to comply with H-2A program requirements. On the other hand, if a petitioner has, for instance, a history of serious OSHA violations for failure to provide workers with personal protective equipment or a history of DOT violations for poor vehicle maintenance and those vehicles were continually used to transport the company's H-2 workers, resulting in the death or injury of (or risk of death or

1592(a), with respect to prohibitions against confiscating workers' passports. See 20 CFR 655.20(z), 20 CFR 655.135(e); Form ETA-9142A, H-2A Application for Temporary Employment Certification, Appendix A, and Form ETA 9142B, H-2B Application for Temporary Employment Certification, Appendix B, available at <https://www.dol.gov/agencies/eta/foreign-labor/forms>. See also William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110-457; 18 U.S.C. 1592(a).

<sup>76</sup> See 20 CFR 655.20(z), 20 CFR 655.135(e).

<sup>77</sup> De minimis OSHA violations "have no direct or immediate relationship to safety and health." DOL, *Employment Law Guide, Safety and Health Standards: Occupational Safety and Health*, <https://webapps.dol.gov/elaws/elg/osh.htm>.

injury to) H-2 workers,<sup>78</sup> then USCIS would likely consider those violations relevant to the petitioner's intention or ability to comply with H-2A or H-2B program requirements under proposed 8 CFR 214.2(h)(10)(iii)(B)(3).

As the denials under proposed 8 CFR 214.2(h)(10)(iii)(B)(3) would be discretionary, DHS is proposing that USCIS would determine whether the violations may call into question the petitioner's ability or intent to comply with H-2 program requirements by examining all relevant factors. Proposed 8 CFR 214.2(h)(10)(iii)(C) identifies several factors that could be relevant to the analysis and that USCIS may therefore consider. The listed factors are not exhaustive; additional relevant factors that are not listed in the proposed provision may be considered by USCIS in the totality, but each one, standing alone, would not be outcome determinative. Further, not all factors would be relevant in all cases, and different factors may be weighted differently depending on the circumstances of each case. Any one of the factors, such as the egregiousness and willfulness<sup>79</sup> of the violation(s) under proposed 8 CFR 214.2(h)(10)(iii)(C)(2) and (5), could be given significant weight in reviewing the totality of the facts presented, even if other listed factors were absent. For example, if the petitioner willfully committed a violation that resulted in the death of several H-2 workers, those two factors alone (*i.e.*, willfulness and egregiousness of the violation leading to the death of the workers) could be sufficient to warrant a discretionary denial under proposed 8 CFR 214.2(h)(10)(iii)(B), notwithstanding the absence of other negative factors such as a prior history of violations or achievement of financial gain.

In applying the proposed discretionary analysis, USCIS officers would use the "preponderance of the evidence" standard of proof.<sup>80</sup> Under this standard, the evidence must demonstrate that the petitioner's claim

that it is willing and able to comply with the requirements of the H-2 program is "more likely than not" true<sup>81</sup> after taking into consideration the prior violations and any relevant factors, both negative and positive. While USCIS officers would evaluate whether the petitioner, more likely than not, will comply with H-2 requirements, USCIS officers would not revisit the merits of the underlying final administrative or judicial determination against the petitioner.

When making a determination that any of the proposed discretionary grounds for denial listed in proposed 8 CFR 214.2(h)(10)(iii)(B) were triggered and that the analysis warrants a discretionary denial, the USCIS denial notice would indicate that the triggering of the discretionary ground for denial may also apply in subsequent adjudications of pending or future H-2 petitions, depending on the facts presented with respect to each such petition. See proposed 8 CFR 214.2(h)(10)(iii)(E)(2). The notice would also inform the petitioner of the right to appeal the denial to the AAO, and the ability to request oral argument pursuant to 8 CFR 103.3.<sup>82</sup>

Providing such notice would enable the petitioner to consider the impact of the discretionary denial on future H-2 petition adjudications. It is the intention of DHS that the petitioner or the petitioner's successor in interest will take corrective actions to bring itself into, and continue to remain in, compliance with H-2 program requirements. Under this proposal, USCIS would take into consideration any such corrective action in subsequent adjudications of H-2 petitions filed by the petitioner or a petitioner's successor in interest. See proposed 8 CFR 214.2(h)(10)(iii)(C)(8). During the discretionary denial period, USCIS would consider all of the relevant factors in each separate adjudication when exercising its discretion under proposed 8 CFR 214.2(h)(10)(iii)(B).

### c. Convictions and Determinations Against Certain Individuals

For the purposes of the mandatory and discretionary denials discussed above, DHS proposes to state that a criminal conviction or final administrative or judicial determination against certain individuals will be treated as a conviction or final

administrative or judicial determination against the petitioner or successor in interest. The proposed regulatory text clarifies that this would include convictions and determinations against a person who is acting on behalf of the petitioning entity, which could include, among others, the petitioner's owner, employee, or contractor. The proposed regulatory text would further clarify that, with respect to discretionary denials under proposed 8 CFR 214.2(h)(10)(iii)(B), this would also include convictions and determinations against any employee of the petitioning entity who a reasonable person in the H-2A or H-2B worker's position would believe is acting on behalf of the petitioning entity. See proposed 8 CFR 214.2(h)(10)(iii)(D).

Because an employer can rightfully be expected to exercise due diligence over its employees or contractors acting on its behalf, it would not be appropriate to allow petitioners to avoid liability merely because an individual acting on the entity's behalf, rather than the entity itself, was the subject of the final administrative or judicial action. Indeed, some of the most egregious violations, such as those resulting in criminal convictions, involve actions against individuals in addition to any separate actions against the business entity that may be listed as petitioner on an H-2A or H-2B petition. For instance, a recent high-profile investigation into egregious violations in the H-2A program resulted in criminal convictions of several individuals related, in part, to human trafficking and forced labor committed against H-2 workers.<sup>83</sup> To the extent that convicted individuals acted in their capacity on behalf of petitioning employers and resulted in violations of H-2 program requirements, such misconduct is entirely relevant to the adjudication of future petitions by the petitioning employers or their successors. Whether the denial of future petitions would be mandatory or discretionary under the proposed regulation would depend on the nature of the specific convictions or final administrative or judicial actions. In other words, the mandatory bar would apply if the relevant individual was the subject of one or more actions listed in proposed 8 CFR 214.2(h)(10)(iii)(A), and USCIS would have the ability to deny as

<sup>78</sup> See Ken Bensinger, Jessica Garrison, Jeremy Singer-Vine, Buzz Feed News, *The Pushovers: Employers Abuse Foreign Workers, U.S. Says, By All Means, Hire More* (May 12, 2016) (describing an example of such an incident), <https://www.buzzfeednews.com/article/kenbensinger/the-pushovers>.

<sup>79</sup> Note that a finding of willfulness must be explicitly stated in the final agency determination, decision, or conviction. USCIS would not independently make a finding of willfulness under proposed 8 CFR 214.2(h)(10)(iii)(C)(5).

<sup>80</sup> See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) ("Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.").

<sup>81</sup> See *Matter of Chawathe*, 25 I&N Dec. at 376 (AAO 2010).

<sup>82</sup> The denial notice would also inform the petitioner of the ability to file a motion under 8 CFR 103.5(a). The filing of a motion would not stay the denial decision. 8 CFR 103.5(a)(1)(iv).

<sup>83</sup> See DOJ, U.S. Attorney's Office, Southern District of Georgia, *Three men sentenced to federal prison on charges related to human trafficking: Each admitted to role in forced farm labor in Operation Blooming Onion*, <https://www.justice.gov/usao-sdga/pr/three-men-sentenced-federal-prison-charges-related-human-trafficking> (Mar. 31, 2022).

a matter of discretion if the relevant individual was the subject of one or more actions listed in proposed 8 CFR 214.2(h)(10)(iii)(B).

Furthermore, for the purposes of discretionary denials under proposed 8 CFR 214.2(h)(10)(iii)(B), proposed 8 CFR 214.2(h)(10)(iii)(D)(2) would include convictions and determinations against “an employee of the petitioning entity who a reasonable person in the H–2A or H–2B worker’s position would believe is acting on behalf of the petitioning entity.” Because employers can rightfully be expected to exercise due diligence over its employees, it would not be appropriate to allow petitioners to avoid liability merely by claiming that an employee was not acting on the petitioner’s behalf. At the same time, to guard against the risk that the petitioner be liable for any and all unauthorized actions of their employees, this liability would apply only if a reasonable person in the worker’s position would believe that the employee was acting on behalf of the petitioning entity. In addition, because liability for this population would be limited to the discretionary denial provision, petitioners would have an opportunity to provide information regarding the circumstances of the employee’s actions, and USCIS would consider all relevant factors in determining whether the petitioner had established its intention and ability to comply with H–2 program requirements.

### 3. Investigation and Verification Authority

Pursuant to its authorities under INA secs. 103(a) and 214, 8 U.S.C. 1103(a) and 1184, HSA sec. 451, 6 U.S.C. 271, and 8 CFR part 103, among other provisions of law, USCIS conducts inspections, evaluations, verifications, and compliance reviews, to ensure that a beneficiary is eligible for the benefit sought and that all laws have been complied with before and after approval of such benefits. These inspections, verifications, and other compliance reviews may be conducted telephonically or electronically, as well as through physical on-site inspections (site visits). The existing authority to conduct inspections, verifications, and other compliance reviews is vital to the integrity of the immigration system as a whole, and to the H–2A and H–2B programs specifically. In this rule, DHS is proposing to add regulations specific to the H–2A and H–2B programs to codify its existing authority and clarify the scope of inspections and the consequences of a refusal or failure to fully cooperate with these inspections. See proposed 8 CFR 214.2(h)(5)(vi)(A)

and 8 CFR 214.2(h)(6)(i)(F)(2). The authority of USCIS to conduct on-site inspections, verifications, or other compliance reviews to verify information does not relieve the petitioner of its burden of proof or responsibility to provide information in the petition (and evidence submitted in support of the petition) that is complete, true, and correct.<sup>84</sup>

The proposed regulations would make clear that inspections may include, but are not limited to, an on-site visit of the petitioning organization’s facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the petition, such as facts relating to the petitioner’s and beneficiary’s eligibility and continued compliance with the requirements of the H–2 program. See proposed 8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F)(2). The proposed provisions would also make clear that an H–2A or H–2B petitioner and any employer must allow access to all sites where the labor will be performed for the purpose of determining compliance with applicable H–2A and H–2B requirements. The word “employer” used in this context would include H–2B job contractors and employer-clients as reported on the temporary labor certification<sup>85</sup> and H–2A contractors<sup>86</sup> and joint employers, including member employers if the petitioner is an association of agricultural employers. The petitioner and any employers must also agree to USCIS officials interviewing H–2A or H–2B workers, and any other similarly situated employees working for the H–2A or H–2B employer or joint employer, if necessary, including in the absence of the employer or the employer’s representatives. The interviews may take place on the employer’s property, or as feasible, at a neutral location agreed to by the employee and USCIS away from the employer’s property. The ability to inspect any and all of the various locations where the labor will be performed is critical because the

purpose of a site inspection is to confirm information related to the petition, and any one of these locations may have information relevant to a given petition. In addition, DHS proposes to require access to the sites where H–2A workers are housed. H–2A petitioners are required to provide housing to H–2A workers at no cost to the workers. See INA sec. 218(c)(4) and 20 CFR 655.1304(d). While USCIS does not, and would not, conduct inspections regarding the standard of housing provided, access to H–2A worker housing is appropriate to ensure USCIS has access to the workers themselves during the course of compliance review activities. In addition, the proposed requirement that USCIS be allowed to interview workers without the employer or its representatives present is based on reports indicating that H–2 workers may currently underreport abuse for fear of reprisal by employers.<sup>87</sup> The presence of employer representatives during such interviews can reasonably be expected to have a chilling effect on the ability of interviewed workers to speak freely, and in turn, impede the Government’s ability to ensure compliance with the terms and conditions of the H–2 program.

The proposed regulation also states that if USCIS is unable to verify facts related to the H–2 petition, including due to the failure or refusal of the petitioner or employer to cooperate in an inspection or other compliance review, then the lack of verification of pertinent facts, including from failure or refusal to cooperate, may result in denial or revocation of any petition for workers performing services at the location or locations that are a subject of inspection or compliance review. See proposed 8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F)(2). A determination that a petitioner or employer failed or refused to cooperate would be case-specific but could include situations where one or more USCIS officers arrived at a petitioner’s worksite, made contact with the petitioner or employer and properly identified themselves to a petitioner’s representative, and the petitioner or employer refused to speak to the officers or were refused entry into the premises or refused permission to review human resources records pertaining to the beneficiary(ies). Failure or refusal to cooperate could also include situations where a petitioner or employer agreed to speak but did not provide the

<sup>84</sup> See 8 CFR 103.2(b). In evaluating the evidence, the “truth is to be determined not by the quantity of evidence alone but by its quality.” *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (quoting *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm’r 1989)).

<sup>85</sup> H–2B job contractors and employer-clients must meet the requirements of the definition of an H–2 “employer” under 20 CFR 655.5 and 655.19.

<sup>86</sup> H–2A labor contractors must meet all of the requirements of the definition of an H–2 “employer” under 20 CFR 655.103 and 655.132.

<sup>87</sup> See GAO–15–154, at 37 (2015), <https://www.gao.gov/assets/gao-15-154.pdf>; CDM, *Ripe for Reform 27* (2020), <https://cdmigrante.org/ripe-for-reform/>.

information requested within the time period specified, or did not respond to a written request for information within the time period specified. Before denying or revoking the petition, USCIS would provide the petitioner an opportunity to rebut adverse information and present information on its own behalf in compliance with 8 CFR 103.2(b)(16).

This new provision would put petitioners on notice of the specific consequences for noncompliance, whether by them or the employer, if applicable. As stated above, relevant employers would include H-2A labor contractors and would also include joint employers. It has long been established that it is the petitioner's burden to establish eligibility for the immigration benefit sought. If USCIS conducts a site visit in order to verify facts related to an H-2A or H-2B petition or to verify that the beneficiary is being employed consistently with the terms of the petition approval, and is unable to verify relevant facts and otherwise confirm compliance, then the petition may be properly denied or revoked. This would be true whether the unverified facts relate to a petitioner worksite or another worksite at which a beneficiary has been or will be placed by the petitioner. It would also be true whether the failure or refusal to cooperate is by the petitioner or employer.

#### 4. H-2 Whistleblower Protection

As noted above, DHS is proposing to provide H-2A and H-2B workers with "whistleblower protection" comparable to the protection currently offered to H-1B workers. See proposed 8 CFR 214.2(h)(20). Under current 8 CFR 214.2(h)(20), a qualifying employer seeking an extension of stay for an H-1B nonimmigrant worker, or a change of status for a worker from H-1B status to another nonimmigrant classification, is able to submit documentary evidence indicating that the beneficiary faced retaliatory action from their employer based on a report regarding a violation of the employer's labor condition application (LCA) obligations. If DHS determines such documentary evidence to be credible, DHS may consider any loss or failure to maintain H-1B status by the beneficiary related to such violation as an "extraordinary circumstance" for purposes of 8 CFR 214.1(c)(4) and 8 CFR 248.1(b). Those regulations authorize DHS to grant a discretionary extension of H-1B stay or a change of status to another nonimmigrant classification even when the worker has failed to maintain the previously accorded status or where

such status expired before the extension of stay or change of status request was filed.<sup>88</sup>

When it proposed the H-1B whistleblower protection provision, DHS noted that it was required under the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Public Law 101-649, to create a process under which an H-1B nonimmigrant worker who files a complaint with DOL regarding such illegal retaliation, and is otherwise eligible to remain and work in the United States, could seek other employment in the United States.<sup>89</sup> While not similarly required by statute in the H-2A and H-2B contexts, it is appropriate to afford such protections to H-2A and H-2B workers in light of the vulnerability of H-2 workers to exploitation and abuse as described at length above. Given DHS's role in ensuring the integrity of the H-2 programs and consistent with its statutory authorities under, e.g., INA secs. 103(a) and 214, 8 U.S.C. 1103(a) and 1184, it is within DHS's authority and interest to take steps to ensure that program violations come to light.<sup>90</sup> As discussed previously, a GAO report has noted that the incidence of abuses in the H-2A and H-2B programs may currently be underreported, in part due to workers' fear of retaliation by their employer.<sup>91</sup> The proposed whistleblower provision, in conjunction with other proposed changes in this rulemaking, including those related to grace periods and portability, may help mitigate the above-discussed structural disincentives that workers could face with respect to reporting abuses.

In order to qualify under the new provision at proposed 8 CFR 214.2(h)(20)(ii), DHS proposes requiring "credible documentary evidence . . . indicating that the beneficiary faced retaliatory action from their employer based on a reasonable claim of a

<sup>88</sup> See *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 FR 82398, 82452 (Nov. 18, 2016) (final rule); see also INA sec. 212(n)(2)(C)(v), 8 U.S.C. 1182(n)(2)(c)(V).

<sup>89</sup> See *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 80 FR 81900, 81920 (Dec. 31, 2015) (proposed rule) (citing ACWIA sec. 413 (INA sec. 212(n)(2)(C)), 8 U.S.C. 1182(n)(2)(C)).

<sup>90</sup> See, e.g., *Cheney R.R. Co., Inc. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) ("[T]he contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion.").

<sup>91</sup> See GAO-15-154, at 37 (2015), <https://www.gao.gov/assets/gao-15-154.pdf>.

violation or potential violation of any applicable program requirements or based on engagement in another protected activity" to be submitted in support of the relevant petition on the beneficiary's behalf seeking an extension of stay or a change of status to another classification. To allow flexibility in the types of documentation that may be submitted, DHS has not proposed specifying any particular form that a "claim" or the "credible documentary evidence" must take. In this respect, the proposed provision is similar to the approach taken in the H-1B whistleblower provision. In the NPRM that included the H-1B whistleblower provision, DHS noted that "[c]redible documentary evidence may include a copy of the complaint filed by the individual, along with corroborative documentation that such a complaint has resulted in retaliatory action against the individual . . ." <sup>92</sup> In the final rule, DHS noted that it "has not limited the scope of credible evidence that may be included to document an employer violation. Rather, DHS generally requests credible documentary evidence indicating that the beneficiary faced retaliatory action from their employer due to a report regarding a violation of the employer's LCA obligations." <sup>93</sup> Thus, while a formal written complaint, if available, would be acceptable under the proposed H-2A and H-2B whistleblower provision, DHS does not propose a requirement that the submitted evidence must include a formal written complaint, written evidence that the worker engaged in protected activity, or another type of written report filed by the affected H-2 worker. DHS notes that a report could be made orally.

DHS is proposing some variations from the language used in the existing H-1B whistleblower provision in order to increase H-2 workers' protection from threats that could chill workers from exercising their rights. For instance, the proposed H-2 provision would specify that the claim could relate to a violation "or potential violation," as long as such claim was reasonable, to reflect that even if a worker is mistaken about the existence of a violation, a complaint regarding a potential violation is protected from retaliation. Proposed 214.2(h)(20)(ii). Furthermore, a report (whether made

<sup>92</sup> See *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 80 FR 81900, at 81920 (Dec. 31, 2015).

<sup>93</sup> See *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 FR 82398, 82454 (Nov. 18, 2016).

orally or in writing) is not required under proposed 8 CFR 214.2(h)(20)(ii) in that the retaliatory action could be either based on “a reasonable claim” or “based on engagement in another protected activity.” In this sense, the proposed H–2 whistleblower provision would be broader than the current H–1B whistleblower provision. Under proposed 8 CFR 214.2(h)(20)(ii), a report would not be required if the H–2 petitioner demonstrates that the retaliatory action was based on a worker’s engagement in a protected activity. Examples of protected activity include making a complaint to a manager, employer, a labor union, or a government agency (including a complaint where the worker reasonably believes there is a violation or potential violation of applicable program requirements or based on engagement in other protected activities but was mistaken about the existence of a violation or an adjudicator determines that the employer did not violate the applicable program, and an employer’s mistaken belief that a worker has made a complaint); cooperating with a government investigation; requesting payment of wages; refusing to return back wages to the employer; complaints by a third party on behalf of an employee; consulting with a labor agency; exercising rights or attempting to exercise rights, such as requesting certain types of leave; testifying at trial; and consulting with an employee of a legal assistance program or an attorney on matters related to their employment.<sup>94</sup>

DHS recognizes that employer retaliation is not limited to termination of employment and could include any number of adverse actions, including harassment, intimidation, threats, restraint, coercion, blacklisting, intimidating employees to return back wages found due (“kickbacks”), or discrimination, that could dissuade an employee from raising a concern about a possible violation or engaging in other protected activity.<sup>95</sup> These examples do not identify all potential fact patterns that could constitute retaliatory action. To ensure flexibility, and to conform to the current approach for H–1B petitions at 8 CFR 214.2(h)(20), DHS is not proposing to define “retaliatory action.” Finally, DHS notes that the proposed

retaliatory action provision under 8 CFR 214.2(h)(20)(i)–(ii) would not preclude other sets of facts from potentially qualifying as “extraordinary circumstances” under 8 CFR 214.1(c)(4) and 8 CFR 248.1(b). For example, if an H–2 worker is involved in a labor dispute or terminates employment because of unsafe working conditions, that could still qualify as “extraordinary circumstances” under 8 CFR 214.1(c)(4) and 8 CFR 248.1(b) even if the worker did not face retaliatory action from the employer, as required under proposed 8 CFR 214.2(h)(20)(ii).

### B. Worker Flexibilities

#### 1. Grace Periods

DHS seeks to expand and harmonize the grace periods afforded to H–2 workers. Expanding the length and types of grace periods afforded to H–2 workers is intended to increase worker flexibility, mobility, and protections. Furthermore, harmonizing grace periods for H–2A and H–2B workers should reduce confusion and better ensure consistency in granting the appropriate grace periods.

First, DHS seeks to provide workers in both H–2 classifications with an initial grace period of up to 10 days prior to the petition’s validity period. Currently, an H–2A nonimmigrant will be admitted for an additional period of “up to one week” before the beginning of the approved validity period, *see* 8 CFR 214.2(h)(5)(viii)(B), while an H–2B nonimmigrant will be admitted for an additional period of “up to 10 days” before the validity period begins, *see* 8 CFR 214.2(h)(13)(i)(A). Under proposed 8 CFR 214.2(h)(5)(viii)(B), DHS seeks to extend the initial grace period for H–2A nonimmigrants to up to 10 days to align it with the initial 10-day grace period already afforded to H–2B nonimmigrants under current 8 CFR 214.2(h)(13)(i)(A). DHS would maintain the initial 10-day grace period currently afforded to H–2Bs at 8 CFR 214.2(h)(13)(i)(A) but proposes to codify it at proposed 8 CFR 214.2(h)(6)(vii)(A).<sup>96</sup>

The initial 10-day grace period allows H–2B nonimmigrant workers to make necessary preparations for their employment in the United States. Because an initial 10-day grace period is a reasonable period of time to allow for preparation for employment in the

United States, DHS has previously afforded the 10-day grace period to other nonimmigrant classifications.<sup>97</sup> For this reason, DHS now proposes to extend this initial 10-day grace period to H–2A workers to benefit workers and employers. As with the existing initial grace period for H–2A and H–2B nonimmigrants, the proposed initial grace period would apply to their dependents in H–4 classification by virtue of 8 CFR 214.2(h)(9)(iv) (“The spouse and children of an H nonimmigrant, if they are accompanying or following to join such H nonimmigrant in the United States, may be admitted, if otherwise admissible, as H–4 nonimmigrants for the same period of admission or extension as the principal spouse or parent.”).

DHS further seeks to harmonize the grace periods by providing both H–2A and H–2B nonimmigrants a grace period of up to 30 days following the expiration of the petition, subject to the 3-year limitation on stay. *See* proposed 8 CFR 214.2(h)(5)(viii)(B); proposed 8 CFR 214.2(h)(6)(vii)(A). Having consistent grace periods for H–2A and H–2B workers should reduce confusion and better ensure consistency in granting the appropriate grace periods. Currently, H–2A nonimmigrants have a 30-day grace period following the expiration of their petition under 8 CFR 214.2(h)(5)(viii)(B), while H–2B nonimmigrants have a 10-day grace period following the expiration of their petition under 8 CFR 214.2(h)(13)(i)(A). Under proposed 8 CFR 214.2(h)(6)(vii)(A), both H–2A and H–2B nonimmigrants would have the same initial grace period of up to 10 days before the beginning of the approved validity period and the same grace period of up to 30 days following the expiration of the H–2 petition.

The post-validity 30-day grace period at current 8 CFR 214.2(h)(5)(viii)(B) was provided to H–2A workers so that they would have enough time to prepare for departure or apply for an extension of stay based on a subsequent offer of employment.<sup>98</sup> In establishing this 30-day grace period for H–2A workers, DHS also noted that this period would facilitate the then newly provided benefit of portability to E-Verify employers.<sup>99</sup> As DHS is now proposing to extend portability to H–2B workers, DHS proposes to also extend this 30-day

<sup>94</sup> *See* 20 CFR 655.135(h); 29 CFR 501.4(a); DOL Wage and Hour Division (WHD), *Field Assistance Bulletin No. 2022–02*, <https://www.dol.gov/sites/dolgov/files/WHD/fab/fab-2022-2.pdf>.

<sup>95</sup> *See* 81 FR 82408, 82428. *Cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (concluding that an adverse action is one that might dissuade a reasonable worker from asserting his or her rights).

<sup>96</sup> Currently, 8 CFR 214.2(h)(6)(vii) only applies to traded professional H–2B athletes. DHS proposes to move this existing provision into a new paragraph (D) within 8 CFR 214.2(h)(6)(vii) and would move provisions generally relating to H–2B periods of admission and limits on stay under current 8 CFR 214.2(h)(13) to proposed 8 CFR 214.2(h)(6)(vii)(A) through (C).

<sup>97</sup> Nonimmigrants in the E–1, E–2, E–3, H–1B1, L–1, O–1, and TN classifications are also afforded an initial 10-day grace period under 8 CFR 214.1(l)(i).

<sup>98</sup> *See Changes to Requirements Affecting H–2A Nonimmigrants*, 73 FR 76891, 76903 (Dec. 18, 2008).

<sup>99</sup> *See id.*

grace period to H–2B workers in order to facilitate the use of this benefit. As proposed, USCIS will include such grace period when extending workers' H–2A or H–2B status or changing their status to H–2A or H–2B status, subject to the 3-year maximum limitation of stay.

In this context, “subject to the 3-year maximum limitation of stay” means that an H–2 worker who has reached their 3-year limitation of stay would not be afforded a post-validity grace period, or that an H–2 worker approaching their 3-year limitation of stay may be afforded a post-validity grace period of less than 30 days. Because grace periods count towards an H–2 worker's 3-year limitation on stay, proposed 8 CFR 214.2(h)(5)(viii)(B) and proposed 8 CFR 214.2(h)(6)(vii)(A) would both state that, following the expiration of the H–2A or H–2B petition, the H–2 worker will be admitted for an additional period of “up to 30 days subject to the 3-year limitation.” This would represent a change from the language at current 8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(13)(i)(A) which do not contain the same “up to” or “subject to” language with respect to the 30-day or 10-day post-validity grace period for H–2A workers or H–2B workers, but would clarify, consistent with USCIS practice, that the general 3-year maximum limit on H–2A or H–2B stay includes their respective grace periods. Current USCIS practice is to shorten the post-validity grace period if the H–2 worker is approaching their 3-year maximum limitation of stay so that the total period of stay does not exceed 3 years. Proposed 8 CFR 214.2(h)(5)(viii)(B) and proposed 8 CFR 214.2(h)(6)(vii)(A) would conform with and clarify current practice.<sup>100</sup>

Third, DHS seeks to provide a new 60-day grace period following a cessation of H–2 employment, for example, if the H–2 worker was terminated, has resigned, or otherwise ceased employment prior to the end date of their authorized validity period. Under proposed 8 CFR 214.2(h)(13)(i)(C), an H–2A or H–2B beneficiary (and their dependents)

<sup>100</sup> DHS believes its previous characterization of the post-validity grace periods as “absolute” could be erroneously construed as extending the maximum period of H–2 stay beyond three years. See *Changes to Requirements Affecting H–2A Nonimmigrants*, 73 FR 8230, 8235 (Feb. 18, 2008) (“This rule proposes to extend the H–2A admission period following the expiration of the H–2A petition from not more than ten days to an absolute thirty-day period. See proposed 8 CFR 214.2(h)(5)(viii)(B).”). The reference to “an absolute thirty-day” period should have read “a maximum thirty-day period, subject to an absolute maximum period of H–2A stay of three years.” This NPRM proposes to clarify this point.

would not be deemed to have failed to maintain nonimmigrant status, and would not accrue any period of unlawful presence for purposes of section 212(a)(9) of the Act, 8 U.S.C. 1182(a)(9), solely on the basis of a cessation of the employment on which the beneficiary's classification was based, for 60 consecutive days or until the end of the authorized period of admission, whichever is shorter. The “authorized period of admission” in proposed 8 CFR 214.2(h)(13)(i)(C) refers to the end date listed on a worker's Form I–94, which will normally be a date 30 days after the end of the petition validity period to account for the 30-day grace period at proposed 8 CFR 214.2(h)(5)(viii)(B) or proposed 8 CFR 214.2(h)(6)(vii). Accordingly, an H–2 worker who ceases employment less than 60 days before the end of the period of admission will be afforded a grace period through the remainder of the authorized period of admission.

The 60-day grace period under proposed 8 CFR 214.2(h)(13)(i)(C) would be available only once during each authorized period of admission. In addition, an H–2 worker who already had a 60-day grace period for cessation of employment under proposed 8 CFR 214.2(h)(13)(i)(C) would not receive another 30-day grace period under proposed 8 CFR 214.2(h)(5)(viii)(B) or proposed 8 CFR 214.2(h)(6)(vii) at the end of the 60-day grace period.

Proposed 8 CFR 214.2(h)(13)(i)(C) would offer relief to H–2 workers whose employment ceased before the expiration of their petition validity, regardless of the reason for employment cessation. The proposed 60-day grace period may be used to seek new employment, make preparations for departure from the United States, or seek a change of status to a different nonimmigrant classification. For example, an H–2 worker could use this grace period to seek new employment after leaving an abusive employment situation, stopping work due to unforeseen hazardous conditions, or if their employer had to terminate employment due to contract impossibility.<sup>101</sup> DHS is proposing this 60-day grace period following a cessation of employment to allow H–2 workers sufficient time to respond to sudden or unexpected changes related to their employment. Because a cessation of employment may come as an unexpected and harsh burden on an already financially vulnerable H–2 worker, and the likelihood that a 30-day grace period would not be sufficient to find new employment or make other

<sup>101</sup> See 20 CFR 655.122(o).

appropriate arrangements, DHS is proposing a 60-day grace period as opposed to the shorter 30-day grace period following the expiration of the H–2 petition under proposed 8 CFR 214.2(h)(5)(viii)(B) or proposed 8 CFR 214.2(h)(6)(vii).

While the 60-day grace period at proposed 8 CFR 214.2(h)(13)(i)(C) would be similar to the one afforded to nonimmigrants included under 8 CFR 214.1(l)(2), there are notable differences. Unlike the grace period in 8 CFR 214.1(l)(2), the grace period at proposed 8 CFR 214.2(h)(13)(i)(C) would be set at either 60 days or the end date of the authorized period of admission, whichever is shorter.<sup>102</sup> DHS's intent in proposing a grace period that would be set at either 60 days, or the end date of the authorized period of admission if shorter than 60 days, is to give more certainty to affected H–2 workers of the time they have in the grace period. Giving more certainty of the length of the grace period could help alleviate some fears held by H–2 workers who are facing abusive employment situations, or otherwise wish to change jobs, but are reluctant to leave such employment due to uncertainty surrounding whether they would benefit from a grace period and how long the grace period would be.

The rulemaking promulgating current 8 CFR 214.1(l)(2) explained that the 60-day grace period is discretionary, and that DHS may determine whether to grant or shorten the grace period based on an individualized assessment that considers the totality of the circumstances surrounding the cessation of employment and the beneficiary's activities after such cessation.<sup>103</sup> While this reasoning remains valid for highly skilled nonimmigrants in the E–1, E–2, E–3, H–1B, H–1B1, L–1, O–1, and TN classifications, DHS believes this reasoning is less persuasive for H–2 nonimmigrants who, as discussed throughout this proposed rule, generally are particularly vulnerable to abusive labor practices. As such, it is our view that H–2 workers would benefit greatly from the increased certainty of this proposed 60-day grace period.

DHS acknowledges that proposed 8 CFR 214.2(h)(13)(i)(C) would not prevent an H–2 worker whose employer had good cause to terminate their employment from receiving the 60-day grace period upon cessation of

<sup>102</sup> *Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 FR 82398, 82438–39 (Nov. 18, 2016).

<sup>103</sup> 81 FR 82439.

employment. The rulemaking promulgating current 8 CFR 214.1(l)(2) explained that the “up to” language was specifically intended to allow DHS to shorten or entirely refuse the 60-day grace period for violations of status, unauthorized employment during the grace period, fraud or national security concerns, or criminal convictions, among other reasons.<sup>104</sup> However, DHS believes that situations where it would need to shorten or eliminate the grace period for such reasons would be rare, and that the importance of protecting H–2 workers substantially outweighs the risk that some H–2 workers who might not be deserving would also benefit from this proposed provision. Further, the proposed limitation that this grace period would apply “solely on the basis of a cessation of employment” (emphasis added) should mitigate the risk that some workers would try to use this grace period to engage in unauthorized employment or other unlawful behavior.

Proposed 8 CFR 214.2(h)(13)(i)(C) would also specify that the H–2 worker “will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9))” solely on the basis of a cessation of employment. This language is intended to assure H–2 workers that a cessation of employment, in and of itself, would not automatically start the accrual of unlawful presence. While current 8 CFR 214.1(l)(2) does not explicitly mention unlawful presence, the phrase in current 8 CFR 214.1(l)(2) “shall not be considered to have failed to maintain nonimmigrant status” already implies that the nonimmigrants covered by that provision also will not accrue unlawful presence solely on the basis of a cessation of the employment. Therefore, the inclusion of the phrase “will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9))” in proposed 8 CFR 214.2(h)(13)(i)(C) would not represent a substantive change from current 8 CFR 214.1(l)(2).

Proposed 8 CFR 214.2(h)(13)(i)(C) would not require H–2 workers to notify DHS or USCIS that they are ceasing employment in order to take advantage of the new grace period. DHS notes that it has not proposed to eliminate the separate requirements that H–2A and H–2B employers notify DHS when a worker does not report for work, is terminated, or the work is completed more than 30 days early under 8 CFR 214.2(h)(5)(vi)(B) and 8 CFR 214.2(h)(6)(i)(F), as this information collection continues to have value. However, as is reinforced in the grace

period provision at proposed 8 CFR 214.2(h)(13)(i)(C), such notification by an employer would not be considered an indication that a worker is immediately out of status. DHS notes that in subsequent petitions on the workers’ behalf, information or evidence may be requested regarding the date of cessation to demonstrate maintenance of status (for instance, by showing that a new petition requesting extension of stay was filed within 60 days after the beneficiary ceased employment with the prior employer).

Fourth, DHS proposes to provide a new 60-day grace period following the revocation of an approved H–2 petition. Under proposed 8 CFR 214.2(h)(11)(iv), an H–2 beneficiary (and their dependents) would not be deemed to have failed to maintain nonimmigrant status, and would not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)), solely on the basis of the petition revocation for a 60-day period following the revocation of the petitioner’s H–2 petition on their behalf, or until the end of the authorized period of admission, whichever is shorter. DHS is proposing this additional 60-day grace period following revocation of a petition approval to give H–2 workers another layer of protection and stability because a worker cannot always anticipate if and when the H–2 petition on their behalf may be revoked, and moreover, if and when the petitioning employer may provide them with notification of the petition revocation. This proposed 60-day grace period would provide these workers with additional time to make arrangements for departure, to seek an extension based on a subsequent offer of employment, or seek a change of status to a different nonimmigrant classification. However, depending on when a worker reaches their 3-year maximum limitation of stay, the post-revocation grace period under proposed 8 CFR 214.2(h)(11)(iv) may be less than 60 days or may not be available.<sup>105</sup> As the post-revocation grace periods for both H–2A and H–2B workers are covered by proposed 8 CFR 214.2(h)(11)(iv), DHS is also proposing to remove the current provision at 8 CFR 214.2(h)(5)(xii).<sup>106</sup>

<sup>105</sup> As with current practice, all time spent in the United States pursuant to the proposed 10-day, 30-day, and 60-day grace periods described above would be considered time spent in H–2A or H–2B status and would count toward the 3-year limitation of stay.

<sup>106</sup> The existing provision at 8 CFR 214.2(h)(5)(xii) also includes language providing that an employer’s H–2A petition is immediately and automatically revoked if DOL revokes the underlying TLC, but that language is not needed as

None of the proposed grace periods would independently authorize the beneficiary to work. See proposed 8 CFR 214.2(h)(5)(viii)(B) (“Unless authorized under 8 CFR 274a.12, the beneficiary may not work except during the validity period of the petition.”); proposed 8 CFR 214.2(h)(6)(vii) (“Unless authorized under 8 CFR 274a.12, the beneficiary may not work except during the validity period of the petition.”); proposed 8 CFR 214.2(h)(11)(iv) (“During such a period, the alien may only work as otherwise authorized under 8 CFR 274a.12.”); and proposed 8 CFR 214.2(h)(13)(i)(C) (“During such a period, the alien may only work as otherwise authorized under 8 CFR 274a.12.”). In this regard, DHS proposes to stay consistent with the current framework for grace periods afforded to H–2 workers at 8 CFR 214.2(h)(5)(viii)(B) (“Unless authorized under 8 CFR 274a.12 . . . , the beneficiary may not work except during the validity period of the petition.”)<sup>107</sup> and 8 CFR 214.2(h)(13)(i)(A) (“The beneficiary may not work except during the validity period of the petition.”), as well as the grace periods afforded to other nonimmigrant classifications at 8 CFR 214.1(l)(1) (“Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period of the petition.”) and 8 CFR 214.1(l)(2) (“Unless authorized under 8 CFR 274a.12, the alien may not work except during such a period.”). None of these existing grace period provisions independently authorize employment. It has long been the policy of DHS that grace periods do not authorize employment.<sup>108</sup>

Nevertheless, stakeholders have recommended that DHS provide a grace period with employment authorization.<sup>109</sup> To the extent that work authorization for H–2 workers prior to or subsequent to petition validity and after a petition is revoked is permissible, consistent with INA sec.

it is covered by the existing provision at 8 CFR 214.2(h)(11)(ii).

<sup>107</sup> The current provision at 8 CFR 214.2(h)(5)(viii)(B) contains a reference to employment authorization under section 214(n) of the Act. However, as that section of the Act relates only to portability for H–1B nonimmigrants, DHS proposes to eliminate that reference from proposed 8 CFR 214.2(h)(5)(viii)(B).

<sup>108</sup> See, e.g., *Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 FR 82398, 82439 (Nov. 18, 2016) (“Consistent with longstanding policy, DHS declines to authorize individuals to work during these grace periods.”).

<sup>109</sup> See, e.g., Letter from Migration that Works to DHS dated May 17, 2022; Letter from Centro de los Derechos del Migrante, Inc. to DHS dated June 1, 2022. These letters are included in the docket for this proposed rulemaking.

214(c)(1), DHS does not consider a grace period with employment authorization to be feasible and therefore did not propose such a provision in this NPRM. For example, DHS considered operational challenges and costs associated with issuing appropriate evidence of work authorization within such a short period of time. DHS ultimately determined that creating a process whereby, upon cessation of employment, a worker would file, with fee, a request for work authorization for a limited period of 60 days and receive evidence of that work authorization before the 60-day period had elapsed, likely would not be an attractive option for the filer nor operationally feasible for the agency. DHS additionally considered whether it should allow work authorization without issuing an actual employment authorization document to the worker. DHS ultimately determined this to be an unacceptable potential solution in recognition of the difficulties employers would face in satisfying the employment verification requirements of section 274A of the Act, as well as the potential for abuse or fraud inherent in allowing employment authorization without proper documentation.

DHS did consider different lengths of time for the grace periods under proposed 8 CFR 214.2(h)(11)(iv) and proposed 8 CFR 214.2(h)(13)(i)(C), specifically, 30 or 90 days. However, DHS chose to propose 60 days in order to be consistent with the grace period already provided to other nonimmigrant classifications and because 60 days should allow sufficient time to respond to sudden or unexpected changes related to their employment.<sup>110</sup>

## 2. Transportation Costs for Revoked H-2 Petitions

In addition to the post-revocation grace period discussed above, proposed 8 CFR 214.2(h)(11)(iv) would state that, upon revocation of an H-2A or H-2B petition, the petitioning employer would be liable for the H-2 beneficiary's reasonable costs of return transportation to their last place of foreign residence abroad, unless the beneficiary obtains an extension of stay based on an approved petition in the same classification filed by a different employer. Such a requirement already

<sup>110</sup> As stated in the final rule codifying the 60-day grace period for cessation of employment under 8 CFR 214.1(l)(2) that applies to other nonimmigrant classifications, 60 days allows "sufficient time to respond to sudden or unexpected changes related to their employment." *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 FR 82398, 82438 (Nov. 18, 2016).

exists at 8 CFR 214.2(h)(6)(i)(C) for H-2B revocations, but not for H-2A revocations. As DHS recognized when promulgating 8 CFR 214.2(h)(6)(i)(C) in 2008, this requirement would "minimize the costs to H-2B workers who are affected by the revocation of a petition."<sup>111</sup> This proposed provision is necessary in light of the overall intent of this regulation to provide protections for both H-2A and H-2B workers from bearing fees and costs that are primarily for the benefit of their H-2 employers, ensuring parallel treatment of prohibited fees for both H-2A and H-2B workers, and providing consistency with current DOL regulations governing return transportation fees with respect to H-2A workers.<sup>112</sup> Finally, DHS proposes to codify this requirement within 8 CFR 214.2(h)(11)(iv), which deals generally with petition revocations, rather than having duplicate language in both 8 CFR 214.2(h)(5) and (6).

DHS is not proposing changes related to transportation costs outside of the revocation scenario. Under the existing regulation at 8 CFR 214.2(h)(6)(vi)(E), an employer is responsible for the return transportation costs of an H-2B worker if the worker is dismissed for any reason other than if the worker "voluntarily terminates his or her employment" prior to the expiration of the validity period. DHS notes that an H-2B worker who is leaving an abusive employment situation would not be considered to have "voluntarily" terminated the employment, so the employer's responsibility for transportation costs would still apply. While there is no parallel provision in the DHS H-2A regulations, DOL H-2A regulations at 20 CFR 655.122(h)(2) and (n) already render an employer responsible to pay for return transportation costs when a worker's employment ends early, unless the worker "voluntarily abandons employment" or is terminated for cause and the employer properly notifies DOL and DHS of the separation, and related DOL guidance clarifies that departure due to intolerable working conditions would not constitute voluntary

<sup>111</sup> See *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers*, 73 FR 49109, 49113 (Aug. 20, 2008).

<sup>112</sup> See current 20 CFR 655.122(h)(2). Subsequent to DHS's publication of its current H-2A regulations in 2008, the Department of Labor revised its H-2A regulations regarding return transportation fees. See 87 FR 61660 (Oct. 12, 2022); 75 FR 6883 (Feb. 12, 2010); see also DOL Wage and Hour Division, *Field Assistance Bulletin, 2009-02*, available at [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FieldAssistanceBulletin2009\\_2.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FieldAssistanceBulletin2009_2.pdf); current 8 CFR 214.2(h)(5)(xi)(A) (specifically limiting the payment of costs and fees by H-2A beneficiaries to those not prohibited by DOL regulations).

abandonment.<sup>113</sup> With respect to both the H-2A and H-2B classifications, if USCIS were to determine that an employer failed to pay transportation costs that were required under DHS or DOL regulations, thereby passing the costs on to H-2 workers, this failure would constitute an indirect collection of a prohibited fee under the provisions at 8 CFR 214.2(h)(5)(xi)(A) or 8 CFR 214.2(h)(6)(i)(B), respectively, and under the proposed regulations would subject the employer to the resulting consequences described in 8 CFR 214.2(h)(5)(xi)(B) and (C) or 8 CFR 214.2(h)(6)(i)(C) and (D). Alternately, depending on the nature of any related final determinations made by USCIS or DOL, such action could potentially make the employer subject to the consequences described in 8 CFR 214.2(h)(10)(iii)(A) through (D), if applicable.

## 3. Portability

To provide additional flexibility to H-2 workers as well as to employers by allowing workers in the United States to begin new employment in the same classification more expeditiously, thereby avoiding gaps in employment and potential hardship to workers, as well as provide employers with better access to available and willing workers, DHS proposes to permanently provide portability to H-2 workers. Specifically, DHS proposes that an eligible H-2A or H-2B nonimmigrant would be authorized to start new employment upon the proper filing of a nonfrivolous H-2A or H-2B extension of stay petition filed on behalf of the worker, or as of the requested start date, whichever is later. See proposed 8 CFR 214.2(h)(2)(i)(I); proposed 8 CFR 274a.12(b)(21); see also proposed 8 CFR 214.2(h)(2)(i)(D).<sup>114</sup> Proposed 8 CFR 214.2(h)(2)(i)(I) would define an "eligible H-2A or H-2B nonimmigrant" as an individual: (1) who has been lawfully admitted into the United States in, or otherwise provided, H-2A or H-2B nonimmigrant status; (2) on whose behalf a nonfrivolous H-2A or

<sup>113</sup> See DOL Wage and Hour Division, *Field Assistance Bulletin No. 2012-1* (Feb. 28, 2012) ("[I]f a worker departs employment because working conditions have become so intolerable that a reasonable person in the worker's position would not stay, the worker's departure may constitute a constructive discharge and not abandonment."), <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2012-1>.

<sup>114</sup> In addition to adding a reference to the newly added portability provision, DHS's proposed changes to 8 CFR 214.2(h)(2)(i)(D) include replacing the reference to "Form I-129" with a more general reference to a petition "for a nonimmigrant worker." Where feasible, DHS prefers to change specific form names to a more general reference in case of future changes to the form name or number.

H–2B petition<sup>115</sup> for new employment has been properly filed, including a petition for new employment with the same employer, with a request to amend or extend the H–2A or H–2B nonimmigrant’s stay in the same classification that the nonimmigrant currently holds, before the H–2A or H–2B nonimmigrant’s period of stay authorized by the Secretary of Homeland Security expires; and (3) who has not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment.<sup>116</sup>

Currently, H–2A nonimmigrants only have portability if they are porting to a new employer that has enrolled in and is a participant in good standing in E-Verify, subject to any conditions and limitations noted on the initial authorization, except as to the employer and place of employment. *See* 8 CFR 274a.12(b)(21). DHS initially limited H–2A portability to E-Verify employers to incentivize the use of E-Verify and to reduce opportunities for unauthorized workers to work in the agricultural sector.<sup>117</sup> However, because DHS is seeking to increase the ability of H–2A workers to change employers, especially in circumstances where a worker is facing dangerous or abusive working conditions, the proposed portability provision for H–2A workers would not be limited to E-Verify employers, thus allowing greater flexibility to workers. *See* proposed 8 CFR 274a.12(b)(21).<sup>118</sup>

While H–2B nonimmigrants can currently port to a new H–2B employer, this portability flexibility is only temporarily in place until the end of January 24, 2024. In contrast, the proposed portability provisions for both H–2A and H–2B workers would be

permanent and would apply to new employment in the same classification with *the same or different* employer. *See* proposed 8 CFR 214.2(h)(2)(i)(I)(1)(ii) (“including a petition for new employment with the same employer”). Further, current H–2A portability is limited to a maximum of 120 days from the receipt date of the new petition, *see* 8 CFR 274a.12(b)(21), while the current temporary H–2B portability is only valid for up to 60 days as of the receipt date of the new petition or the start date on the new petition, whichever is later, *see* 8 CFR 214.2(h)(29); 8 CFR 274a.12(b)(33). The proposed H–2 portability that allows new employment would continue as long as the new H–2 petition remains pending, and would automatically cease upon the adjudication or withdrawal of the H–2 petition. *See* proposed 8 CFR 214.2(h)(2)(i)(I)(2) and proposed 8 CFR 274a.12(b)(21).

In addition, the proposed portability provision would not limit employment to the conditions and limitations noted on the initial authorization, but would allow workers to perform entirely different jobs within the same nonimmigrant classification, while still being afforded the protections of this proposed rule. *See* proposed 8 CFR 274a.12(b)(21). Doing so would provide more flexibility to employers and workers, regardless of whether the beneficiary would begin a new job with the same employer or move to a new employer. Specifically, while H–2A and H–2B workers, among others, can currently continue to work for the same employer for a period not to exceed 240 days based on a timely filed extension of stay pursuant to 8 CFR 274a.12(b)(20), that authorization is limited to the conditions and limitations noted on the *initial* authorization, and therefore requires the worker to continue to be employed in the position described in the initially approved petition. In contrast, the proposed portability provision provides more flexibility for both employers and beneficiaries by allowing beneficiaries to start working in the same or different job within the same nonimmigrant classification pursuant to a newly filed nonimmigrant visa petition after that petition is properly filed but before it is approved. *See* proposed 8 CFR 214.2(h)(2)(i)(I).

The proposed provision also addresses circumstances where there may be successive portability petitions. In those cases the ability to port would end when any successive H–2A or H–2B portability petition in the succession is denied, unless the beneficiary’s previously approved period of H–2A or

H–2B status remains valid. *See* proposed 8 CFR 214.2(h)(2)(i)(I)(4)(ii). The denial of a successive portability petition would not, however, affect the ability of an H–2A or H–2B beneficiary to continue or resume working in accordance with the previously approved H–2A or H–2B petition, if that petition remains valid and the beneficiary maintained H–2A or H–2B status or a period of authorized stay and has not been employed in the United States without authorization. *See* proposed 8 CFR 214.2(h)(2)(i)(I)(4)(iii). Note that the portability provisions at proposed 8 CFR 214.2(h)(2)(i)(I) would not allow an H–2A worker to port to an H–2B employer, or vice versa.

DHS is also proposing to clarify that a beneficiary of an H–2 portability petition generally is considered to have been in a period of authorized stay during the pendency of the petition and generally will not be considered to have been employed in the United States without authorization. Specifically, during the pendency of the H–2 portability petition, and notwithstanding any subsequent denial or withdrawal of that petition, a beneficiary will not be considered to have been in a period of unauthorized stay during the pendency of the petition and will not be considered to have been employed in the United States without authorization solely on the basis of employment pursuant to that petition. *See* proposed 8 CFR 214.2(h)(2)(i)(I)(3). In addition, by filing a new H–2A or H–2B petition supported by a valid temporary labor certification on behalf of the beneficiary seeking to port, the petitioner and any employer agrees to comply with the applicable H–2A or H–2B program requirements. Therefore, during the employment period when that beneficiary is working while the H–2 portability petition filed on the beneficiary’s behalf is pending, the new petitioner and any employer,<sup>119</sup> as well as the beneficiary, are subject to H–2A or H–2B program requirements, as applicable under the relevant program, including worker protections, even if the relevant petition is subsequently withdrawn or denied. *See* proposed 8 CFR 214.2(h)(2)(i)(I)(3).

DHS believes that its proposal to extend portability, particularly when combined with the extended grace periods, would benefit H–2 workers and employers. These provisions would work together to provide an H–2 worker

<sup>115</sup> For instance, the filing of a petition unsupported by a temporary labor certification would be considered frivolous.

<sup>116</sup> This definition would be the same definition of who is “eligible” for H–1B portability under 8 CFR 214.2(h)(2)(i)(H). More generally, the H–2 portability provisions at proposed 8 CFR 214.2(h)(2)(i)(I) substantively mirror the existing H–1B portability provisions at 8 CFR 214.2(h)(2)(i)(H), except that the H–2 portability provisions would not refer to “concurrent” employment because H–2 employment must be full-time, thereby precluding concurrent employment. The H–2 portability provisions would also contain new language at proposed 8 CFR 214.2(h)(2)(i)(I)(3).

<sup>117</sup> *See Changes to Requirements Affecting H–2A Nonimmigrants*, 73 FR 8230, 8235 (Feb. 13, 2008) (NPRM); *Changes to Requirements Affecting H–2A Nonimmigrants*, 73 FR 76891, 76905 (Dec. 18, 2008) (final rule).

<sup>118</sup> DHS remains committed to promoting the use of E-Verify to ensure a legal workforce; however, DHS no longer believes it is appropriate to restrict the benefit of portability to H–2A workers seeking employment with E-Verify employers particularly given the need to increase these workers’ mobility.

<sup>119</sup> We note that in some cases, the petitioner may be different from the employer, such as when the petitioner is an association of agricultural employers filing the petition on behalf of its member-farmers as an agent, and not as a joint employer.

facing dangerous or abusive working conditions, for instance, the ability to leave their employer and still maintain status for 60 days. If during those 60 days the worker finds a new H-2 employer, they could begin working for that new employer immediately upon the filing of a new nonfrivolous H-2 petition on the worker's behalf.<sup>120</sup> The proposed portability provisions together with the proposed grace period provisions would therefore improve H-2 worker flexibilities and protections.

In addition, employers would benefit from these provisions by having more time to recruit H-2 workers during the extended grace periods and being able to employ H-2 workers upon filing of the petition rather than having to wait for petition approval. For petitioners seeking workers under the cap-subject H-2B classification, this would also serve as an alternative for those who have not been able to find U.S. workers and have not been able to obtain H-2B workers subject to the statutory numerical limitations.<sup>121</sup>

#### 4. Effect on an H-2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or an Immigrant Visa

DHS proposes to increase flexibility by clarifying that an H-2 worker may take steps toward becoming a lawful permanent resident while still

<sup>120</sup> When a qualifying H-2 petition is properly filed on the H-2 nonimmigrant worker's behalf requesting a start date during this 60-day grace period, DHS would consider the individual to no longer be in the 60-day grace period. As stated above, during the time a qualifying H-2 petition remains pending, the porting H-2 beneficiary receives H-2 protections for that period. Further, absent his or her violating the terms of his or her authorized period of stay, the porting beneficiary remains in a period of authorized stay.

<sup>121</sup> In the recent joint TFRs providing supplemental H-2B visas, which have included a similar, but temporary, portability provision, DHS and DOL have noted that portability is "an additional option for employers that cannot find U.S. workers." *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 86 FR 281980, 28210 (May 25, 2021); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 4722, 4736 (Jan. 28, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 30334, 30349 (May 18, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022).

maintaining lawful nonimmigrant status.<sup>122</sup> Under proposed 8 CFR 214.2(h)(16)(ii), the fact that DOL has approved a permanent labor certification, or that an immigrant visa petition was filed by or on behalf of a beneficiary, or that the beneficiary has applied to adjust to lawful permanent resident status or for an immigrant visa would not, by itself, be a violation of H-2 status or show an intent to abandon a foreign residence. Such fact, standing alone, would not constitute a basis for denying an H-2A or H-2B petition or the beneficiary's admission in H-2A or H-2B status, or a petition to change status or extend status. USCIS would consider such fact, however, together with all other facts presented, in determining whether the beneficiary is maintaining H-2 status and has a residence in a foreign country which he or she has no intention of abandoning. This change would therefore complement DHS's other proposals to establish longer grace periods and provide permanent portability flexibility, all toward the goal of further improving H-2 worker mobility.

Under existing regulations, approval of a permanent labor certification, or the filing of a preference petition for an H-2A or H-2B worker currently employed by or in a training position *with the same petitioner*, is considered sufficient reason, by itself, to deny the worker's extension of stay. 8 CFR 214.2(h)(16)(ii). DHS acknowledges that, when it finalized the current 8 CFR 214.2(h)(16) in 1990,<sup>123</sup> in response to a commenter's assertion that H-2 workers are capable of simultaneously having the same lawful temporary and permanent intent as H-1B workers, the agency stated that it could not extend the concept of temporary/permanent intent to the H-2 classifications because "[c]ontinuing H-2A and B status requires the employer's need for the services to remain temporary."<sup>124</sup> However, upon consideration, DHS now recognizes that this stated rationale conflates the

<sup>122</sup> Similar flexibility is currently provided by regulation to P nonimmigrants who, like H-2 nonimmigrants, are required to maintain a foreign residence that they have no intention of abandoning. INA sec. 101(a)(15)(P), 8 U.S.C. 1101(a)(15)(P); 8 CFR 214.2(p)(15). *See also Matter of Hosseinpour*, 15 I&N Dec. 191, 192 (BIA 1975) ("[T]he filing of an application for adjustment of status is not necessarily inconsistent with the maintenance of lawful nonimmigrant status.").

<sup>123</sup> *See Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act*, 55 FR 2606, 2619 (final rule) (Jan. 26, 1990). This rule was issued by the former Immigration and Naturalization Service (INS).

<sup>124</sup> *See Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act*, 55 FR 2606, 2619 (final rule) (Jan. 26, 1990).

beneficiary's nonimmigrant intent with the nature of the employer's need. Further, while at that time the agency stressed the importance of not allowing petitioners to circumvent the requirement to demonstrate a temporary need by petitioning for permanent status on behalf of the worker even *in a different job*,<sup>125</sup> DHS now believes that such a prohibition is overly broad and that it is important to increase H-2 workers' mobility to the extent possible, particularly given the vulnerability of H-2 workers to potential intimidation and threats made on the basis of their nonimmigrant status.<sup>126</sup> The requirements that an H-2A or H-2B petitioner must establish temporary and/or seasonal need, as applicable, will remain covered by the provisions at 8 CFR 214.2(h)(5)(iv) and 8 CFR 214.2(h)(6)(ii), respectively.

#### 5. Removing "Abscondment," "Abscond," and Its Other Variations

DHS proposes a technical change that would remove the words "abscondment," "abscond," and its other variations from the H-2 regulations. More specifically, DHS proposes to remove the definition of "abscondment," replace the word "absconds" with the phrase "does not report for work for a period of 5 consecutive workdays without the consent of the employer." This replacement language is based on the definition contained in current 8 CFR 214.2(h)(5)(v)(E) and (h)(6)(i)(F), and would replace the phrase "fails to" with "does not," among other related changes. *See* proposed 8 CFR 214.2(h)(5)(vi)(B) and (E), 8 CFR 214.2(h)(5)(ix), and 8 CFR 214.2(h)(6)(i)(F). The words and phrases relating to "abscondment" inherently convey or imply wrongdoing by the H-2 worker when in fact there could be many legitimate reasons why an H-2 worker does not report for work, including unsafe conditions at the work site. Replacing these negatively charged words with more neutral words and phrases signifies DHS's recognition that each H-2 worker deserves to be treated fairly and their situation should be considered based on all of the relevant circumstances.

Further, while DHS is not proposing to eliminate or substantively change the

<sup>125</sup> *See Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act*, 55 FR 2606, 2619 (final rule) (Jan. 26, 1990).

<sup>126</sup> *See, e.g., Polaris, On-ramps, intersections, and exit routes 41* (2018), <https://polarisproject.org/wp-content/uploads/2018/08/A-Roadmap-for-Systems-and-Industries-to-Prevent-and-Disrupt-Human-Trafficking.pdf>.

notification requirements in 8 CFR 214.2(h)(5)(vi)(B) and 8 CFR 214.2(h)(6)(i)(F), DHS reiterates that it does not consider the information provided in an employer notification, alone, to be conclusive evidence regarding the worker's current status or the start date of the worker's 60-day grace period under proposed 8 CFR 214.2(h)(13)(i)(C), if applicable. If and when a subsequent petition requesting extension of stay or change of status is filed for the beneficiary, the new petitioner should provide information or evidence regarding the timing of the beneficiary's cessation of prior employment to demonstrate maintenance of status. In the event that the information in an employer notification calls into question the timing of cessation (for instance, if it calls into question whether the grace period ended prior to the filing of the new petition), the new petitioner would receive an opportunity to rebut that information.

### C. Improving H-2 Program Efficiencies and Reducing Barriers to Legal Migration

#### 1. Removal of the H-2 Eligible Countries Lists Provisions

DHS, with the concurrence of the Secretary of State, is proposing to remove the regulations at 8 CFR 214.2(h)(5)(i)(F) and 214.2(h)(6)(E), under which, as explained in more detail above, USCIS generally may only approve petitions for H-2A and H-2B classification for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated by notice published in the **Federal Register**. This yearly notice is often referred to as the "eligible countries lists."

Such designations must be published as a notice in the **Federal Register** and expire after one year. In designating countries to include on the lists, the Secretary, with the concurrence of the Secretary of State, takes into account factors including, but not limited to: (1) the country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest. See 8 CFR 214.2(h)(5)(i)(F)(1)(i) and 8 CFR 214.2(h)(6)(i)(E)(1). Examples of specific

factors serving the U.S. interest that are taken into account when considering whether to designate or terminate the designation of a country include, but are not limited to: fraud (e.g., fraud in the H-2 petition or visa application process by nationals of the country, the country's level of cooperation with the U.S. Government in addressing H-2 associated visa fraud, and the country's level of information sharing to combat immigration-related fraud), nonimmigrant visa overstay rates for nationals of the country (including but not limited to H-2A and H-2B nonimmigrant visa overstay rates), and noncompliance with the terms and conditions of the H-2 visa programs by nationals of the country. See, e.g., *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, 87 FR 67930 (Nov. 10, 2022).

Removing the eligible countries lists requirements would improve H-2 program efficiency by reducing burdens on DHS, USCIS, and H-2 employers, consistent with DHS's goal of streamlining the H-2 petition process. Further, removal of the eligible countries lists requirements would enhance accessibility of the H-2 programs, consistent with DHS's commitment to eliminate unnecessary barriers to legal migration and promote regular migration.<sup>127</sup> Along with the removal of 8 CFR 214.2(h)(5)(i)(F) and 214.2(h)(6)(C), DHS proposes to revise 8 CFR 214.2(h)(2)(ii) and (iii) to eliminate language about specific filing requirements for workers from countries that are not on the eligible country lists.

Removal of the eligible countries lists requirements would free up DHS resources devoted to developing and publishing the eligible countries lists in the **Federal Register** every year. Currently, several DHS components and agencies, as well as DOS, provide data, collaboration, and research towards the publication of the eligible countries lists.

USCIS incurs burdens associated with adjudicating waiver requests for nationals of countries not on the eligible countries lists. These waiver adjudications are generally complex, as

<sup>127</sup> See E.O. 14012 of February 2, 2021, at 86 FR 8277, *Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*, <https://www.federalregister.gov/documents/2021/02/05/2021-02563/restoring-faith-in-our-legal-immigration-systems-and-strengthening-integration-and-inclusion-efforts>; The White House, *Los Angeles Declaration on Migration and Protection* (June 10, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/>.

they require officers to determine whether it is in the U.S. interest for a worker to be a beneficiary of such a petition based on numerous factors, including: whether a worker with the required skills is not available from among foreign workers from a country currently on the respective lists; whether the beneficiary has been admitted to the United States previously in H-2 status; the potential for abuse, fraud, or other harm to the integrity of the H-2 programs through the potential admission of a beneficiary from a country not currently on the lists; and such other factors as may serve the U.S. interest. See 8 CFR

214.2(h)(5)(i)(F)(1)(ii) and 214.2(h)(6)(E)(2). USCIS may incur additional burdens by separating out requests for workers who are nationals on the respective eligible countries lists and workers who are not nationals on the respective eligible countries lists. For instance, while USCIS recommends that H-2A and H-2B petitions for workers from countries not listed on the respective eligible countries lists be filed separately from petitions for workers from countries on the respective eligible countries lists, this is not a current regulatory requirement.<sup>128</sup>

The eligible countries lists also create burdens for petitioners. An unexpected change in the lists from one year to the next could impact a petitioner's operations or ability to plan for its workforce. Further, petitioners incur extra burdens to prepare a petition requesting a worker from a country not on the respective eligible countries list, including naming each beneficiary, providing initial evidence to support the waiver request, and providing any additional evidence requested by USCIS. DHS recognizes that the additional requirements imposed on petitioners seeking workers from non-participating countries may be burdensome to employers and delay time-sensitive H-2 petitions, particularly in the H-2A agricultural program context, which is highly time-sensitive. For instance, the time-delay associated with issuance of a request for additional evidence when the petitioner's initial evidence did not establish the requisite U.S. interest to have its H-2A petition approved, when seeking nationals from countries not on

<sup>128</sup> See 8 CFR 214.2(h)(2)(ii) (petitions for workers from designated countries and undesignated countries "should be filed separately"); see also USCIS, Form I-129 Instructions for Petition for a Nonimmigrant Worker (recommending that H-2A and H-2B petitions for workers from countries not listed on the respective eligible countries lists be filed separately), <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf>.

the list, could profoundly impact the success of a harvest season. Eliminating the eligible countries lists in the entirety would therefore streamline adjudications and benefit petitioners, their prospective workers, and ease burdens on DHS and USCIS.

DHS acknowledges that the eligible countries lists have been used as a tool to “encourage countries to work collaboratively with the United States to ensure the timely return of their nationals who have been subject to a final order of removal.”<sup>129</sup> In proposing these regulations in 2008, DHS noted that it had faced “an ongoing problem of countries refusing to accept or unreasonably delaying the acceptance of their nationals who have been removed,” and further noted that “Congress gave the Secretary of State the authority to discontinue the issuance of visas to citizens, subjects, nationals, and residents of a country upon notification by the Secretary of Homeland Security that the government of that country refuses to accept their return” under INA sec. 243(d), 8 U.S.C. 1253(d).<sup>130</sup> However, neither the problem of countries refusing or delaying acceptance of removed nationals, nor the authority to discontinue issuance of visas under INA sec. 243(d), 8 U.S.C. 1253(d), is specific or unique to the H–2A and H–2B programs. Overall, DHS does not believe that using participation in these programs as a tool to address the problem or that the limited benefits of the eligible countries lists, outweigh the burdens associated with administering the eligible countries lists and the benefits of eliminating the lists.

Similarly, to the extent that the eligible countries lists have been used to address concerns of fraud and abuse, DHS believes that such concerns are instead better addressed at the petitioner level, rather than the country level. As noted above, DHS has referenced fraud concerns as among the examples of specific factors serving the U.S. interest that are taken into account when considering whether to designate or terminate the designation of a country.<sup>131</sup> Rather than seeking to address such concerns using the eligible countries lists, which affect all

petitioners seeking to hire workers from a given country, DHS is proposing to enhance program integrity through various provisions in this proposed rule that focus specifically on individual petitioners that have violated program requirements.<sup>132</sup>

DHS considered an alternative to removing the provisions in title 8 of the CFR designating certain countries as eligible participants for the H–2 program. Under this alternative, instead of automatic expiration after 1 year, the H–2 eligible countries designations would remain in effect until DHS, with the concurrence of DOS, publishes new designations of countries. This alternative would also require that the Secretary of Homeland Security, in consultation with the Secretary of State, review the lists no less than every 3 years, instead of the current 1 year, following which review DHS could, if necessary and with the concurrence of DOS, publish new designations. Absent the mandate to publish a new notice annually, under this alternative DHS and DOS would have greater flexibility to consider important factors using more timely and relevant data than the current annual designation periods allow.

Ultimately, however, DHS has decided to forego this alternative and instead proposes to remove in their entirety the provisions requiring designation of countries eligible to participate in the H–2 programs. If DHS were to adopt the alternative to maintain the lists but simply amend the timing of designating eligible countries, the fundamental flaws of the provisions would largely remain, namely, the aforementioned significant burdens it places on petitioners, USCIS, and DHS. Furthermore, this alternative could lock in place the lists for a longer period and potentially tie the agency’s hands when seeking to eliminate countries from the lists or delay the inclusion of countries for which favorable factors would warrant designation on the lists.

<sup>132</sup> For example, DHS removed Moldova from the list of countries eligible to participate in the H–2A program in 2021 based, in part, on DOS evidence of agents in Moldova charging prohibited recruitment fees. See *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs*, 86 FR 62559, 62561 (Nov. 10, 2021). While the proposed removal of the eligible countries lists would mean that DHS could no longer bar participation by nationals of a country in which prohibited fees have been charged, the proposed regulation includes provisions that otherwise enhance DHS’ ability to enforce the prohibition on prohibited fees.

2. Eliminating the H–2 “Interrupted Stay” Calculation and Reducing the Period of Absence To Restart the 3-Year Maximum Period of Stay Clock

DHS is proposing to eliminate the regulations relating to absences from the United States that will “interrupt” the accrual of time toward an individual’s total period of stay in H–2 status. See proposed 8 CFR 214.2(h)(5)(viii)(C) and (D); 8 CFR 214.2(h)(6)(vii)(A) through (C); 8 CFR 214.2(h)(13)(i)(B); 8 CFR 214.2(h)(13)(iv); and 8 CFR 214.2(h)(13)(v). An individual’s total period of stay in H–2A or H–2B nonimmigrant status may not exceed 3 years. Under current regulations, an individual who has spent 3 years in H–2A or H–2B status may not seek extension, change status, or be readmitted to the United States in H–2 status unless the individual has been outside of the United States for an uninterrupted period of 3 months. See 8 CFR 214.2(h)(5)(viii)(C) and 214.2(h)(13)(iv). However, certain periods of time spent outside the United States are deemed to interrupt the period of stay and temporarily “stop the clock” toward the accrual of the 3-year limit. See 8 CFR 214.2(h)(5)(viii)(C) (relating to H–2A workers) and 8 CFR 214.2(h)(13)(v) (relating to H–2B workers). Specifically, under current regulations, a period of absence<sup>133</sup> from the United States will interrupt the stay of H–2 workers (the time periods are the same for both H–2A and H–2B workers) in the following circumstances:

- If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days.<sup>134</sup>
- If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 2 months.<sup>135</sup>

If H–2 time is interrupted, time stops accruing toward the H–2 worker’s 3-year

<sup>133</sup> For purposes of interrupted stays, the terms “a period of absence” or “an absence” refer to a single, consecutive period of time spent outside of the United States.

<sup>134</sup> For purposes of interrupted stays, a day is a full 24-hour period (from midnight to midnight) outside the United States. USCIS calculates a travel day to or from the United States as a full day in the United States—even if the H–2 worker departs at 12:01 a.m. See USCIS, *Calculating Interrupted Stays for the H–2 Classifications*, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications>.

<sup>135</sup> For purposes of interrupted stays, a month can be anywhere from 28 to 31 days, depending on which month is used to calculate the interruption. See USCIS, *Calculating Interrupted Stays for the H–2 Classifications*, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications>.

<sup>129</sup> See *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers*, 73 FR 78104, 78110 (Dec. 19, 2008).

<sup>130</sup> See *Changes to Requirements Affecting H–2A Nonimmigrants*, 73 FR 8230, 8234 (Feb. 13, 2008); *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers*, 73 FR 49109, 49111 (Aug. 20, 2008).

<sup>131</sup> See, e.g., *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs*, 87 FR 67930 (Nov. 10, 2022).

limit. Once the individual returns to the United States in H-2 status, time toward the 3-year limit begins to accrue again from the point where it stopped. However, if at any time the H-2 worker is outside the United States for at least 3 months, their 3-year limit restarts from the beginning upon the worker's readmission to the United States in H-2 status.<sup>136</sup>

The current regulations regarding interrupted periods of stay were published in 2008.<sup>137</sup> The regulations made the time periods for interrupted periods of stay consistent for H-2A and H-2B nonimmigrants. In addition to making the time periods consistent, DHS explained in proposing the regulations relating to H-2A workers that the purpose was to "reduce the amount of time employers are required to be without the services of needed workers and enable the employers to have a set timeframe from which they can better monitor compliance with the terms and conditions of H-2A status."<sup>138</sup>

However, the current regulations on interrupted periods of stay have caused confusion for employers and are challenging for USCIS to implement. The confusion often relates to the different timeframes for an interrupted stay—45 days or 2 months—that is determined by the duration of the accumulated stay—18 months or less, or more than 18 months. Currently, in order to accurately demonstrate when an individual's limit on H-2 status will be reached, employers and workers need to monitor and document the accumulated time in H-2 status, track when the amount of time required for an interruptive stay changes from 45 days to 2 months, and calculate the total time in H-2 status across multiple time periods following interruptive absences. Adjudicators must also make these same determinations in adjudicating H-2 petitions with named workers to assess whether a beneficiary is eligible for the requested period of stay. The varying timeframes and starting and stopping of the accumulated stay in H-2 status can be confusing and frequently results in RFEs in adjudicating H-2 petitions, which leads to delays for employers and workers and inefficiencies for USCIS. In

an effort to streamline the administration of the H-2 programs, DHS seeks to eliminate the current interrupted stay provisions that temporarily "stop the clock" toward the accrual of the 3-year limit. Eliminating these interrupted stay provisions would reduce potential confusion for employers and workers and simplify USCIS adjudications, resulting in fewer RFEs and greater efficiency in adjudicating H-2 petitions.

Recognizing that the interrupted stay provisions provide some benefit to H-2 workers and employers in the event of a worker's departure from the country, DHS proposes to shorten the period of absence that will reset the 3-year limit of stay. Currently, once an H-2 worker is outside the United States for an uninterrupted period of 3 months ("period of absence"), their 3-year limitation on stay will restart from the beginning upon that worker's readmission to the United States in H-2 status.<sup>139</sup> DHS proposes to shorten the current 3-month period of absence to 60 days.

Under proposed 8 CFR 214.2(h)(5)(vi)(C) and (D) and 8 CFR 214.2(h)(6)(vii)(B) and (C), an uninterrupted absence for the designated period of at least 60 days would in all cases "reset" the H-2 clock, allowing for an additional 3 years in the United States in H-2 status upon the worker's readmission, regardless of whether an H-2 worker has already reached the 3-year maximum. This change would make it easier to determine how much time a given H-2 worker had remaining in H-2 status. For example, if an employer knew that a given worker had been outside the United States for at least 60 days, the employer would also know that the worker's H-2 clock had "reset" and thus the worker would again be eligible to spend up to 3 years in the United States in H-2 status. There would be no need for the employer or worker to look back at periods of stay prior to that 60-day absence to determine the amount of H-2 time remaining. Resetting the clock at 60 days instead of 3 months is also intended to benefit H-2 workers seeking readmission in H-2 status by allowing them the option to remain outside of the United States for a shorter period of time between periods of H-2 employment.

Further, reducing the period of absence from the United States from 3 months to 60 days would provide workers and their employers with greater flexibility while still ensuring that such workers' stay is temporary in nature. The intent of having a required period of absence is to ensure that the H-2 worker qualifies as a nonimmigrant and that their stay remains temporary in nature. H-2 eligibility requires that employment be seasonal or temporary. See INA secs. 101(a)(15)(H)(ii)(a)-(b); 8 CFR 214.2(h)(5)(iv)(A); 8 CFR 214.2(h)(6)(i)(A). It also requires that the beneficiary qualify as a nonimmigrant. See INA secs. 101(a)(15)(H)(ii)(a)-(b). In a 1987 interim final rule, the former INS maintained the existing 3-year limit on an H-2 worker's stay, and also imposed a new, but still "significant absence" standard of 6 months, in order to ensure a meaningful interruption in the H-2A worker's employment in the United States. *Nonimmigrant Classes*, 52 FR 20554 (June 1, 1987). The rule explained: "If a significant absence is not required, an alien would be able to effectively bypass the limitation and indefinitely work in the United States at various temporary jobs by vacationing abroad every three years." 52 FR 20555. The INA does not specify what length of absence would be sufficient to ensure that the H-2A or H-2B worker's stay in the United States is considered temporary. The former INS, in its 1987 interim rule, chose to require a 6-month period of absence. In doing so, however, the agency did not state that 6 months must be the absolute floor to ensure compliance with the statute.

In 2008, this 6-month period of absence was reduced to 3 months "in order to reduce the amount of time employers would be required to be without the services of needed workers, while not offending the fundamental temporary nature of employment under the H-2A program."<sup>140</sup> Beyond that

<sup>136</sup> See USCIS, *Calculating Interrupted Stays for the H-2 Classifications*, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications>.

<sup>137</sup> See *Changes to Requirements Affecting H-2A Nonimmigrants*, 73 FR 76891 (Dec. 18, 2008); *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers*, 73 FR 78104 (Dec. 19, 2008).

<sup>138</sup> See *Changes to Requirements Affecting H-2A Nonimmigrants*, 73 FR 8230, 8235 (Feb. 13, 2008).

<sup>139</sup> See 8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(13)(iv); see also USCIS, *Calculating Interrupted Stays for the H-2 Classifications* (May 6, 2020), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications>.

<sup>140</sup> See *Changes to Requirements Affecting H-2A Nonimmigrants*, 73 FR 8230, 8235 (Feb. 13, 2008) (proposing the reduction to 3 months); *Changes to Requirements Affecting H-2A Nonimmigrants*, 73 FR 76891, 76904 (Dec. 18, 2008) (adopting the proposed reduction in waiting time without change and agreeing with comments stating that 3 months would "enhance the workability of the H-2A program for employers while not offending the fundamental temporary nature of employment under the H-2A program"); *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers*, 73 FR 49109, 49111 (Aug. 20, 2008) (proposing to reduce the required absence period to 3 months to "reduce the amount of time employers would be required to be without the services of needed workers while not offending the fundamental temporary nature of employment under the H-2B program"); *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers*, 73 FR 78104 (Dec. 19, 2008)

general explanation, however, DHS, in reducing the required period of absence from 6 months to 3 months, did not specifically explain how it arrived at 3 months as the appropriate period of absence as opposed to another period of time, nor did it state that 3 months is the absolute floor for ensuring that an H–2 worker’s stay is temporary in nature.

It is DHS’s position that reducing the current 3-month period of absence to 60 days would accomplish the same goal of reducing the amount of time employers would be required to be without the services of needed workers, while still ensuring adherence to the fundamental requirement under the H–2 programs that an H–2 worker’s period of admission to this country be temporary by continuing to impose a significant absence.

The proposed regulation also clarifies that, to avail itself of the benefits of this provision, the petitioner must provide evidence that the beneficiary had an uninterrupted 60-day period of absence. The proposed regulation would provide examples of the types of evidence that may be provided to establish a period of absence from the United States. In addition, DHS is proposing to move the provisions relating to periods of absence for H–2B workers from its current location at 8 CFR 214.2(h)(13)(iv)–(v) to proposed 8 CFR 214.2(h)(6)(vii)(C) in order to consolidate provisions regarding period of admission into one section specific to H–2B workers and to reflect the change from 3 months to 60 days.<sup>141</sup> DHS proposes to keep the proposed H–2A period of absence provision under 8 CFR 214.2(h)(5)(viii) but would move it to a new dedicated subordinate paragraph (D) and revise the language to reflect the change from 3 months to 60 days. The proposed changes to the regulations regarding calculation of stay would benefit the agency, employers, and workers because they would provide greater clarity for employers and workers and greater efficiency for DHS. DHS seeks comments on all aspects of this provision, and particularly the 60-day

(adopting the proposed reduction in waiting time without change).

<sup>141</sup> DHS is also proposing uniform evidentiary requirements for demonstrating an H–2B worker’s absence(s) from the United States. Currently, the regulations require “clear and convincing proof” to establish that an H–2B worker resides abroad and commutes or is only seasonally or intermittently employed in the United States for 6 months or less per year, while the regulations only require “information about the alien’s employment, place of residence, and the dates and purposes of any trips to the United States” to show that an H–2B worker has been absent long enough to reset or interrupt the period of stay. See 8 CFR 214.2(h)(13)(v) and 214.2(h)(13)(i)(B), respectively.

duration of absence that would reset the clock for purposes of the 3-year maximum period of stay.

As an alternative to the complicated calculations needed to determine an interrupted stay under the current H–2 framework, DHS considered adopting an interrupted stay provision similar to the current “recapture” provision for H–1B beneficiaries. For H–1Bs, current DHS regulations at 8 CFR 214.2(h)(13)(iii)(C) generally state that time spent outside the United States exceeding 24 hours by a noncitizen will not be considered for purposes of calculating the H–1B beneficiary’s total period of authorized admission. Furthermore, the time spent physically outside of the United States may be “recaptured” in a subsequent H–1B petition on behalf of the noncitizen, though it is the petitioner’s burden to request and demonstrate the specific amount of time for recapture on behalf of the beneficiary. See 8 CFR 214.2(h)(13)(iii)(C)(1).

In the end, DHS chose to propose the changes explained above rather than match the H–1B provision because it believes the H–1B provision to “recapture time” would be only a minimally less confusing calculation for petitioners and H–2 workers, as well as for USCIS adjudicators. It is likely also that because of the shorter duration of H–2 petition validity periods relative to those in the H–1B program, and perhaps for other reasons specific to the different classifications (e.g., different types of occupations), fewer H–2 beneficiaries travel outside of the United States or H–2 beneficiaries travel abroad for fewer days during their period of admission, so the amount of time available for these workers to “recapture” would be minimal compared to H–1B beneficiaries. DHS believes a single, consistent standard under which an uninterrupted absence of at least 60 days would reset the 3-year limitation represents the best way to reduce confusion, resulting in fewer RFEs and greater efficiency in adjudicating H–2 petitions.

Finally, DHS seeks to make clarifying edits at proposed 8 CFR 214.2(h)(5)(viii)(C)–(D) and 8 CFR 214.2(h)(6)(vii)(B)–(C). These edits would clarify that any time spent in H–2A or H–2B status would count toward the 3-year limitation of stay, consistent with current practice and other H–2 regulations governing the 3-year limitation on stay.<sup>142</sup>

<sup>142</sup> See 8 CFR 214.2(h)(13)(iv) (“An H–2B alien who has spent 3 years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under sections 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and

#### D. Severability

As stated at proposed 214.2(h)(30), DHS intends for the provisions of this proposed rule, if finalized, to be severable from each other such that if a court were to hold that any provision is invalid or unenforceable as to a particular person or circumstance, the rule would remain in effect as to any other person or circumstance. While the various provisions of this proposed rule, taken together, would provide maximum benefit with respect to strengthening program integrity, increasing worker flexibility, and improving program efficiency, none of the provisions are interdependent and unable to operate separately, nor is any single provision essential to the rule’s overall workability. DHS welcomes public input on the proposed severability clause at 8 CFR 214.2(h)(30).

#### E. Request for Preliminary Public Input Related to Future Actions/Proposals

DHS is seeking preliminary public input on ways to provide H–2 and other Form I–129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf, including receipt notices for a petition to extend, amend, or change status filed on their behalf. USCIS does not currently provide notices directly to Form I–129 beneficiaries. DHS is aware that the lack of petition information may leave Form I–129 beneficiaries unable to verify their own immigration status and susceptible to employer abuse.<sup>143</sup> DHS is also aware

been physically present outside the United States for the immediately preceding 3 months.”); 8 CFR 214.2(h)(15)(ii)(C) (“The alien’s total period of stay as an H–2A or H–2B worker may not exceed three years”) 8 CFR 214.2(h)(13)(i)(B) (“When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States . . . for the time limit imposed on the particular H classification. . . . A certain period of absence from the United States of H–2A and H–2B aliens can interrupt the accrual of time spent in such status against the 3-year limit set forth in 8 CFR 214.2(h)(13).”); see also USCIS, H–2A Temporary Agricultural Workers, Period of Stay, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers> (“A person who has held H–2A nonimmigrant status for a total of 3 years must depart and remain outside the United States for an uninterrupted period of 3 months before seeking readmission as an H–2A nonimmigrant. Additionally, previous time spent in other H or L classifications counts toward total H–2A time.”).

<sup>143</sup> See, e.g., DHS, Office of the Citizenship and Immigration Services Ombudsman, *Recommendation to Remove a Barrier Pursuant to Executive Order 14012: Improving U.S. Citizenship and Immigration Services’ Form I–129 Notification Procedures Recommendation Number 62* (Mar. 31, 2022), [https://www.dhs.gov/sites/default/files/2022-03/CIS%20OMBUDSMAN\\_I-129\\_](https://www.dhs.gov/sites/default/files/2022-03/CIS%20OMBUDSMAN_I-129_)

that having case status information would promote the benefits intended by the proposed portability provisions in this rule, and more generally, improve worker mobility and protections as intended in this rule.

DHS is committed to addressing the issue of beneficiary notification but is not at this time proposing a specific beneficiary notification process or regulation. The agency continues to research and consider the feasibility, benefits, and costs of various options separate and apart from this proposed rule. At this time, DHS would like to solicit preliminary public comments on requiring H-2 petitioners to provide a copy of the notice of USCIS actions to beneficiaries in the United States seeking extension or change of status. This option is being considered for potential future action separate from this rulemaking. In addition, DHS is interested in any other suggestions from the public regarding ways to ensure adequate notification to beneficiaries of actions taken with respect to petitions filed on their behalf.

Limiting this notification requirement to beneficiaries in the United States seeking extension or change of status is intended to recognize the challenges associated with providing notices to unnamed H-2 workers. In addition, DHS believes such notification may be especially beneficial in the context of extensions or changes of status. While petition beneficiaries who are outside of the United States will receive basic petition information on Form I-94, Arrival-Departure Record, and on their

*BENEFICIARY\_RECOMMENDATION\_fnl\_03-2022\_508.pdf* (“lack of direct notification may leave them without status documentation, rendering them noncompliant with the law, susceptible to abuse by employers, and unable to access benefits requiring proof of status”). This report formally recommended that USCIS directly notify beneficiaries of Form I-129 actions taken in the petition on their behalf. DHS also received several stakeholder letters advocating for H-2 beneficiaries to receive case status information. For example, see the Letter from Migration that Works to DHS dated May 17, 2022; Letter from Centro de los Derechos del Migrante, Inc. to DHS dated June 1, 2022; Letter from AFL-CIO to DHS; Farmworkers Justice Comment to USCIS dated May 19, 2021. All of these letters are included in the docket for this proposed rulemaking. In addition, Members of Congress recently indicated in explanatory remarks the need to provide status documentation directly to certain beneficiaries so that they can better understand their immigration status. See Joint Explanatory Statement to Department of Homeland Security Appropriations Act, 2022, 168 Cong. Rec. H2395, H2418 (daily ed. March 9, 2022) (“USCIS shall also establish a process whereby workers may confirm that they are the beneficiaries of H-2A petitions and can receive information about their own immigration status, including their authorized period of stay and the status of any requested visa extensions.”), available at <https://www.congress.gov/congressional-record/volume-168/issue-42/house-section/article/H1709-1>.

nonimmigrant visa, beneficiaries who are already in the United States must rely entirely on petitioners and employers to provide such information.<sup>144</sup> DHS recognizes this option would leave open the possibility that unscrupulous petitioners would not comply with this requirement, something DHS intends to forestall, but believes it would still provide benefits and worker protections while USCIS continues to explore other options, including the feasibility of technological solutions that would allow USCIS to directly notify beneficiaries or allow beneficiaries to directly access case status.<sup>145</sup> DHS is particularly interested in comments that cite evidence of the expected costs and burdens on petitioners as a result of such a requirement, as well as comments and evidence about the extent that such a provision would benefit H-2 workers, which DHS will take into consideration when crafting potential future solutions or regulatory proposals.

## V. Statutory and Regulatory Requirements

*A. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 14094 (Modernizing Regulatory Review)*

Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review) and E.O. 14094 (Modernizing Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives. If a regulation is necessary, these Executive Orders direct that, to the extent permitted by law, agencies ensure that the benefits of a regulation justify its costs and select the regulatory approach that maximizes net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It explicitly draws attention to “equity, human dignity, fairness, and distributive impacts,” values that are

<sup>144</sup> The Form I-797 approval notice instructs petitioners that the lower portion of the notice, including Form I-94, “should be given to the beneficiary(ies).”

<sup>145</sup> See USCIS Memorandum, *Response to Recommendations on Improving Form I-129 Notification Procedures* (Aug. 11, 2022), [https://www.dhs.gov/sites/default/files/2022-08/SIGNED%20USCIS%20Response%20to%20Formal%20Recommendation%20-%20Form%20I-129.08122022\\_v2.pdf](https://www.dhs.gov/sites/default/files/2022-08/SIGNED%20USCIS%20Response%20to%20Formal%20Recommendation%20-%20Form%20I-129.08122022_v2.pdf).

difficult or impossible to quantify. All of these considerations are relevant in this rulemaking.

The Office of Management and Budget (OMB) has designated this rule a “significant regulatory action” as defined under section 3(f) of E.O. 12866, as amended by E.O. 14094. Accordingly, OMB has reviewed this regulation.

### 1. Summary of Major Provisions of the Regulatory Action

As discussed in the preamble, DHS is amending its regulations affecting temporary agricultural and temporary nonagricultural workers within the H-2 programs, and their employers. The proposed rule seeks to better ensure the integrity of the H-2 programs, enhance protection for workers, and clarify requirements and consequences of actions incongruent with the intent of H-2 employment. The provisions of this proposed rule subject to this regulatory analysis are grouped into four categories: (1) integrity and worker protections; (2) worker flexibilities; (3) improving H-2 program efficiencies and reducing barriers to legal migration; and (4) forms and technical updates.

### 2. Summary of Costs and Benefits of the Proposed Rule

This proposed rule would impose new direct costs on petitioners in the form of opportunity costs of time to complete and file H-2 petitions and time spent to familiarize themselves with the rule. The quantifiable costs of this rule that would impact petitioners consistently and directly are the increased opportunity cost of time to complete Form I-129 H Classification Supplement and opportunity costs of time related to the rule’s portability provision. Over the 10-year period of analysis, DHS estimates the total costs of the proposed rule would be approximately \$18,640,075 to \$24,901,101 (undiscounted). DHS estimates annualized costs of this proposed rule range from \$1,998,572 to \$2,668,028 at a 3-percent discount rate and \$2,186,033 to \$2,915,885 at a 7-percent discount rate. In addition, the rule results in transfers from consumers to a limited number of H-2A and H-2B workers that may choose to supply additional labor. The total annualized transfer amounts to \$2,918,958 in additional earnings at the 3-percent and 7-percent discount rate and related tax transfers of \$337,122 (\$168,561 from these workers + \$168,561 from employers). Fees paid for Form I-129 and premium processing as a result of the proposed rule’s portability provision constitute a transfer of \$636,760 from

petitioners of porting workers to USCIS (3 and 7-percent annualized equivalent).

Certain petitioners may also incur other difficult to quantify costs. For example, certain petitioners may incur additional opportunity costs of time should they be selected for a compliance review or a site visit. Other petitioners may face stricter consequences regarding prohibited fees, or may opt to transport and house H-2A beneficiaries earlier than they would have otherwise based on the proposed extension of the pre-employment grace period from 7 to 10 days. In general, petitioners who are found to be noncompliant with the provisions of the rule (or other existing authorities) may incur costs related to lost sales, productivity, or profits as well as

additional opportunity costs of time spent attempting to comply with the rule. Moreover, USCIS may incur increased opportunity costs of time for adjudicators to review information regarding debarment and other past violation determinations more closely, issue RFEs or NOIDs, and for related computer system updates.

The benefits of this proposed rule would be diverse, though most are difficult to quantify. The proposed rule extends portability to H-2 workers lawfully present in the United States who are seeking to extend their stay regardless of a porting petitioner’s E-Verify standing, allowing for greater consistency across portability regulations and other nonimmigrant worker categories. Beneficiaries would

also benefit from the extended grace periods, the permanent ability to port, the clarification that employers who utilize porting workers must continue to abide by all H-2 requirements regarding worker benefits and protections, and eliminating the interrupted stay provisions and instead reducing the period of absence out of the country to reset their 3-year maximum period of stay. The Federal Government would also enjoy benefits, mainly through bolstering existing program integrity activities and providing a greater ability for USCIS to deny or revoke petitions for issues related to program compliance. Table 2 provides a more detailed summary of the proposed provisions and their impacts.

TABLE—SUMMARY OF PROVISIONS AND IMPACTS

Provision	Purpose of proposed provision	Expected impact of the proposed provision
8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F).	DHS is proposing to add stronger language requiring petitioners or employers to both consent to and fully comply with any USCIS audit, investigation, or other program integrity activity and clarify USCIS’s authority to deny/revoke a petition if unable to verify information related to the petition, including due to lack of cooperation from the petitioner or employer during a site visit or other compliance review.	<p>Cost:</p> <ul style="list-style-type: none"> <li>• Cooperation during a site visit or compliance review may result in opportunity costs of time for petitioners to provide information to USCIS during these compliance reviews and inspections. On average, USCIS site visits last 1.7 hours, which is a reasonable estimate for the marginal time that a petitioner may need to spend in order to comply with a site visit.</li> <li>• Employers that do not cooperate would face denial or revocation of their petition(s), which could result in costs to those businesses.</li> </ul> <p>Benefit:</p> <ul style="list-style-type: none"> <li>• USCIS would have clearer authority to deny or revoke a petition if unable to verify information related to the petition. The effectiveness of existing USCIS program integrity activities would be improved through increased cooperation from employers.</li> </ul>
8 CFR 214.2(h)(20) .....	DHS is proposing to provide H-2A and H-2B workers with “whistleblower protection” comparable to the protection currently offered to H-1B workers.	<p>Cost:</p> <ul style="list-style-type: none"> <li>• Employers may face increased RFEs, denials, or other actions on their H-2 petitions, or other program integrity mechanisms available under this rule or existing authorities, as a result of H-2 workers’ cooperation in program integrity activity due to whistleblower protections. Such actions may result in potential costs such as lost productivity and profits to employers whose noncompliance with the program is revealed by whistleblowers.</li> </ul> <p>Benefit:</p> <ul style="list-style-type: none"> <li>• Such protections may afford workers the ability to expose issues that harm workers or are not in line with the intent of the H-2 programs while also offering protection to such workers (therefore potentially improving overall working conditions), but the extent to which this would occur is unknown.</li> </ul>

TABLE—SUMMARY OF PROVISIONS AND IMPACTS—Continued

Provision	Purpose of proposed provision	Expected impact of the proposed provision
8 CFR 214.2(h)(5)(xi)(A), 8 CFR 214.2(h)(5)(xi)(C), 8 CFR 214.2(h)(6)(i)(B), 8 CFR 214.2(h)(6)(i)(C), and 8 CFR 214.2(h)(6)(i)(D).	DHS is proposing significant revisions to the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H–2A and H–2B workers, including new bars on approval for some H–2 petitions.	<p>Cost:</p> <ul style="list-style-type: none"> <li>Enhanced consequences for petitioners who charge prohibited fees could lead to increased financial losses and extended ineligibility from participating in H–2 programs.</li> </ul> <p>Benefit:</p> <ul style="list-style-type: none"> <li>Possibly increase compliance with provisions regarding prohibited fees and thus reduce the occurrence and burden of prohibited fees on H–2 beneficiaries.</li> </ul>
8 CFR 214.2(h)(10)(iii) .....	DHS is proposing to institute certain mandatory and discretionary bars to approval of an H–2A or H–2B petition.	<p>Costs:</p> <ul style="list-style-type: none"> <li>USCIS adjudicators may require additional time associated with reviewing information regarding debarment and other past violation determinations more closely, issuing RFEs or NOIDs, and conducting the discretionary analysis for relevant petitions.</li> <li>The expansion of violation determinations that could be considered during adjudication, as well as the way debarments and other violation determinations would be tracked, would require some computer system updates resulting in costs to USCIS.</li> </ul> <p>Benefit:</p> <ul style="list-style-type: none"> <li>Possibly increase compliance with H–2 program requirements, thereby increasing protection of H–2 workers.</li> </ul>
8 CFR 214.2(h)(2)(ii) and (iii), 8 CFR 214.2(h)(5)(i)(F), and 8 CFR 214.2(h)(6)(i)(E).	Eliminate the lists of countries eligible to participate in the H–2 programs.	<p>Costs:</p> <ul style="list-style-type: none"> <li>None expected.</li> </ul> <p>Benefits:</p> <ul style="list-style-type: none"> <li>Employers and the Federal Government will benefit from the simplification of Form I–129 adjudications by eliminating the “national interest” portion of the adjudication that USCIS is currently required to conduct for beneficiaries from countries that are not on the lists.</li> <li>Remove petitioner burden to provide evidence for beneficiaries from countries not on the lists.</li> <li>Petitioners may have increased access to workers potentially available to the H–2 programs.</li> <li>Free up agency resources devoted to developing and publishing the eligible country lists in the FEDERAL REGISTER every year.</li> </ul>
8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(6)(vii)(A). 8 CFR 214.2(h)(11)(iv) and 8 CFR 214.2(h)(13)(i)(C).	<p>Change grace periods such that they will be the same for both H–2A and H–2B Programs.</p> <p>Create a 60-day grace period following any H–2A or H–2B revocation or cessation of employment during which the worker will not be considered to have failed to maintain nonimmigrant status and will not accrue any unlawful presence solely on the basis of the revocation or cessation.</p>	<p>Costs<sup>146</sup>:</p> <ul style="list-style-type: none"> <li>H–2A employers may face additional costs such as for housing, but employers likely would weigh those costs against the benefit of providing employees with additional time to prepare for the start of work.</li> </ul> <p>Benefits:</p> <ul style="list-style-type: none"> <li>Provides employees (and their employers) with extra time to prepare for the start of work. Provides clarity for adjudicators and makes timeframes consistent for beneficiaries and petitioners.</li> <li>Provides workers additional time to seek other employment or depart from the United States if their employer faces a revocation or if they cease employment.</li> </ul>
8 CFR 214.2(h)(11)(iv) .....	Clarifies responsibility of H–2A employers for reasonable costs of return transportation for beneficiaries following a petition revocation.	<p>Costs:</p> <ul style="list-style-type: none"> <li>None expected since H–2A petitioning employers are already generally liable for the return transportation costs of H–2A workers.</li> </ul> <p>Benefits:</p> <ul style="list-style-type: none"> <li>Beneficiaries would benefit in the event that clarified employer responsibility decreased the incidence of workers having to pay their own return travel costs in the event of a petition revocation.</li> </ul>

TABLE—SUMMARY OF PROVISIONS AND IMPACTS—Continued

Provision	Purpose of proposed provision	Expected impact of the proposed provision
8 CFR 214.2(h)(16)(i) .....	Clarifies that H–2 workers may take steps toward becoming a lawful permanent resident of the United States while still maintaining lawful nonimmigrant status.	<p>Costs:</p> <ul style="list-style-type: none"> <li>• None expected.</li> </ul> <p>Benefits:</p> <ul style="list-style-type: none"> <li>• DHS expects this could enable some H–2 workers who have otherwise been dissuaded to pursue lawful permanent residence with the ability to do so without concern over becoming ineligible for H–2 status.</li> </ul>
8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(6)(vii), and 8 CFR 214.2(h)(13)(i)(B).	Eliminates the “interrupted stay” calculation and instead reduces the period of absence to reset an individual’s 3-year period of stay.	<p>Costs:</p> <ul style="list-style-type: none"> <li>• Workers in active H–2 status who would consider making trips abroad for periods of less than 60 days but more than 45 days, may be disincentivized to make such trip.</li> </ul> <p>Benefit:</p> <ul style="list-style-type: none"> <li>• Simplifies and reduces the burden to calculate beneficiary absences for petitioners, beneficiaries, and adjudicators.</li> <li>• May reduce the number of RFEs related to 3-year periods of stay.</li> </ul> <p>Transfers:</p> <ul style="list-style-type: none"> <li>• As a result of a small number of H–2 workers at the 3-year maximum stay responding to the proposed shorter absence requirement by working 30 additional days, DHS estimates upper bound annual transfer payment of \$2,918,958 in additional earnings from consumers to H–2 workers and \$337,122 in tax transfers from these workers and their employers to tax programs (Medicare and Social Security).</li> </ul>
8 CFR 214.2(h)(2)(i)(D), 8 CFR 214.2(h)(2)(i)(I), and 8 CFR 274a.12(b)(21).	Make portability permanent for H–2B workers and remove the requirement that H–2A workers can only port to an E-Verify employer.	<p>Costs:</p> <ul style="list-style-type: none"> <li>• The total estimated annual opportunity cost of time to file Form I–129 by human resource specialists is approximately \$40,418. The total estimated annual opportunity cost of time to file Form I–129 and Form G–28 will range from approximately \$90,554 if filed by in-house lawyers to approximately \$156,132 if filed by outsourced lawyers.</li> <li>• The total estimated annual costs associated with filing Form I–907 if it is filed with Form I–129 is \$4,728 if filed by human resource specialists. The total estimated annual costs associated with filing Form I–907 would range from approximately \$9,006 if filed by an in-house lawyer to approximately \$15,527 if filed by an outsourced lawyer.</li> <li>• The total estimated annual costs associated with the portability provision ranges from \$133,684 to \$198,851, depending on the filer.</li> <li>• DHS may incur some additional adjudication costs as more petitioners will likely file Form I–129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form.</li> </ul>

TABLE—SUMMARY OF PROVISIONS AND IMPACTS—Continued

Provision	Purpose of proposed provision	Expected impact of the proposed provision
8 CFR 214.2(h)(2)(i)(I)(3) .....	DHS proposes to clarify that a beneficiary of an H-2 portability petition is considered to have been in a period of authorized stay during the pendency of the petition and that the petitioner must still abide by all H-2 program requirements.	<p>Benefit:</p> <ul style="list-style-type: none"> <li>• Enabling H-2 workers present in the United States to port to a new petitioning employer affords these workers agency of choice at an earlier moment in time consistent with other portability regulations and more similar to other workers in the labor force.</li> <li>• Replacing the E-Verify requirement for employers wishing to hire porting H-2A workers with strengthened site visit authority and other provisions that maintain program integrity would aid porting beneficiaries in finding petitioners without first needing to confirm if that employer is in good standing in E-Verify. Although this change impacts an unknown portion of new petitions for porting H-2A beneficiaries, no reductions in E-Verify enrollment are anticipated.</li> <li>• An H-2 worker with an employer that is not complying with H-2 program requirements would have additional flexibility in porting to another employer's certified position.</li> </ul> <p>Transfers:</p> <ul style="list-style-type: none"> <li>• Annual undiscounted transfers of \$636,760 from filing fees for Form I-129 combined with Form I-907 from petitioners to USCIS.</li> </ul> <p>Benefits:</p> <ul style="list-style-type: none"> <li>• Provides H-2 workers with requisite protections and benefits as codified in the rule in the event that a porting provision is withdrawn or denied.</li> </ul> <p>Costs:</p> <ul style="list-style-type: none"> <li>• None expected.</li> </ul>

**Cumulative Impacts of Proposed Regulatory Changes**

DHS proposes to make changes to the Form I-129, to effectuate the proposed regulatory changes.	<p>Costs:</p> <ul style="list-style-type: none"> <li>• The time burden to complete and file Form I-129, H Classification Supplement, would increase by 0.3 hours as a result of the proposed changes. The estimated opportunity cost of time for each petition by type of filer would be \$15.28 for an HR specialist, \$34.25 for an in-house lawyer, and \$59.06 for an outsourced lawyer. The estimated total annual opportunity costs of time for petitioners or their representatives to file H-2 petitions under this proposed rule ranges from \$745,330 to \$985,540.</li> </ul>
Petitioners or their representatives would familiarize themselves with the rule .....	<p>Costs:</p> <ul style="list-style-type: none"> <li>• Petitioners or their representatives would need to read and understand the rule at an estimated opportunity cost of time that ranges from \$9,739,715 to \$12,877,651, incurred during the first year of the analysis.</li> </ul>

Source: USCIS analysis.

<sup>146</sup> USCIS does not expect any additional costs to H-2B employers as, generally, they do not have to provide housing for workers. Employers are required to provide housing at no cost to H-2A

workers. *See* INA sec. 218(c)(4), 8 U.S.C. 1188(c)(4). There is no similar statutory requirement for employers to provide housing to H-2B workers, although there is a regulatory requirement for an H-

2B employer to provide housing when it is primarily for the benefit or convenience of the employer. *See* 20 CFR 655.20(b), (c); 29 CFR 531.3(d)(1); 80 FR 24042, 24063 (Apr. 29, 2015).

OMB A-4 ACCOUNTING STATEMENT TIME PERIOD: FY 2024 THROUGH FY 2033  
 [\$ millions, FY 2022]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation	
<b>Benefits</b>					
Monetized Benefits .....	N/A .....	N/A	N/A	Regulatory Impact Analysis ("RIA").	
Annualized quantified, but unmonetized, benefits.	N/A .....	N/A	N/A		
Unquantified Benefits .....	Strengthened protections for workers who expose program or labor law violations, and for workers benefitting from increased grace periods; improvements to program integrity from reduced incentives for employers to collect prohibited fees and increased incentives to comply with program requirements; and increased access to workers potentially available to businesses that utilize the H-2 programs. Elimination of the eligible countries lists would reduce burdens upon DHS, USCIS, and H-2 employers. DHS would focus these resources on continuing to identify human trafficking and other forms of noncompliance with the H-2 visa programs.				
<b>Costs</b>					
Annualized monetized costs (7%) .....	\$2.33 .....	\$2.00	\$2.67	RIA	
Annualized monetized costs (3%) .....	\$2.55 .....	\$2.19	\$2.92		
Annualized quantified, but unmonetized, costs.	Increased cooperation with existing USCIS site visits that average 1.7 hours in duration. Whereas 12-percent of petitioners underestimated compliance burdens, additional costs to comply with existing program requirements may occur.				
Qualitative (unquantified) costs .....	Certain employers may incur costs (including, but not limited to, lost sales, productivity, or profits and additional opportunity costs of time) for failing to comply with investigative or adjudicative actions undertaken due to the rule.			RIA.	
<b>Transfers</b>					
Annualized monetized transfers: From consumers to limited number of workers supplying more labor.	(3% and 7%) \$2.92 .....	N/A	N/A	RIA.	
Annualized monetized transfers: From limited number of H-2 workers to taxes.	(3% and 7%) \$0.17 .....	N/A	N/A	RIA.	
Annualized monetized transfers: From limited number of H-2 employers to taxes.	(3% and 7%) \$0.17 .....	N/A	N/A	RIA.	
Annualized monetized transfers: Fees from petitioners to USCIS.	(3% and 7%) \$0.64 .....	N/A	N/A	RIA.	
Miscellaneous analyses/category				Effects	Source citation
Effects on State, local, or tribal governments .....				None .....	RIA.
Effects on small businesses .....				None .....	RIA.
Effects on wages .....				None .....	None.
Effects on growth .....				None .....	None.

3. Background and Purpose of the Rule  
 The purpose of this rulemaking is to modernize and improve the regulations relating to the H-2A temporary

agricultural worker program and the H-2B temporary nonagricultural worker program (collectively "H-2 programs"). Through this proposed rule, DHS seeks

to strengthen worker protections and the integrity of the H-2 programs, provide greater flexibility for H-2A and H-2B workers, and improve program

efficiency and reduce barriers to legal migration.

The H-2A temporary agricultural nonimmigrant classification allows U.S. employers unable to find sufficient able, willing, qualified, and available U.S. workers to bring foreign nationals to the United States to fill seasonal and temporary agricultural jobs. To qualify as seasonal, employment must be tied to a certain time of year by an event or pattern, such as a short annual growing cycle or specific aspect of a longer cycle and requires labor levels far above those necessary for ongoing operations. To qualify as temporary, the employer's need to fill the position will, except in extraordinary circumstances, last no longer than 1 year.

The H-2B visa classification program was designed to serve U.S. businesses that are unable to find a sufficient number of qualified U.S. workers to perform nonagricultural work of a temporary or seasonal nature. For an H-2A or H-2B nonimmigrant worker to be admitted into the United States under one of these nonimmigrant classifications, the hiring employer is required to: (1) obtain a TLC from DOL (or, in the case of H-2B employment on Guam, from the Governor of Guam); and (2) file a Form I-129 with DHS. The

temporary nature of the services or labor described on the approved TLC is subject to DHS review during adjudication of Form I-129.<sup>147</sup>

For the H-2B program there is a statutory cap of 66,000 visas allocated per fiscal year, with up to 33,000 allocated in each half of a fiscal year, for the number of nonimmigrants who may be granted H-2B nonimmigrant status.<sup>148</sup> Any unused numbers from the first half of the fiscal year will be available for employers seeking to hire H-2B workers during the second half of the fiscal year. However, any unused H-2B numbers from one fiscal year do not carry over into the next and will therefore not be made available.<sup>149</sup>

4. Population

The proposed rule would impact petitioners (employers) who file Form I-129, Petition for a Nonimmigrant Worker, seeking to bring foreign nationals (beneficiaries or workers) to the United States to fill temporary agricultural and nonagricultural jobs through the H-2A and H-2B visa programs, respectively. This proposed rule also would have additional impacts on employers and workers presently in the United States under the H-2A and H-2B programs by permanently providing "portability" to all H-2A and

H-2B workers. Portability, for purposes of this proposed rule, is the ability to begin new qualifying employment upon the filing of a nonfrivolous petition rather than upon petition approval. Workers may transfer, or "port," to a qualifying new job offer that is in the same nonimmigrant classification that the worker currently holds. Porting, as proposed in this NPRM, does not include transferring from one H visa classification to another—for example, from H-2A to H-2B or vice versa. The new job offer may be through the same employer that filed the petition or a different employer after an H-2B petition is filed. This proposed provision would apply to all H-2A and H-2B workers on a permanent basis, whereas currently portability applies to only certain H-2A workers and on a time-limited basis to all H-2B workers.<sup>150</sup> Portability allows H-2A and H-2B workers to continue to earn wages and gaining employers to continue obtaining necessary workers. Table 3 and Table 4 present the total populations this proposed rule would impact. For provisions impacting a subset of these populations, the analysis provides separate population totals, when possible, for more specific analysis.

TABLE 3—TOTAL H-2A PETITIONS RECEIVED USING FORM I-129 FOR TOTAL BENEFICIARIES WITH TOTAL APPROVED H-2A PETITIONS AND BENEFICIARIES, FY 2013 THROUGH FY 2022

Fiscal year	Total petitions received	Total number of beneficiaries	Total petitions approved	Total beneficiaries approved
2013	7,332	105,095	7,280	104,487
2014	8,226	123,328	8,189	122,816
2015	9,158	157,622	9,077	155,683
2016	10,248	178,249	9,989	172,661
2017	11,602	218,372	11,504	216,000
2018	13,444	262,630	13,315	258,360
2019	15,509	287,606	15,356	282,133
2020	17,012	306,746	16,776	300,834
2021	20,323	353,650	19,853	339,419
2022	24,370	415,229	23,704	396,255
Total	137,224	2,408,527	135,043	2,348,648
10-year Average	13,722	240,853	13,504	234,865

Source: USCIS Office of Policy and Strategy—C3, ELIS USCIS Data System as of Oct. 18, 2022.

As shown in Table 3, the number of Form I-129 H-2A petitions increased from 7,332 in FY 2013 to 24,370 in FY 2022 while approved petitions increased from 7,280 in FY 2013 to

23,704 in FY 2022.<sup>151</sup> The number of beneficiaries also increased over this time period from 105,095 to 415,229 with approved beneficiaries increasing from 104,487 to 396,255. Note that

petitioners can petition for multiple beneficiaries on one petition, hence the much larger number of beneficiaries to petitions received and approved. On average, 13,722 H-2A petitions were

<sup>147</sup> Revised effective January 18, 2009 (73 FR 78104).

<sup>148</sup> See INA sec. 214(g)(1)(B), (g)(10), 8 U.S.C. 1184(g)(1)(B), (g)(10).

<sup>149</sup> A TLC approved by DOL must accompany an H-2B petition. The employment start date stated on the petition generally must match the start date

listed on the TLC. See 8 CFR 214.2(h)(6)(iv)(A) and (D).

<sup>150</sup> See *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022) (providing temporary H-2B portability to petitioners and H-2B nonimmigrant

workers initiating employment through the end of January 24, 2024).

<sup>151</sup> DHS notes that the number of filed H-2A petitions has grown by an approximately 12.76 compound average growth rate between FY2013 and FY2022. DHS acknowledges that potential costs may be underestimated in this analysis if historical growth rates continue.

received for an average 240,853 beneficiaries and 13,504 H-2A petitions were approved for an annual average of 234,865 beneficiaries.

TABLE 4—TOTAL H-2B PETITIONS RECEIVED USING FORM I-129 FOR TOTAL BENEFICIARIES WITH TOTAL APPROVED H-2B PETITIONS AND BENEFICIARIES, FY 2013 THROUGH FY 2022

Fiscal year	Total petitions received	Total number of beneficiaries	Total petitions approved	Total beneficiaries approved
2013	4,720	81,220	4,546	78,532
2014	5,314	91,150	5,132	87,859
2015	5,412	93,160	5,165	90,031
2016	6,527	114,181	5,946	105,213
2017	6,112	110,794	5,860	105,839
2018	6,148	113,850	5,941	108,380
2019	7,461	128,122	7,337	125,773
2020	5,422	95,826	5,269	93,345
2021	9,160	160,790	8,937	156,528
2022	12,388	185,705	12,120	181,775
Total	68,664	1,174,798	66,253	1,133,275
10-year average	6,866	117,480	6,625	113,328

Source: USCIS Office of Policy and Strategy—C3, ELIS USCIS Data System as of Oct. 18, 2022.

Table 4 shows that the number of Form I-129 H-2B petitions and number of beneficiaries increased from FY 2013 through FY 2019, declined in FY 2020 due to labor market conditions during COVID-19, and then increased again in FY 2021 and FY 2022.<sup>152</sup> As previously discussed, the total number of H-2B visas is constrained in recent fiscal years by statutory numerical limits, or “caps,” with some exceptions, on the total number of noncitizens who may be issued an initial H-2B visa or otherwise granted H-2B status during each fiscal year.<sup>153</sup> Whereas the exact statutory limits (including any supplemental limits) on H-2B visas are unknown for FY 2024 and beyond, the receipts and approvals seen in FY 2022 are assumed to be a reasonable estimate of future H-2B petitions and beneficiaries.

As these tables show, U.S. employers and foreign temporary workers have been increasingly interested in the H-2A and H-2B programs from FY 2013 to FY 2022 as evidenced by an increasing number of petitions filed for an increasing number of beneficiaries. However, the H-2B program remains constrained by the statutory cap of

66,000 visas allocated per fiscal year, provided for under INA sec. 214(g)(1)(B), 8 U.S.C. 1184(g)(1)(B), though Congress, through time-limited legislation, has allowed, to date, supplemental allocations beyond that 66,000 visa cap.<sup>154</sup> The supplements allocate additional visas for nonimmigrants who may be granted H-2B nonimmigrant status in each half of a fiscal year.<sup>155</sup>

5. Cost-Benefit Analysis

The provisions of this proposed rule subject to this regulatory analysis are grouped into the following four categories: (1) integrity and worker protections; (2) worker flexibilities; (3) improving H-2 program efficiencies and reducing barriers to legal migration; and (4) forms and technical updates. Each subsection that follows explains the

<sup>154</sup> See section 543 of Division F of the Consolidated Appropriations Act, 2017, Public Law 115-31; section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115-141; section 105 of Division H of the Consolidated Appropriations Act, 2019, Public Law 116-6; section 105 of Division I of the Further Consolidated Appropriations Act, 2020, Public Law 116-94; section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116-260 (FY 2021 Omnibus); section 105 of Division O of the Consolidated Appropriations Act, 2021, FY 2021 Omnibus, sections 101 and 106(3) of Division A of Public Law 117-43, Continuing Appropriations Act, 2022, and section 101 of Division A of Public Law 117-70, Further Continuing Appropriations Act, 2022; section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117-103, and section 101(6) of Division A of Public Law 117-180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, and section 303 of Division O, Consolidated Appropriations Act, 2023, Public Law 117-328.

<sup>155</sup> See INA sec. 214(g)(1)(B), (g)(10), 8 U.S.C. 1184(g)(1)(B), (g)(10).

proposed provision, its population if available, and its potential impacts.

a. Integrity and Worker Protections

To improve the integrity of the H-2 programs, DHS proposes to provide clearer requirements for USCIS compliance reviews and inspections, to provide H-2A and H-2B workers “whistleblower protections,” revise the provisions relating to prohibited fees, and to institute certain mandatory and discretionary bars to approval of an H-2A or H-2B petition. We address each of these provisions in turn below.

(1) USCIS Compliance Reviews and Inspections

DHS is proposing new provisions specific to the H-2A and H-2B programs to conduct compliance inspections, clarify the scope of inspections, and specify the consequences of a refusal or failure to fully cooperate with such compliance reviews and inspections. While no inspection that the USCIS Fraud Detection and National Security Directorate (FDNS) conducts is mandatory, if an inspection is conducted, this provision would make the successful completion of an inspection required for a petition’s approval.<sup>156</sup> Inspections can include site visits, telephone interviews, or correspondence (both electronic and mail).<sup>157</sup> This regulatory change would

<sup>156</sup> For more information on site visits, see USCIS, *Administrative Site Visit and Verification Program* (Sept. 9, 2019), <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program>.

<sup>157</sup> The expected time burden to comply with audits conducted by DHS and OFLC is 12 hours. The number in hours for audits was provided by

<sup>152</sup> 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. See *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 86 FR 28202 (May 25, 2021).

<sup>153</sup> On October 12, 2022, DHS announced that it will make available to employers an additional 64,716 H-2B temporary nonagricultural worker visas for fiscal year 2023. See DHS, *DHS to Supplement H-2B Cap with Nearly 65,000 Additional Visas for Fiscal Year 2023* (Oct. 12, 2022), <https://www.dhs.gov/news/2022/10/12/dhs-supplement-h-2b-cap-nearly-65000-additional-visas-fiscal-year-2023>.

apply to both pre- and post-adjudication petitions, which would provide USCIS the ability to either deny or revoke petitions accordingly. This proposed rule would provide USCIS with a greater ability to obtain compliance from petitioners and employers. Outside of this proposed rulemaking, USCIS is planning to conduct future site visits for both H-2A and H-2B work sites, some of which are expected to occur in late FY 2023.

Data on H-2 program inspections are limited and generally consist of site visits. USCIS has conducted only 189 H-2A program site visits associated with fraud investigations since calendar year 2004. With respect to H-2B program inspections, USCIS conducted a limited site visit pilot in FY 2018 and FY 2019 in which USCIS completed 364 (randomly selected) H-2B employment sites for inspection and conducted site visits.<sup>158</sup> Of the site visits USCIS conducted, USCIS officers were unable to make contact with employers or workers over 12 percent of the time (45 instances).<sup>159</sup> On average, each site visit took 1.7 hours.<sup>160</sup> Of the limited number of site visits USCIS has conducted thus far, non-cooperation exists in at least some cases. Cooperation is crucial to USCIS's ability to verify information about employers and workers, and the overall conditions of employment.

This proposed rule would provide a clear disincentive for petitioners who do not cooperate with compliance reviews and inspections while giving USCIS a greater ability to access and confirm information about employers and workers as well as identify fraud. Employers who may be selected to participate in such inspections may incur costs related to the opportunity cost of time to provide information to USCIS instead of performing other work. As discussed above, FDNS data on previous H-2B site visits show that the average site visit takes 1.7 hours. DHS believes that, due to the rule's provisions clarifying the consequences of a refusal or failure to fully cooperate with compliance reviews and

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

<sup>158</sup> The H-2B petitions were randomly selected so they do not represent a population that data led USCIS to believe were more vulnerable to fraud or abuse.

<sup>159</sup> Site visits can be categorized as "inconclusive" for a variety of reasons including, but not limited to, noncooperation or a lack of personnel (petitioner, beneficiary, or other relevant personnel) present at the respective site.

<sup>160</sup> Data from USCIS FDNS, Reports and Analysis Branch.

inspections, the rate of "inconclusive" site visits will be negligible. As such, each site visit that warrants a conclusive finding under the rule that would have warranted an "inconclusive" finding under the baseline scenario would therefore cause a 1.7-hour time burden to accrue to the respective petitioner due the petitioner now expending time cooperating that they would not have under the baseline.

DHS cannot quantify these costs, however, because the relevant hourly opportunity cost of time is highly specific to the affected petitioner and, as such, any average would likely not be informative. DHS expects the benefit of participation in the H-2 program would outweigh these costs, however. Additionally, employers who do not cooperate would face denial or revocation of their petition(s), which could result in costs to those businesses.

USCIS does not expect this proposed provision would result in additional costs to the Federal Government because it would not require additional resources or time to perform compliance reviews and inspections and, at the same time, USCIS is not proposing to establish a particular number of compliance reviews and inspections to complete annually or increase the number of compliance reviews and inspections or the number of H-2 program site visits. A benefit is that USCIS would have the authority to deny or revoke a petition if unable to verify information related to the petition. Additionally, existing USCIS program integrity activities would be made more effective by additional cooperation from employers.

DHS welcomes public comment on the costs H-2 program employers and workers would incur based on the proposed changes related to compliance reviews and inspections.

### (2) Whistleblower Protections

DHS is proposing to provide H-2A and H-2B workers with "whistleblower protections" comparable to the protections currently offered to H-1B workers.<sup>161</sup> For example, if an H-1B worker (1) applies to extend their H-1B status or change their nonimmigrant status; (2) indicates that they faced retaliatory action from their employer because they reported an LCA violation; and (3) lost or failed to maintain their H-1B status, USCIS may consider this situation to be an instance of "extraordinary circumstances" as

<sup>161</sup> *See* USCIS, Combating Fraud and Abuse in the H-1B Visa Program (Feb. 9, 2021), <https://www.uscis.gov/scams-fraud-and-misconduct/report-fraud/combating-fraud-and-abuse-in-the-h-1b-visa-program>.

defined by sections 8 CFR 214.1(c)(4) and 248.1(b). In addition, H-1B workers normally are not eligible to extend or change their status if they have lost or failed to maintain their H-1B status. However, if they can demonstrate "extraordinary circumstances," USCIS may use its discretion to excuse this requirement on a case-by-case basis.

USCIS does not currently have data specific to whistleblower protections for the H-1B program nor does it have data on other similar types of reports on worker issues from the H-2 population.<sup>162</sup> Therefore, it is possible that whistleblower protections may afford H-2 workers the ability to expose issues that harm beneficiaries or are not congruent with the intent of H-2 employment. This impact could, potentially, improve working conditions but the extent to which H-2 workers would cooperate in program integrity activities as a direct result of prohibitions on specified employer retaliations is unknown. It is also possible that employers may face increased RFEs, denials, or other actions on their H-2 petitions, or other program integrity mechanisms available under this rule or existing authorities, as a result of H-2 workers' cooperation in program integrity activity due to whistleblower protections. Such actions may result in potential costs such as lost productivity and profits to employers whose noncompliance with the program is revealed by whistleblowers. The Department invites comments from petitioners regarding compliance costs resulting from whistleblower protections.

### (3) Prohibited Fees

DHS is proposing to revise the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H-2A and H-2B workers, including new bars on approval for some H-2 petitions. The economic impacts of these proposed changes are difficult to assess because USCIS currently does not have the means to track or identify petitions associated with the payment of prohibited fees. Prohibited fees are paid by a worker and include, but are not limited to, withholding or deducting workers'

<sup>162</sup> WHD prohibits retaliation and publishes fact sheets and other resources online. *See, e.g.*, Retaliation | U.S. Department of Labor (dol.gov); WHD, Fact Sheet #77D: Retaliation Prohibited under the H-2A Temporary Visa Program (Apr. 2012), <https://www.dol.gov/agencies/whd/fact-sheets/77d-h2a-prohibiting-retaliation>; Fact Sheet #78H: Retaliation Prohibited under the H-2B Temporary Visa Program, <https://www.dol.gov/agencies/whd/fact-sheets/78h-h2b-retaliation-prohibited>.

wages; directly or indirectly paying a recruiter, employer, agent, or anyone else in the recruitment chain agent; or paying for other work-related expenses the employer is required by statute or regulation to cover.

USCIS generally has no direct interaction with beneficiaries, so it currently depends in significant part on findings by DOS consulates to determine if prohibited fees have been paid, usually in relation to applicant interviews or investigations. For example, the DOS Office of Fraud Prevention, in collaboration with several consulates in Mexico, confirmed they do not have data on the average number of prohibited fees charged nor the amount paid.<sup>163</sup> A consulate in Mexico shared that during visa interviews beneficiaries may disclose the payment of prohibited fees, but typically these admissions are for fees paid to previous facilitators or employers from returning applicants who are going to work for a new employer.<sup>164</sup> This is likely due to disincentives to admitting to the payment of fees for current petitions for fear of losing the proffered job opportunity in the United States.<sup>165</sup> DOS assumes it only receives reports from a small fraction of the workers who pay prohibited fees because they still are able to obtain work and make more money in the United States than they would in Mexico regardless of whether they pay fees or not leading some workers to choose not to report the prohibited fees.<sup>166</sup> Further, DOS also noted that workers usually only report paying prohibited fees when fees are increased, when they do not have the money to pay the fee in a current year, or they are excluded from being listed on a petition.

Moreover, DOS noted that prohibited fees are commonplace and pervasive in the H-2 program, but that this issue largely goes unreported.<sup>167</sup> Consular employees noted, in their experience, that fees ordinarily range from \$800 to \$1,000 for a beneficiary to be included on a petition but that non-monetary transfers may also occur.<sup>168</sup>

<sup>163</sup> Information from email discussions. See DOS Emails Re\_Prohibited fees (H-2) (Sept. 19, 2022).

<sup>164</sup> *Id.*

<sup>165</sup> Workers have a disincentive to report prohibited fees since regulations stipulate that a visa should be denied to those admitting to paying these fees.

<sup>166</sup> Information from email discussions. See DOS Emails Re\_Prohibited fees (H-2) (Sept. 19, 2022).

<sup>167</sup> *Id.*

<sup>168</sup> In addition to the non-exhaustive list of prohibited fees, there are also other types of non-fee payments, including favors, meals, or even the transfer of livestock.

Data on the prevalence of prohibited fees is very limited. However, according to one non-profit organization that conducted a survey, about 58 percent of H-2 workers reported paying a prohibited fee.<sup>169</sup> Since data on the prevalence of prohibited fees is very limited, we use the 58 percent estimate as a primary estimate of beneficiaries that may be subject to some form of prohibited fee. Using this estimated percentage, we can multiply by the total number of FY 2022 beneficiaries to consider the potential population impacted by prohibited fees.<sup>170</sup> If we assume 58 percent of beneficiaries pay an average fee of \$900,<sup>171</sup> we estimate that prohibited fees (including those incurred both within and outside of the United States) may have cost H-2A workers around \$216.7 million and H-2B workers around \$96.9 million in FY 2022.<sup>172</sup> If prohibited fees are a prevalent problem on such an economically significant scale, it may not be reasonable to assume that this rule would stop all fees paid by H-2 workers. However, for beneficiaries who currently pay prohibited fees or could pay them in the future, this proposed provision seeks to minimize the occurrence and burden of prohibited fees on H-2 beneficiaries.

It is difficult to estimate the specific impacts that this proposed change would have, but DHS expects that enhanced consequences for petitioners would act as a deterrent to charge or collect prohibited fees from H-2 workers. In addition, the harsher consequences for employers charging prohibited fees could, in conjunction with whistleblower protections proposed in this rule, reduce disincentives for workers to report that prohibited fees had been charged. However, DHS is not able to estimate whether and to what extent those disincentives are expected to be reduced. Consequently, under this proposed rule, there would be additional unquantifiable and non-monetizable reductions in indenture and harms from other more serious

<sup>169</sup> See Centro de los Derechos del Migrante, *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change*. Not dated. Available at [https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment\\_Revealed.pdf](https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf). Last accessed Mar. 31, 2023.

<sup>170</sup> FY 2022 Total H-2A beneficiaries 415,229 × 0.58 = 240,833 (rounded); FY 2022 Total H-2B beneficiaries 185,705 × 0.58 = 107,709 (rounded).

<sup>171</sup> We take an average of the range provided by the consular office in Mexico: (\$800+\$1000)/2=\$900.

<sup>172</sup> Calculations: Half of FY 2022 H-2A beneficiaries 240,833 × \$900 fee = \$216.7 million (rounded); Half of FY 2022 H-2B beneficiaries 107,709 × \$900 fee = \$96.9 million (rounded).

abuses such as those discussed in section III, Background.

DHS welcomes public comment on the prevalence, population, and cost of prohibited fees and their impacts on H-2 workers.

#### (4) Mandatory and Discretionary Bars

As another integrity measure and deterrent for petitioners that have been found to have committed labor law violations or abused the H-2 programs, DHS is proposing to institute certain mandatory and discretionary bars to approval of an H-2A or H-2B petition. The impacts of this proposed provision are targeted at H-2 petitioners that have committed serious violations or have otherwise not complied with H-2 program requirements.

To understand the baseline, USCIS has data on current debarments. USCIS relies on debarment data shared by DOL to determine the eligibility of certain H-2 petitions. As of December 19, 2022, there were 76 active debarments for both the H-2A and H-2B programs. Historically, from FY 2013 through FY 2022, USCIS has tracked a total of 326 recorded debarments for a company, individual or agent as provided by DOL. USCIS regularly performs additional research to confirm debarment and petitioner information to assist in adjudications. For the period of debarment, a petition covered by the debarment may not be approved where the debarred organization, or its successor-in-interest in some limited circumstances, whether or not having the same name as that listed, is the petitioner or employer.

Costs under this provision of the proposed rule would be borne by such petitioners or their successor in interest through denials and bars to participating in the H-2 program for a period of between 1 to 5 years. More petitioners may face financial losses as a result of these bars because they may lose access to labor for extended periods, which could result in too few workers, loss of revenue, and some could go out of business. DHS expects program participants to comply with program requirements, however, and notes that those that do not could experience significant impacts due to this proposed rule. DHS expects that the proposed rule would hold certain petitioners more accountable for violations, including certain findings of labor law and other violations, and would result in fewer instances of worker exploitation and safer working environments for beneficiaries.

The Federal Government may experience costs associated with implementing this provision.

Specifically, USCIS adjudicators may require additional time associated with reviewing petitioner information relating to debarment by DOL and other determinations of past violations more closely (as they would now be able to consider past noncompliance in the current adjudications), issuing an RFE or NOID, and, if the violation determination is covered under the discretionary bar provision, including when debarment has concluded, conducting the discretionary analysis for relevant petitions. Additionally, the proposed expansion of bases for debarment as well as the way debarments are tracked in current USCIS systems would require additional inter-agency coordination and information sharing.

DHS welcomes public comments on any costs resulting from these proposed mandatory and discretionary bars to employers, if the proposed bars are adequate to address misconduct, and if there are data available that should be considered.

#### b. Worker Flexibilities

DHS is proposing changes to provide greater flexibility to H-2A and H-2B workers by implementing grace periods, clarifying the responsibility of H-2A employers for reasonable costs of return transportation for beneficiaries following a petition revocation, clarifying expressly that H-2 workers may take steps toward becoming a permanent resident of the United States while still maintaining lawful nonimmigrant status, and expanding job portability. We address each of the provisions regarding these worker flexibilities in turn below.

##### (1) Grace Periods

DHS proposes to provide increased flexibility for H-2 workers by extending grace periods. Workers would not experience an increase in work time due to these extended grace periods. More specifically, this rule proposes to provide the same 10-day grace period prior to a petition's validity period that H-2B nonimmigrants currently receive to H-2A nonimmigrants, resulting in the extension of the initial grace period of an approved H-2A petition from 1 week to 10 days. The proposed initial grace period would also apply to their dependents in the H-4 visa classification. USCIS does not have data on how early H-2 workers arrive in the United States prior to a petition's validity period. As a result, we do not know how many H-2B workers currently or historically arrive up to 10 days prior to their employment start date, nor do we know how many H-2A

workers currently or historically arrive a full week (7 days) early. Further, the portion of the H-2A populations that may benefit from this proposed provision is unknown. Extending the grace period prior to a petition's validity period for H-2A workers by 3 days may result in additional costs to employers, such as for housing.<sup>173</sup> However, since H-2A employers pay for and normally arrange transportation to the worksite, USCIS assumes employers would weigh the costs of providing additional days of housing to H-2A workers against the benefit of providing their employees with additional time to prepare for the start of work. For example, it may be beneficial for an employer to provide workers additional time to adjust to a new time zone or climate.

DHS also proposes to extend the 10-day grace period following the expiration of their petition from 10 days to 30 days for H-2B nonimmigrants, subject to the 3-year maximum limitation of stay. USCIS does not have data on the length of time H-2A or H-2B workers typically spend in the United States following the validity period of a petition because departures from the United States are not always tracked. Unlike the general practice regarding entries, departures are not always tracked and do not typically require an encounter with U.S. Customs and Border Protection, so it is difficult to determine when nonimmigrants leave the United States. Therefore, the population that may benefit from this proposed provision is unknown. However, because this proposed rule would extend only the H-2B grace period, USCIS does not expect any additional costs to employers as they generally are not required to provide housing for their workers during the time of employment or during the grace period. The extended grace period for H-2B workers would benefit the workers by providing additional time to prepare for departure or seek alternative work arrangements such as applying for an extension of stay based on a subsequent offer of employment or porting to a new employer. Additionally, this proposed provision would align the grace periods for H-2A and H-2B workers so that they both are afforded 10 days prior to the approved validity period and 30 days following the expiration of an H-2 petition, thereby reducing confusion for potential employers and better ensuring

<sup>173</sup> H-2A workers must be provided housing. See WHD, *H-2A: Temporary Agricultural Employment of Foreign Workers*, <https://www.dol.gov/agencies/whd/agriculture/h2a>.

consistency in granting workers the grace periods.

DHS is also proposing to provide a new 60-day grace period following a cessation of H-2 employment or until the end of the authorized period of admission, whichever is shorter. USCIS does not have data on H-2 employment cessations and, therefore, the impact of this provision on the portion of the H-2A and H-2B populations is unknown. However, this provision would likely offer H-2 workers time to respond to sudden or unexpected changes related to their employment, regardless of the reason for employment cessation. The time could be used to seek new employment, prepare for departure from the United States, or seek a change of status to a different nonimmigrant classification.

DHS welcomes public comments on any costs resulting from the proposed grace period extensions from 1 week to 10 days prior to a petition's validity period for H-2A nonimmigrants and from 10 days to 30 days following the expiration of their petition for H-2B nonimmigrants, subject to the 3-year maximum limitation of stay. DHS also welcomes public comments on the proposed grace period of 60 days following a cessation of H-2 employment or until the end of the authorized period of admission, whichever is shorter.

##### (2) Transportation Costs for Revoked H-2 Petitions

DHS proposes to add language clarifying that upon revocation of an H-2A or H-2B petition, the petitioning employer would be liable for the H-2 beneficiary's reasonable costs of return transportation to their last place of foreign residence abroad. Under existing 20 CFR 655.20(j)(1)(ii) and 20 CFR 655.122(h)(2), as well as 8 CFR 214.2(h)(6)(i)(C) and 8 CFR 214.2(h)(6)(vi)(E), petitioning employers are already generally liable for the return transportation costs of H-2 workers, so this proposed change is not expected to result in any additional costs to employers.

##### (3) Effect on an H-2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or Immigrant Visa

DHS proposes to clarify that H-2 workers may take certain steps toward becoming lawful permanent residents of the United States while still maintaining lawful nonimmigrant status. The population impacted by this provision can be seen in Table 5. Historical receipts data for Form I-485

(Application to Register Permanent Residence or Adjust Status) show a 5-year total of 9,748 receipts from applicants with H-2A and H-2B status. The annual average is 1,950 receipts.

TABLE 5—FORM I-485 RECEIPTS FROM APPLICANTS WITH H-2A AND H-2B STATUS, FY 2018 THROUGH FY 2022

Fiscal year	Receipts	Approved	Denied	Admin close/withdraw
2018 .....	1,294	240	22	2
2019 .....	1,698	1,032	81	2
2020 .....	2,491	1,366	87	1
2021 .....	2,701	2,411	97	2
2022 .....	1,564	1,832	138	6
Total .....	9,748	6,881	425	13
5-year average .....	1,950	1,376	85	3

Source: USCIS Office of Policy and Strategy—C3, ELIS USCIS Data System as of Nov. 4, 2022.

USCIS does not have information on how many H-2 workers have been deemed to have violated their H-2 status or abandoned their foreign residence. However, DHS expects this could enable some H-2 workers who have otherwise been dissuaded to pursue lawful permanent residence with the ability to do so without concern over becoming ineligible for H-2 status. This proposed rule would not expand the underlying eligibility of H-2 workers for lawful permanent resident status.

DHS welcomes public comments on the impacts that may result from this proposed provision to allow H-2 workers to take steps toward becoming permanent residents of the United States.

(4) Portability

DHS proposes to permanently provide portability for eligible H-2A and H-2B nonimmigrants. The population affected by this provision are nonimmigrants in H-2A and H-2B status who are present in the United States on whose behalf a nonfrivolous H-2 petition for new employment has been filed, with a request to amend or extend the H-2A or H-2B nonimmigrant’s stay in the same classification they currently hold, before their period of stay expires and who have not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment. Codifying this provision in regulation for H-2 nonimmigrants would provide stability and job flexibility to the beneficiaries of approved H-2 visa petitions. This portability provision would facilitate the ability of individuals to move to more favorable employment situations and/or extend employment in the United States without being tied to one position with one employer. Additionally, DHS is proposing an

additional portability provision that would clarify that H-2 employers must comply with all H-2 program requirements and responsibilities (such as worker protections) in the event that a petition for a porting worker is withdrawn or denied.

Currently, portability is available on a permanent basis to H-2A workers, but it is limited to E-Verify employers.<sup>174</sup> E-Verify is a DHS web-based system that allows enrolled employers to confirm the identity and eligibility of their employees to work in the United States by electronically matching information provided by employees on the Employment Eligibility Verification (Form I-9) against records available to DHS and the Social Security Administration (SSA).<sup>175</sup> DHS does not charge a fee for employers to participate in E-Verify and create cases to confirm the identity and employment eligibility of newly hired employees. Under this proposed rule, employers petitioning for a porting H-2A worker would no longer need to be enrolled in E-Verify, but would remain subject to all program

<sup>174</sup> While unrelated to this NPRM, we note that on April 20, 2020, a final rule published to temporarily amend its regulations to allow H-2A workers to immediately work for any new H-2A employer to mitigate the impact on the agricultural industry due to COVID-19. This temporary final rule (TFR) was effective from April 20, 2020, through August 18, 2020. See *Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency*, 85 FR 21739 (Apr. 20, 2020). Another TFR published August 20, 2020, again allowing H-2A workers to immediately work for any new H-2A employer. That TFR was effective from August 19, 2020, through August 19, 2023 and allowed employers to request the flexibilities under this TFR by filing an H-2A petition on or after August 19, 2020, and through December 17, 2020. See *Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due To the COVID-19 National Emergency: Partial Extension of Certain Flexibilities*, 85 FR 51304 (Aug. 20, 2020).

<sup>175</sup> See DHS, *About E-Verify*, <https://www.e-verify.gov/about-e-verify> (last updated Apr. 10, 2018).

requirements based on the approved TLC and the filing of the H-2 petition.

Although there is no fee to use E-Verify, this proposed requirement would result in savings to newly enrolling employers. Employers that newly enroll in E-Verify to hire H-2 workers incur startup enrollment or program initiation costs as well as additional opportunity costs of time for users to participate in webinars and learn about and incorporate any new features and system updates that E-Verify may have every year. DHS assumes that most employers that are currently participating in E-Verify would not realize cost savings of these expenses since they previously incurred enrollment costs and would continue to participate in webinars and incorporate any new E-Verify features and system changes regardless of this proposed rule.<sup>176</sup> Additionally, DHS expects that only those employers who would have enrolled for the explicit purpose of petitioning on behalf of a porting employee would realize a cost savings for verifying the identity and work authorization of all their newly hired employees, including any new H-2A workers as a result of this proposed rule. For employers currently enrolled in E-Verify that choose to hire an H-2A worker, the proposed rule would not result in a cost savings to such employers since they already must use E-Verify for all newly hired employees as of the date they signed the E-Verify Memorandum of Understanding

<sup>176</sup> Employers already participating in E-Verify likely already attend webinars and learn about and incorporate new features and system changes annually because they voluntarily chose to enroll or because of rules or regulations beyond the scope of this proposed rule. DHS anticipates that such employers would continue to use E-Verify regardless of their decision to hire H-2A workers or not.

(MOU).<sup>177</sup> Therefore, with or without the proposed rule, an employer already enrolled in E-Verify that chooses to hire a porting H-2A worker would continue to incur the opportunity cost of time to confirm the employment authorization of any newly hired employees.

Participating in E-Verify and remaining in good standing requires employers to enroll in the program online,<sup>178</sup> electronically sign the associated MOU with DHS that sets the terms and conditions for participation and create E-Verify cases for all newly hired employees. The MOU requires employers to abide by lawful hiring procedures and to ensure that no employee will be unfairly discriminated against as a result of E-Verify.<sup>179</sup> If an employer violates the terms of this agreement, it can be grounds for immediate termination from E-Verify.<sup>180</sup> Additionally, employers are required to designate and register at least one person that serves as an E-Verify administrator on their behalf.

For this analysis, DHS assumes that each employer participating in E-Verify designates one HR specialist to manage the program on its behalf. Based on the most recent Paperwork Reduction Act (PRA) Information Collection Package for E-Verify, DHS estimates the time burden for an HR specialist to undertake the tasks associated with E-Verify. DHS estimates the time burden for an HR specialist to complete the enrollment process is 2 hours 16 minutes (2.26 hours), on average, to provide basic company information, review and sign the MOU, take a new user training, and review the user guides.<sup>181</sup> Once enrolled in E-Verify, DHS estimates the time burden is 1 hour to users who may participate in voluntary webinars and learn about and incorporate new features and system updates to E-Verify annually.<sup>182</sup> This may be an overestimate in some cases as webinars are not mandatory, but we recognize that some recurring burden to users

exists to remain in good standing with E-Verify.

Cost savings due to this provision relate only to the opportunity costs of time to petitioners associated with the time an employer would save by not newly enrolling or participating in E-Verify. In this analysis, DHS uses an hourly compensation rate for estimating the opportunity cost of time for an HR specialist. DHS uses this occupation as a proxy for those who might prepare and complete the Form I-9, Employment Eligibility Verification, and create the E-Verify case for an employer. DHS notes that not all employers may have an HR specialist, but rather some equivalent occupation may prepare and complete the Form I-9 and create the E-Verify case.

According to Bureau of Labor Statistics (BLS) data, the average hourly wage rate for HR specialists is \$35.13.<sup>183</sup> DHS accounts for worker benefits by calculating a benefits-to-wage multiplier using the most recent BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.45 and, therefore, is able to estimate the full opportunity cost per E-Verify user, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement, etc.<sup>184</sup> Therefore, DHS calculates an average hourly compensation rate of \$50.94 for HR specialists.<sup>185</sup> Applying this average hourly compensation rate to the estimated time burden of 2.26 hours for the enrollment process, DHS estimates an average opportunity cost of time savings for a new employer to enroll in E-Verify is \$115.12.<sup>186</sup> DHS assumes the estimated opportunity cost of time to enroll in E-Verify is a one-time cost to employers. In addition, DHS estimates an opportunity cost of time savings associated with 1 hour of each E-Verify user to attend voluntary webinars and

learn about and incorporate new features and system changes for newly enrolled entities would be \$50.94 annually in the years following enrollment.

Newly enrolled employers would also incur opportunity costs of time savings from not having to enter employee information into E-Verify to confirm their identity and employment authorization. DHS estimates the time burden for an HR specialist to create a case in E-Verify is 7.28 minutes (or 0.121 hours).<sup>187</sup> Therefore, DHS estimates the opportunity cost of time savings would be approximately \$6.57 per case.<sup>188</sup> These employers would not be able to verify the employment eligibility information of newly hired employees against government data systems if they fail to register and use E-Verify.

Table 6 shows the number of Form I-129 H-2A petitions filed for extensions of stay due to change of employer and Form I-129 H-2A petitions filed for new employment for FY 2018 through FY 2022. The average rate of extension of stay due to change of employer compared to new employment was approximately 6.7 percent over this time period. USCIS also considered the number of beneficiaries that correspond to the Form I-129 H-2A petitions that filed extensions of stay due to a change of employer to estimate the average number of beneficiaries per petition of six. Table 6 also shows that although petitions have been increasing for extension of stay due to change of employer, the number of beneficiaries on each petition has declined from FY 2018 to FY 2022. This indicates that it may be harder for petitioners to find porting workers. One reason may be because petitioners face certain constraints such as the ability for petitioners to access workers seeking to port or a limited number of workers seeking to port.

<sup>177</sup> See DHS, *About E-Verify, Questions and Answers* (last updated Sept. 15, 2022), <https://www.e-verify.gov/about-e-verify/questions-and-answers?tid=All&page=0>.

<sup>178</sup> See DHS, *Enrolling in E-Verify, The Enrollment Process* (last updated Aug. 9, 2022), <https://www.e-verify.gov/employers/enrolling-in-e-verify/the-enrollment-process>.

<sup>179</sup> An employer that discriminates in its use of E-Verify based on an individual's citizenship status or national origin may also violate the INA's anti-discrimination provision, at 8 U.S.C. 1324b.

<sup>180</sup> See USCIS, *The E-Verify Memorandum of Understanding for Employers* (June 1, 2013), [http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify\\_Native\\_Documents/MOU\\_for\\_E-Verify\\_Employer.pdf](http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf).

<sup>181</sup> The USCIS Office of Policy and Strategy, PRA Compliance Branch estimates the average time burdens. See PRA E-Verify Program (OMB Control

Number 1615-0092) (Mar. 30, 2021). The PRA Supporting Statement can be found at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=202103-1615-015](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202103-1615-015), under Question 12 (Last accessed Apr. 4, 2023).

<sup>182</sup> *Id.*

<sup>183</sup> See BLS, *Occupational Employment and Wages*, May 2022, Human Resources Specialist (13-1071), <https://www.bls.gov/oes/2022/may/oes131071.htm>.

<sup>184</sup> The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) = \$42.48/\$29.32 = 1.45 (rounded). See BLS, *Economic News Release, Employer Cost for Employee Compensation—December 2021*, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (Mar. 17, 2023), [https://www.bls.gov/news.release/archives/ecec\\_03172023.pdf](https://www.bls.gov/news.release/archives/ecec_03172023.pdf).

<sup>185</sup> Calculation: \$35.13 average hourly wage rate for HR specialists × 1.45 benefits-to-wage multiplier = \$50.94 (rounded).

<sup>186</sup> Calculation: 2.26 hours for the enrollment process × \$50.94 total compensation wage rate for an HR specialist = \$115.12.

<sup>187</sup> The USCIS Office of Policy and Strategy, PRA Compliance Branch estimates the average time burdens. See PRA E-Verify Program (OMB Control Number 1615-0092), March 30, 2021. The PRA Supporting Statement can be found at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=202103-1615-015](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202103-1615-015), under Question 12 (Last accessed Apr. 4, 2023).

<sup>188</sup> Calculation: 0.121 hours to submit a query × \$50.94 total compensation wage rate for an HR specialist = \$6.57 (rounded).

TABLE 6—NUMBER OF FORM I-129 H-2A PETITIONS AND BENEFICIARIES FILED FOR EXTENSION OF STAY DUE TO CHANGE OF EMPLOYER AND FORM I-129 H-2A PETITIONS FILED FOR NEW EMPLOYMENT, FY 2018—FY 2022

Fiscal year	Form I-129 H-2A petitions filed for extension of stay due to change of employer	Form I-129 H-2A petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings	Number of beneficiaries corresponding to Form I-129 H-2A extension of stay petitions filed	Average number of beneficiaries per petition filed for extension of stay due to change of employer
	A	B	C = A/B	D	E = D/A
2018 .....	425	10,841	0.039	3,566	8
2019 .....	626	12,177	0.051	4,265	7
2020 .....	915	12,989	0.070	5,995	7
2021 .....	1,334	15,128	0.088	7,226	5
2022 .....	1,526	18,093	0.084	7,250	5
Total .....	4,826	69,228	.....	28,302	.....
5-year Average .....	965	13,846	0.067	5,660	6

Source: USCIS, Office of Policy and Strategy—C3, ELIS USCIS Data System, as of Oct. 18, 2022 and USCIS Analysis.

DHS expects that existing H-2A petitioners would continue to participate in E-Verify and would thus not realize a cost savings due to this proposed rule. For employers that do not yet port H-2A workers but do obtain TLCs from DOL, they would experience a cost-savings relevant to avoiding enrollment and participation in E-Verify but would not be able to verify the employment eligibility information of newly hired employees against government data systems. However, for employers that do not yet port H-2A workers and do not yet obtain TLCs, the cost-savings would be offset by their need to submit DOL’s Employment and Training Administration (ETA) Form 9142A. The public reporting burden for Form ETA-9142A is estimated to average 3.63 hours per response for H-2A.<sup>189</sup> Depending on the filer, the cost to submit Form ETA-9142A is estimated at \$184.91 for an HR specialist, \$414.44 for an in-house lawyer, and \$ 714.57 for an out-sourced

lawyer.<sup>190</sup> Compared to the absolute minimum opportunity cost of time to enroll in, participate in an hour of training, and submit one query in E-Verify of \$172.63,<sup>191</sup> regardless of the filer, a new H-2A porting employer needing to obtain TLCs would not experience a cost-savings in the first year following this rule.<sup>192</sup>

By removing the requirement for a petitioner to participate in E-Verify in order to benefit from portability, this provision may result in some increased demand for H-2A petitioners to apply to port eligible H-2A workers. DHS expects H-2A petitioners that already hire porting H-2A beneficiaries to continue to use E-Verify in the future. However, DHS is unable to estimate the number of future employers that would opt not to enroll in E-Verify in the future as a result of this rule or how many would need to obtain TLCs. DHS does not expect any reduction in protection to the legal workforce as a result of this rule as some H-2A petitioners would continue to use E-Verify. Any new petitioners for porting H-2A workers would still be required to obtain TLCs through DOL, these H-2A employers would be subject to the site visit requirements and comply with the terms and conditions of H-2

employment set forth in this NPRM and under other related regulations, and the porting worker would have already been approved to legally work in the United States as an H-2A worker.

Temporary portability for H-2B workers has been provided as recently as the FY 2023 H-2B Supplemental Cap temporary final rule (TFR) and was available under previous supplemental caps dating back to FY 2021.<sup>193</sup> However, data show that there is a longer history of extensions of stay due to changes of employer for H-2B petitions filed even in years when portability was not authorized.<sup>194</sup> Since it is difficult to isolate the impacts of inclusion of temporary portability provisions in the FY 2021 through FY 2023 H-2B Supplemental Cap TFRs from the extensions of stay due to changes of employer that would be expected in the absence of this proposed provision, we reproduce the FY 2023 H-2B Supplemental Cap TFR’s analysis here.<sup>195</sup> Additionally, USCIS is unclear how many additional H-2B visas Congress would allocate in future fiscal

<sup>189</sup> See DOL, H-2A Application for Temporary Employment Certification Form ETA-9142A (OMB Control Number 1205-0466), Expires Oct. 31, 2025. The PRA Supporting Statement can be found at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=202303-1205-002](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202303-1205-002) under Question 12 (Last accessed Apr. 4, 2023); see also DOL, Supplementary Documents, Appendix—Breakdown of Hourly Burden Estimates, H-2A Application for Temporary Employment Certification Form ETA-9142A (OMB Control Number 1205-0537), *Id.* at Section C. (Last accessed Apr. 4, 2023). DOL estimates the time burden for completing Form ETA-9142A is 3.63 hours, including 0.33 hours to complete Form ETA-9142A, 1.33 hours to H-2ALC Filing Requirements, 0.50 hours to complete Waiver for Emergency Situations, 0.25 hours to complete Modify Application/Job Order, 0.50 hours to complete Amend Application/Job Order, and 0.50 hours to complete Herder Variance Request.

<sup>190</sup> Calculations: HR specialist: \$50.94 hourly wage × 3.63 hours = \$184.91 (rounded), In-house lawyer: \$114.17 hourly wage × 3.63 hours = \$414.44 (rounded); Out-sourced lawyer = \$196.85 hourly wage × 3.63 hours = \$714.57 (rounded).

<sup>191</sup> Calculation: \$115.12 enrollment + \$50.94 annual training + \$6.57 query submission = \$172.63.

<sup>192</sup> DHS recognizes that the opportunity cost of time would be higher than this absolute minimum because employers would have more than one employee and E-Verify participants are required to query every employee.

<sup>193</sup> See *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*, 87 FR 76816 (Dec. 15, 2022).

<sup>194</sup> *Id.*

<sup>195</sup> On May 14, 2020, a final rule published to temporarily amend its regulations to allow H-2B workers to immediately work for any new H-2B employer to mitigate the impact on nonagricultural services or labor essential to the U.S. food supply chain due to COVID-19. Since the analysis is based on annual fiscal years, data from the months between May and September 2020 are not able to be separated out to determine those early impacts on portability. See *Temporary Changes to Requirements Affecting H-2B Nonimmigrants Due to the COVID-19 National Emergency*, 85 FR 28843 (May 14, 2020).

years beyond the 66,000 statutory cap for H–2B nonimmigrants.

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. In the FY 2023 H–2B Supplemental Cap TFR, USCIS uses the population of 66,000 H–2B workers authorized by statute and the 64,716 additional H–2B

workers authorized by the rule as a proxy for the H–2B population that could be currently present in the United States.<sup>196</sup> USCIS uses the number of Form I–129 petitions filed for extension of stay due to change of employer relative to the number of petitions filed for new employment from FY 2011 through FY 2020. This includes the 10 years prior to the implementation of the first portability provision in an H–2B

Supplemental Cap TFR. Using these data, we estimate the baseline rate and compare it to the average rate from FY 2011 through FY 2020 (Table 7). We find that the average rate of extension of stay due to change of employer compared to new employment from FY 2011 through FY 2020 is approximately 10.5 percent.

TABLE 7—NUMBERS OF FORM I–129 H–2B PETITIONS FILED FOR EXTENSION OF STAY DUE TO CHANGE OF EMPLOYER AND FORM I–129 H–2B PETITIONS FILED FOR NEW EMPLOYMENT, FY 2011 THROUGH FY 2020

Fiscal year	Form I–129 H–2B petitions filed for extension of stay due to change of employer	Form I–129 H–2B petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings
2011	360	3,887	0.093
2012	293	3,688	0.079
2013	264	4,120	0.064
2014	314	4,666	0.067
2015	415	4,596	0.090
2016	427	5,750	0.074
2017	556	5,298	0.105
2018	744	5,136	0.145
2019	812	6,251	0.130
2020	804	3,997	0.201
FY 2011 through FY 2020 Total	4,990	47,389	0.105

Source: USCIS, Office of Performance and Quality—SAS PME C3 Consolidated, as of Oct. 10, 2022, TRK 10638

In FY 2021, the first year an H–2B Supplemental Cap TFR included a portability provision, there were 1,113 petitions filed using Form I–129 for extension of stay due to change of employer compared to 7,207 petitions filed for new employment.<sup>197</sup> In FY 2022, there were 1,791 petitions filed using Form I–129 for extension of stay due to change of employer compared to 9,233 petitions filed for new employment.<sup>198</sup> Over the period when a portability provision was in place for H–

2B workers, the rate of petitions filed using Form I–129 for extension of stay due to change of employer relative to new employment was 17.7 percent.<sup>199</sup> This is above the 10.5 percent rate of filings expected when there was no portability provision in place. We estimate that a rate of about 17.7 percent should be expected in periods with a portability provision in a H–2B Supplemental Cap TFR that provides an additional allocation of visas. Using 4,398 as our estimate for the number of

petitions filed using Form I–129 for H–2B new employment in FY 2023, we estimate that 462 petitions for extension of stay due to change of employer would be filed in absence of this rulemaking’s portability provision.<sup>200</sup> With the rule’s portability provision in effect, we estimate that 778 petitions would be filed using Form I–129 for extension of stay due to change of employer.<sup>202</sup> As a result of this provision, we estimate 316 additional petitions using Forms I–129 would be filed.<sup>203</sup> As shown in Table 12

<sup>196</sup> This number may overestimate H–2B workers who have already completed employment and departed and may underestimate H–2B workers not reflected in the current cap and long-term H–2B workers. In FY 2021, USCIS approved 735 requests for change of status to H–2B, and Customs and Border Protection (CBP) processed 1,341 crossings of visa-exempt H–2B workers. See USCIS, *Characteristics of H–2B Nonagricultural Temporary Workers FY2021 Report to Congress*, <https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY21-Characteristics-Report.pdf> (Mar. 10, 2022). DHS assumes some of these workers, along with current workers with a valid H–2B visa under the cap, could be eligible to port under this new provision. DHS does not know the exact number of H–2B workers who would be eligible to port at this time but uses the cap and supplemental cap allocations as a possible proxy for this population.

<sup>197</sup> USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, data queried October 2022, TRK 10638.

<sup>198</sup> USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, data queried October 2022, TRK 10638.

<sup>199</sup> Calculation, Step 1: 1,113 Form I–129 petitions for extension of stay due to change of employer FY 2021 + 1,791 Form I–129 petitions for extension of stay due to change of employer in FY 2022 = 2,904 Form I–129 petitions filed extension of stay due to change of employer in portability provision years.

Calculation, Step 2: 7,207 Form I–129 petitions filed for new employment in FY 2021 + 9,233 Form I–129 petitions filed for new employment in FY 2022 = 16,440 Form I–129 petitions filed for new employment in portability provision years.

Calculation, Step 3: 2,904 extensions of stay due to change of employment petitions/16,440 new

employment petitions = 17.7 percent rate of extension of stay due to change of employment to new employment.

<sup>200</sup> Calculation for expected petitions: 66,000 beneficiaries allowed by the annual statutory cap/15.01 historical average of beneficiaries per petition = 4,398 Forms I–129 filed due to the rule’s portability provision (rounded).

<sup>201</sup> Calculation: 4,398 Form I–129 H–2B petitions filed for new employment × 10.5 percent = 462 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, no portability provision.

<sup>202</sup> Calculation: 4,398 Form I–129 H–2B petitions filed for new employment × 17.7 percent = 778 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, with a portability provision.

45.84 percent of petitions using Form I-129 will be filed by an in-house or outsourced lawyer. Therefore, we expect that a lawyer would file 145 of these petitions and an HR specialist would file the remaining 171.<sup>204</sup> Similarly, we estimated that about 93.57 percent of petitions using Form I-129 for H-2B beneficiaries are filed with Form I-907 to request premium processing. As a result of this portability provision, we expect that an additional 296 requests using Form I-907 would be filed.<sup>205</sup> We expect lawyers to file 136 requests using Forms I-907 and HR specialists to file the remaining 160 requests.<sup>206</sup>

Petitioners seeking to hire H-2B nonimmigrants who are currently present in the United States in lawful H-2B status would need to file Form I-129 and pay the associated fees.<sup>207</sup> Additionally, 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 stated, we expect that about 45.84 percent of petitions using Form I-129 would be filed by an in-house or outsourced lawyer. Therefore, we expect that 145 petitions would be filed by a lawyer and the remaining 171 petitions would be filed by an HR specialist. The opportunity cost of time to file a Form I-129 H-2B petition would be \$236.36 for an HR specialist; and the

opportunity cost of time to file a Form I-129 H-2B petition with accompanying Form G-28 would be \$624.51 for an in-house lawyer and \$1,076.77 for an outsourced lawyer.<sup>208</sup> Therefore, we estimate the cost of the additional petitions filed using Form I-129 from the portability provision for HR specialists would be \$40,418.<sup>209</sup> The estimated cost of the additional petitions filed using Form I-129 accompanied by Forms G-28 from the portability provision for lawyers would be \$90,554 if filed by in-house lawyers and \$156,132 if filed by outsourced lawyers.<sup>210</sup>

We previously stated that about 93.57 percent of Form I-129 H-2B petitions are filed with Form I-907 for premium processing. As a result of this provision, we expect that an additional 296 requests for premium processing using Form I-907 will be filed.<sup>211</sup> We expect 136 of those requests would be filed by a lawyer and the remaining 160 would be filed by an HR specialist.<sup>212</sup> The estimated opportunity cost of time to file Form I-907 would be about \$29.55 for an HR specialist; and the estimated opportunity cost of time for an in-house lawyer to file Form I-907 would be approximately \$66.22 and for an outsourced lawyer it would be about \$114.17.<sup>213</sup> The estimated annual cost of

filing additional requests for premium processing using Form I-907 if HR specialists file would be approximately \$4,728.<sup>214</sup> The estimated annual cost of filing additional requests for premium processing using Form I-907 would be about \$9,006 if filed by in-house lawyers, and approximately \$15,527 if filed by outsourced lawyers.<sup>215</sup>

The estimated annual cost of this provision ranges from \$144,706 to \$216,805 depending on what share of the forms are filed by in-house or outsourced lawyers.<sup>216</sup>

The transfer payments from filing petitions using Form I-129 for an H-2B beneficiary include the filing costs to submit the form. The current filing fee for Form I-129 is \$460 plus an additional fee of \$150 for employers petitioning for H-2B beneficiaries.<sup>217</sup> These filing fees are not a cost to society or an expenditure of new resources but a transfer from the petitioner to USCIS in exchange for agency services. USCIS anticipates that petitioners would file an additional 316 petitions using Form I-129 due to the portability provision in the proposed rule. The annual value of transfers from petitioners to the Government for filing Form I-129 due to the proposed rule would be approximately \$192,760.<sup>218</sup>

Additionally, employers may use Form I-907 to request premium processing of Form I-129 petitions for H-2B visas. The current filing fee for Form I-907 to request premium processing for H-2B petitions is \$1,500.<sup>219</sup> Based on historical trends,

to file Form I-907 = \$114.17 cost to file Form I-907.

<sup>214</sup> Calculation, HR specialist: \$29.55 to file a Form I-907 × 160 forms = \$4,728 (rounded).

<sup>215</sup> Calculation, In-house lawyer: \$66.22 to file a Form I-907 × 136 forms = \$9,006 (rounded).

Calculation for an outsourced lawyer: \$114.17 to file a Form I-907 × 136 forms = \$15,527 (rounded).

<sup>216</sup> Calculation for HR specialists and in-house lawyers: \$40,418 for HR specialists to file Form I-129 H-2B petitions + \$90,554 for in-house lawyers to file Form I-129 and the accompanying Form G-28 + \$4,728 for HR specialists to file Form I-907 + \$9,006 for in-house lawyers to file Form I-907 = \$144,706.

Calculation for HR specialists and outsourced lawyers: \$40,418 for HR specialists to file Form I-129 H-2B petitions + \$156,132 for outsourced lawyers to file Form I-129 and the accompanying Form G-28 + \$4,728 for HR specialists to file Form I-907 + \$15,527 for outsourced lawyers to file Form I-907 = \$216,805.

<sup>217</sup> See Instructions for Petition for Nonimmigrant Worker Department of Homeland Security, USCIS Form I-129, OMB Control Number 1615-0009 (expires Nov. 30, 2025), <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf>; see also INA sec. 214(c)(13), 8 U.S.C. 1184(c)(13).

<sup>218</sup> Calculation: 316 petitions × \$610 per petition = \$192,760.

<sup>219</sup> See Instructions for Request for Premium Processing Service, USCIS Form I-907, OMB Control Number 1615-0048 (expires Nov. 30, 2022),

<sup>203</sup> Calculation: 778 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, with a portability provision—462 estimated number of Form I-129 H-2B petitions filed for extension of stay due to change of employer, no portability provision = 316 Form I-129 H-2B petition increase as a result of portability provision.

<sup>204</sup> Calculation, Lawyers: 316 additional Form I-129 due to portability provision × 45.84 percent of Form I-129 for H-2B positions filed by an attorney or accredited representative = 145 (rounded) estimated Form I-129 filed by a lawyer.

Calculation, HR specialist: 316 additional Form I-129 due to portability provision—145 estimated Form I-129 filed by a lawyer = 171 estimated Form I-129 filed by an HR specialist.

<sup>205</sup> Calculation: 316 Form I-129 H-2B petitions × 93.57 percent premium processing filing rate = 296 (rounded) Forms I-907.

<sup>206</sup> Calculation, Lawyers: 296 Forms I-907 × 45.84 percent filed by an attorney or accredited representative = 136 Forms I-907 filed by a lawyer.

Calculation, HR specialists: 296 Forms I-907—136 Forms I-907 filed by lawyer = 160 Forms I-907 filed by an HR specialist.

<sup>207</sup> The current filing fee for Form I-129 is \$460 and employers filing H-2B petitions must submit an additional fee of \$150. See Instructions for Petition for Nonimmigrant Worker Department of Homeland Security, USCIS Form I-129, OMB Control Number 1615-0009 (expires November 30, 2025), <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf>.

<sup>208</sup> Calculation, HR Specialist: \$50.94 hourly opportunity cost of time × 4.64-hour time burden for form I-129 = \$236.36 estimated cost to file a Form I-129 H-2B petition.

Calculation, In-house lawyer: \$114.17 hourly opportunity cost of time × 5.47-hour time burden for form I-129 and Form G-28 = \$624.51 estimated cost to file a Form I-129 H-2B petition.

Calculation, outsourced lawyer: \$196.85 hourly opportunity cost of time × 5.47-hour time burden for form I-129 and Form G-28 = \$1,076.77 (rounded) estimated cost to file a Form I-129 H-2B petition.

<sup>209</sup> Calculation, HR specialist: \$236.36 estimated cost to file a Form I-129 H-2B petition × 171 petitions = \$40,418 (rounded).

<sup>210</sup> Calculation, In-house Lawyer: \$624.51 estimated cost to file a Form I-129 H-2B petition and accompanying Form G-28 × 145 petitions = \$90,554 (rounded).

Calculation, Outsourced Lawyer: \$1,076.77 estimated cost to file a Form I-129 H-2B petition and accompanying Form G-28 × 145 petitions = \$156,132 (rounded).

<sup>211</sup> Calculation: 316 estimated additional Form I-129 H-2B petitions × 93.57 percent accompanied by Form I-907 = 296 (rounded) additional Form I-907.

<sup>212</sup> Calculation, Lawyers: 296 additional Form I-907 × 45.84 percent = 136 (rounded) Form I-907 filed by a lawyer. Calculation, HR specialists: 296 Form I-907—136 Form I-907 filed by a lawyer = 160 Form I-907 filed by an HR specialist.

<sup>213</sup> Calculation, HR Specialist: \$50.94 hourly opportunity cost of time × 0.58-hour time burden to file Form I-907 = \$29.55 cost to file Form I-907.

Calculation, In-house lawyer: \$114.17 hourly opportunity cost of time × 0.58-hour time burden to file Form I-907 = \$66.22 cost to file Form I-907.

Calculation, outsourced lawyer: \$196.85 hourly opportunity cost of time × 0.58-hour time burden

DHS expects that 93.57 percent of petitioners would file a Form I-907 with Form I-129. Applying that rate to the expected number of filings of Form I-129 petitions would result in 296 requests for premium processing using Form I-907 filed due to the rule.<sup>220</sup> We estimate that the annual transfers from petitioners to the Federal Government related to filing Form I-907 due to the rule would be approximately \$444,000.<sup>221</sup> The undiscounted annual transfers from petitioners to the Federal Government due to the rule are \$636,760.<sup>222 223</sup>

Portability is a benefit to employers that cannot find U.S. workers, and as an additional flexibility for H-2 employees seeking to begin work with a new H-2 employer. This rule would allow petitioners to immediately employ certain H-2 workers who are present in the United States in H-2 status without waiting for approval of the H-2 petition.

DHS welcomes public comments on the annual time burden associated with users remaining in good standing with E-Verify as well as the impacts of permanent portability on H-2 petitioners and beneficiaries.

#### c. Improving H-2 Program Efficiencies and Reducing Barriers to Legal Migration

This section is divided into two subheadings where each provision and its expected impacts are discussed. DHS's proposals include the following: (1) removing the eligible countries lists; and (2) eliminating the calculation of interrupted stays and reducing the period of absence that would reset an individual's 3-year maximum period of stay.

##### (1) Eligible Countries Lists

USCIS is proposing to remove the lists that designate certain countries as eligible to participate in the H-2 programs. Currently, nationals of countries that are not eligible to participate in the H-2 programs may still be named as beneficiaries on an H-2A or H-2B petition. However, petitioners must: (1) name each

<https://www.uscis.gov/sites/default/files/document/forms/i-907instr.pdf>.

<sup>220</sup> Calculation: 316 petitions × 93.57 Form I-907 rate = 296 Forms I-907 (rounded).

<sup>221</sup> Calculation: \$1,500 per petition × 296 Forms I-907 = \$444,000.

<sup>222</sup> Calculation: \$192,760 + \$444,000 = \$636,760.

<sup>223</sup> It is possible that the combination of porting workers and workers availing themselves of increased grace periods may increase tax transfers from workers to the Federal Government. DHS cannot estimate the magnitude of these transfers, however, because of a lack of detailed data regarding the workers utilizing these provisions separately or jointly.

beneficiary who is not from an eligible country; and (2) provide evidence to show that it is in the U.S. interest for the individual to be the beneficiary of such a petition. USCIS also recommends that H-2A and H-2B petitions for workers from countries not listed on the respective eligible countries lists be filed separately.<sup>224</sup>

To understand the population of beneficiaries who come from countries not on the eligible countries lists and the petitioners who apply for these workers, we considered historical data from FY 2013 through FY 2022 on the beneficiary country of birth for both H-2A and H-2B receipts by fiscal year.<sup>225</sup> The data are extremely limited, with an average of 77 percent and 75 percent of H-2A and H-2B receipts, respectively, missing the beneficiary country of birth. Data are primarily limited because of the high percentage of H-2 petitions filed requesting unnamed beneficiaries. Additionally, this data is input manually, with only certain fields entered. Country of birth is not a mandatory field and tends to be blank.

On the eligible countries lists published November 10, 2021, FY 2022<sup>226</sup> data did not identify any H-2A beneficiaries with a country of birth from 55 of 85 eligible countries.<sup>227</sup> Additionally, 30 petitions with 141 beneficiaries from 12 countries were not on the eligible countries list. Of the 86 eligible countries for H-2B beneficiaries, the FY 2022 data did not identify any beneficiaries with a country of birth from 43 of these countries. It also showed that there was only a total of 12 petitions with 79 beneficiaries from five countries not on the eligible countries list.

From these limited data, we can see that USCIS does receive petitions for

<sup>224</sup> See Instructions for Petition for Nonimmigrant Worker Department of Homeland Security, USCIS Form I-129, OMB Control Number 1615-0009 (expires November 30, 2025), <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf>.

<sup>225</sup> Country of citizenship data is available for about 20 percent of the H-2A category but not for the H-2B category. For consistency and because there is slightly more data available, we use country of birth data in this analysis.

<sup>226</sup> The most recent publication of the eligible countries lists for H-2A and H-2B visa programs was published on November 10, 2022. See *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, 87 FR 67930 (Nov. 10, 2022). For the purpose of this analysis, we rely on the eligible countries lists from 2021 because we have data from FY 2022 that would include any impacts of that prior lists on the behavior of petitioners and their beneficiaries.

<sup>227</sup> See *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, 87 FR 67930 (Nov. 10, 2022).

beneficiaries outside of those on the eligible countries lists. However, it is unclear if the lists may act as a deterrent with the additional burden on petitioners. The data provide some insight into the potential concentration of H-2 visas in FY 2022, where the greatest number of petitions had beneficiaries listed with Mexico as their country of birth (1,628 petitions and 30,075 H-2A beneficiaries, and 1,523 petitions and 21,136 H-2B beneficiaries, respectively). However, because only about 12 percent of H-2A beneficiaries and 29 percent of H-2B beneficiaries in FY 2022 had a country of birth listed, it is difficult to draw any strong conclusions.

As stated earlier, USCIS recommends that H-2A and H-2B petitions for workers from countries not listed on the respective eligible countries lists be filed separately. USCIS does not have data on the number of H-2 employers that file petitions separately for workers from countries not listed on the respective eligible countries lists from those on the eligible countries lists. For those that file separately, though, this proposed provision would result in saved fees.<sup>228</sup> The current base fee to file Form I-129 is \$460. Employers filing H-2B petitions must also submit an additional fee of \$150. Therefore, employers currently filing separate petitions could save \$460 per H-2A petition and \$610 (\$460 + \$150) per H-2B petition.<sup>229</sup>

To produce the eligible countries lists each year, several DHS components and agencies provide data, collaboration, and research. For DHS, this includes months of work to gather recommendations and information from offices across U.S. Immigration and Customs Enforcement (ICE), CBP, and USCIS, compile statistics, and cooperate closely with DOS. Research in these efforts focuses on topics including overstays, fraud, human trafficking concerns, and more. However, some of the work involved in creating the eligible countries lists is duplicative, time-consuming, and limited in its response to ever-changing global dynamics. For example, DOS already performs regular national interest assessments and would not approve H-

<sup>228</sup> See USCIS, *Calculating Interrupted Stays for the H-2 Classifications, What do I need to know if I choose to file separate petitions for H-2 workers?* (May 6, 2020), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-agricultural-workers/calculating-interrupted-stays-for-the-h-2-classifications>.

<sup>229</sup> See Instructions for Petition for Nonimmigrant Worker Department of Homeland Security, USCIS Form I-129, OMB Control Number 1615-0009 (expires Nov. 30, 2025), <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf>.

2 work visas that it deems problematic regardless of the country’s standing on the eligible countries lists.

Benefits of this proposed provision include freeing up resources currently dedicated to publishing the eligible countries lists every year, which could be used more effectively on other pressing projects across DHS and DOS. This change would also reduce the burden on petitioners that seek to hire H–2 workers from countries not designated as eligible since they would no longer need to meet additional criteria showing that it is in the U.S. interest to employ such workers. This provision would also increase access to workers potentially available to businesses that utilize the H–2 programs.

DHS welcomes public comments on impacts on petitioners, beneficiaries, and the Federal Government resulting from the proposal to eliminate the eligible countries lists.

(2) Eliminate Interrupted Stays and Reduce Period of Absence

DHS is proposing to eliminate the “interrupted stay” calculation and reduce the period of absence from the United States from 3 months to 60 days to reset an individual’s 3-year period of stay.<sup>230</sup> Under current regulations, an individual’s total period of stay in H–2A or H–2B nonimmigrant status may not

exceed 3 years. Currently, an individual who has spent 3 years in H–2A or H–2B status may not seek extension, change status, or be readmitted to the United States in H–2 status unless the individual has been outside of the United States for an uninterrupted period of 3 months. In the proposed rule, the total period of stay of 3 years would remain unchanged, but the period of absence that would reset an individual’s 3-year period of stay would be reduced. For ease of understanding, the term “clock” will be used in this section to describe the 3-year maximum period of stay for an H–2 worker and the term “absence” will generally be used in place of “interruption.” As critical context, the estimated population impacted by this proposed change is constrained because the DOL-certified seasonal or temporary nature of H–2A and H–2B labor needs means that, currently, most beneficiaries’ clocks are effectively reset each year upon completion of the first and only petitioner’s labor need and subsequent departure from the country. Instructions on DOL’s Foreign Application Gateway (FLAG) state that petitioners’ certified seasonal or temporary labor needs must not exceed 9 months for H–2B labor certifications and should not normally exceed 10 months for H–2A certifications, so there would be no

direct impacts nor costs to an employer from the proposed simplifications to the existing definition of absence for the purpose of resetting the 3-year clock.<sup>231</sup>

Additionally, under this proposed simplification, USCIS would no longer recognize certain absences as an “interrupted stay” for purposes of pausing the calculation of the 3-year limit of stay. Thus, if a worker leaves the United States for less than 60 days, the absence would not pause the 3-year maximum period of stay clock nor extend the timeframe in which a worker could work in H–2 status upon their return from abroad. This change to the calculation of interrupted stay is not expected to impact the two current subset populations of H–2A and H–2B workers whose accumulated stay is 18 months or less whose clock currently pauses when they leave the United States for at least 45 days but less than 3 months, and those whose accumulated stay is greater than 18 months but less than 3 years. Under this proposed rule, the 3-year clock would no longer pause, as it does now, when an individual leaves the United States for the period of time specified in rows 2 and 3 of Table 8; rather, the 3-year clock would now reset following an uninterrupted absence of 60 days, irrespective of the individual’s period of accumulated stay in the United States.

TABLE 8—H–2 CLOCK AND ABSENCES FROM THE UNITED STATES DURING A 3-YEAR MAXIMUM PERIOD OF STAY.

Time worked in H–2 status	Current clock reset or interruption *	Proposal and impact to H–2 workers and employers		
		Proposed absence counted as reset	Cost	Benefit
3 years .....	Reset at 3 months .....	Reset at 60 days .....	N/A	30 fewer days required to reset clock.
18 months or less .....	Interruption pause accrues at 45 days, but less than 3 months.	Reset at 60 days .....	N/A	N/A.
More than 18 months, but less than 3 years.	Interruption pause accrues at 2 months, but less than 3 months.	Reset at 60 days .....	N/A	N/A.

Source: USCIS analysis.

\* An interruption is when the 3-year clock is paused, meaning the period of time outside the United States, the absence, isn’t counted towards 3-year maximum period of stay.

USCIS next considers a potential subpopulation of workers who, under the baseline, might port from one

petitioning employer with a labor certification to a subsequent petitioner with a temporary labor certification

three or more times in an effort to maximize earnings over the 3-year (1,095 days) limit. USCIS does not have

<sup>230</sup> USCIS officers use the term “interrupted stay” when adjudicating extension of stay requests in the H–2A and H–2B nonimmigrant classifications. It refers to certain periods of time an H–2 worker spends outside the United States during an authorized period of stay that do not count toward the noncitizen’s maximum 3-year limit in the classification. See USCIS, *Calculating Interrupted Stays for the H–2 Classifications* (May 6, 2020), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2-agricultural-workers/>

*calculating-interrupted-stays-for-the-h-2-classifications.*

<sup>231</sup> See DOL, *H–2A Temporary Labor Certification for Agriculture Workers* (“The need for the work must be seasonal or temporary in nature [ . . . ] normally lasting 10 months or less” for H–2A Temporary Certification For Agriculture Workers), <https://flag.dol.gov/programs/H-2A> (last visited May 31, 2023); DOL, *H–2B, Temporary Labor Certification for Non-Agriculture Workers* (“The employer’s job opportunities must be. . . [t]emporary (9 months or less, except one-time

occurrences”)), <https://flag.dol.gov/programs/H-2B> (last visited May 31, 2023). DOL regulations at 20 CFR 655.6(b) limit an H–2B period of need to 9 months, except where the employer’s need is based on a one-time occurrence, but due to an appropriations rider that is currently in place, DOL uses the definition of temporary need as provided in 8 CFR 214.2(h)(6)(ii)(B), which does not list a 9 month limit. *Consolidated Appropriations Act 2023*, Public Law 117–328, Division H, Title I, Sec. 111.

data on the size of the H-2A or H-2B worker populations that currently leave the United States while in H-2 status or for how long. Without information on the number of workers who experience absences from the United States, it is not possible to predict additional impacts to the behavior of H-2 visa holders and the petitioners with DOL-certified seasonal or temporary labor needs, however, the observed rates of porting shown in Tables 6 and 7 suggest beneficiaries porting more than 3 times without leaving the country is small to non-existent at present. DOL requires H-2A and H-2B employers to pay workers at least the highest of the prevailing wage rate obtained from the ETA or the applicable Federal, State, or local minimum wage.<sup>232</sup> Additionally, we know that the Fair Labor Standards Act covers requirements for all workers in the United States with respect to overtime and a job offer must always be consistent with Federal, State, and local laws.<sup>233</sup>

To estimate the potential impacts from a small number of H-2 workers choosing to provide 30 additional days of labor every 3 years, we first consider wages. The Federal minimum wage is currently \$7.25.<sup>234</sup> While using the Federal minimum wage may be appropriate in some instances, DHS recognizes that many States have higher minimum wage rates than the Federal minimum. Therefore, DHS believes that a more accurate and timely estimate of wages is available via data from the Department of Labor. More specifically, DHS uses the most recent wage data from DOL's Bureau of Labor Statistics' (BLS) National Occupational Employment and Wage Estimates. DHS believes that the unweighted, 10th percentile wage estimate for all occupations of \$13.14 per hour is a reasonable lower bound for the population in question.<sup>235</sup> DHS

<sup>232</sup> See WHD, *Fact Sheet #26: Section H-2A of the Immigration and Nationality Act (INA)* (Feb. 2010), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs26.pdf>, and *Fact Sheet #78C: Wage Requirements under the H-2B Program* (Apr. 2015), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs78c.pdf>.

<sup>233</sup> See WHD, *Wages and the Fair Labor Standards Act*, <https://www.dol.gov/agencies/whd/flsa> (last visited Dec. 15, 2022).

<sup>234</sup> See 29 U.S.C. 206, "Minimum wage," <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title29/html/USCODE-2011-title29-chap8-sec206.htm> (accessed Dec. 15, 2022). See also WHD, *Minimum Wage*, <https://www.dol.gov/general/topic/wages/minimumwage> (the minimum wage in effect as of Dec. 15, 2022).

<sup>235</sup> See Occupational Employment and Wage Estimates United States. May 2022. BLS, Occupational Employment Statistics program, All Occupations, available at [https://www.bls.gov/oes/2022/may/oes\\_nat.htm#00-0000](https://www.bls.gov/oes/2022/may/oes_nat.htm#00-0000) (last visited July 28, 2023).

accounts for worker benefits by calculating a benefits-to-wage multiplier using the most recent BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.45 and, therefore, is able to estimate the full opportunity cost per applicant, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement, etc.<sup>236</sup> Although the Federal minimum wage could be considered a lower bound income for the population of interest, DHS calculates the total rate of compensation for the 10th percentile hourly wage is \$19.05, which is 81.3 percent higher than the Federal minimum wage.<sup>237</sup>

DHS does not rule out the possibility that some portion of H-2A and H-2B employees might earn more than the 10th percentile wage, but without empirical information, DHS believes that including a range with the lower bound relying on the 10th percentile wage with benefits of \$19.05 is justifiable for both H-2A and H-2B workers. For H-2A workers, DHS uses an upper bound wage specific to agricultural workers of \$17.04.<sup>238</sup> DHS calculates the average total rate of compensation for agricultural workers as \$24.71 per hour, where the mean hourly wage is \$17.04 per hour worked and average benefits are \$7.67 per hour.<sup>239</sup> For H-2B workers, DHS relies on the average wage rate for all occupations of \$29.76 as an upper bound in consideration of the variance in average wages across professions and

<sup>236</sup> The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) = \$42.48/\$29.32 = 1.450 = 1.45 (rounded). See BLS, *Economic News Release, Employer Cost for Employee Compensation—December 2022*, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (Mar. 17, 2023), [https://www.bls.gov/news.release/archives/ecec\\_03172023.pdf](https://www.bls.gov/news.release/archives/ecec_03172023.pdf).

<sup>237</sup> Calculations (1) for lower bound compensation: \$13.14 lower bound wage \* 1.45 total compensation factor = \$19.05 (rounded to 2 decimal places); (2) ((\$19.05 wage - \$10.51 wage)/\$10.51) wage = 0.813, which rounded and multiplied by 100 = 81.3 percent.

<sup>238</sup> The average wage for agricultural workers is found at BLS, *Occupational Employment and Wages—May 2022* (Apr. 25, 2023), Table 1. National employment and wage data from the Occupational Employment and Wage Statistics survey by occupation, May 2022, [https://www.bls.gov/news.release/archives/ocwage\\_04252023.pdf](https://www.bls.gov/news.release/archives/ocwage_04252023.pdf).

<sup>239</sup> Calculation of the weighted mean hourly wage for agricultural workers: \$17.04 per hour \* 1.45 benefits-to-wage multiplier = \$24.71 (rounded).

States.<sup>240</sup> Therefore, DHS calculates the average total rate of compensation for all occupations as \$43.15 per hour, where the mean hourly wage is \$29.76 per hour worked and average benefits are \$13.39 per hour.<sup>241</sup>

Since DHS calculated absences from the United States centered on calendar days, and wage estimates are specifically linked to hours, we apply the scalar developed as follows. Calendar days are transformed into workdays to account for the actuality that typically, 5 out of 7, or 71.4 percent, of the calendar week is allotted to work-time, and that a workday is typically 8 hours.<sup>242</sup> Thus, in limited instances, individuals resetting their clock at or immediately after the 1,095th day of the 3-year limitation may be afforded an opportunity to work 30 additional calendar days, or approximately 21 days of H-2. DHS notes that some H-2 workers may work more days or hours per week in some instances. Additionally, if overtime hours are worked, DHS has no basis for which to measure the extent to which this may occur among these populations. Based on the 10th percentile wage (lower bound), each calendar day generates about \$108.81 in relevant earnings for potential H-2 workers. It follows that for the upper wage bounds that each calendar day generates about \$141.14 per H-2A worker and about \$246.47 per H-2B worker in relevant earnings.<sup>243</sup> Over 30 potential workdays, this equates to a lower bound of \$3,264 in additional earnings with upper bounds of \$4,234 for H-2A workers and \$7,394 for H-2B workers (see Table 9).<sup>244</sup>

<sup>240</sup> The average wage for all occupations is found at BLS, *Occupational Employment and Wages—May 2022* (Apr. 25, 2023), Table 1. National employment and wage data from the Occupational Employment and Wage Statistics survey by occupation, May 2022, [https://www.bls.gov/news.release/archives/ocwage\\_04252023.pdf](https://www.bls.gov/news.release/archives/ocwage_04252023.pdf).

<sup>241</sup> The calculation of the weighted mean hourly wage for applicants: \$29.76 per hour \* 1.45 benefits-to-wage multiplier = \$43.15 (rounded) per hour.

<sup>242</sup> USCIS did review DOL disclosure data on basic number of hours and found the average number of hours per week to be around 40 hours. For this reason, we assume a typical 40-hour workweek for both H-2A and H-2B workers for this analysis.

<sup>243</sup> Calculations: E10th percentile wage (lower bound): 0.714 \* 8 hours per day \* \$19.05 wage = \$108.81 (rounded). H-2A average wage for agricultural workers (upper bound): 0.714 \* 8 hours per day \* \$24.71 wage = \$141.14 (rounded). H-2B average wage for all occupations (upper bound): 0.714 \* 8 hours per day \* \$43.15 wage = \$246.47 rounded.

<sup>244</sup> Calculations: t10th percentile wage (lower bound): \$108.81 \* 30 days = \$3,264 (rounded). H-2A average wage for agricultural workers (upper bound): \$141.14 \* 30 days = \$4,234 (rounded). H-

TABLE 9—EARNINGS ESTIMATES FOR H-2 WORKERS WITH 30 ADDITIONAL DAYS.

	Hourly wage	Calendar day scalar	Work hours	Daily additional wages	Additional wages for 30 days	Additional taxes
	A	B	C	D = A × B × C	E = D × 30	F = E × 15.3%
Lower Bound .....	\$19.05	0.714	8	\$108.81	\$3,264	0 *
H-2A Upper Bound .....	24.71	.....	.....	141.14	4,234	0 *
H-2B Upper Bound .....	43.15	.....	.....	246.47	7,394	1,131

Source: USCIS analysis.

\* H-2A workers and employers are not subject to U.S. social security and Medicare taxes.

In instances where an employer with a DOL-certified temporary labor need cannot transfer the 21 days of work onto other H-2 workers, DHS acknowledges that this additional work may result in additional tax revenue to the government. It is difficult to quantify income tax transfers because individual tax situations vary widely,<sup>245</sup> but DHS estimates the potential payments to other employment tax programs, namely Medicare and Social Security, which have a combined tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).<sup>246</sup> While H-2A wages are exempt from these taxes, H-2B wages are not.<sup>247</sup> With both the employee and employer paying their respective portion of Medicare and Social Security taxes, the total estimated tax transfer for Medicare and Social Security is 15.3 percent.<sup>248</sup> DHS recognizes this quantified estimate is not representative of all potential tax losses by Federal, State, and local governments and we make no claims this quantified estimate includes all tax losses. We continue to acknowledge the potential for additional Federal, State, and local government tax losses in the scenario where a company cannot transfer additional work onto current employees and cannot hire replacement labor for the position the H-2 worker is absent. As seen in Table 9, tax transfers could range from \$0 for H-2A workers and up to \$1,131 for H-2B workers over a 30-day period.

One benefit of this proposed provision is that it would make it easier for DHS, petitioners and beneficiaries to calculate when a beneficiary reaches their 3-year limit on stay, irrespective of how long the individual has been in the United States in H-2 status. As

described earlier, to accurately demonstrate when an individual's limit on H-2 status will be reached, employers and workers currently need to monitor and document the accumulated time in H-2 status and calculate the total time in H-2 status across multiple time periods following interruptive absences. USCIS adjudicators must also make these same determinations in adjudicating H-2 petitions with named workers to assess whether a beneficiary is eligible for the requested period of stay. No longer needing to monitor absences from the United States of less than 60 days simplifies calculations for employers, workers, and adjudicators. Additionally, DHS expects that USCIS adjudicators may issue fewer RFEs related to the 3-year maximum period of stay to workers with absences, which would reduce the burden on employers, workers, and adjudicators and save time in processing petitions. As shown in Table 10, RFEs related to the 3-year maximum period of stay have increased since FY 2020 for H-2A workers and have generally remained stable at between 200 to 300 each year since FY 2020 for H-2B workers.

TABLE 10—RFEs RELATING TO 3-YEAR MAXIMUM STAY FOR H-2 WORKERS

Fiscal year	H-2A	H-2B
2018 .....	63	134
2019 .....	53	649
2020 .....	22	207
2021 .....	272	292
2022 .....	436	208
Total .....	846	1,490

(Dec. 16, 2021), <https://www.irs.gov/pub/irs-pdf/p15.pdf>, for specific information on employment tax rates.

<sup>247</sup> See Federal Income Tax and FICA Withholding for Foreign Agricultural Workers with an H-2A Visa, <https://www.irs.gov/pub/irs-pdf/p5144.pdf> (last accessed July 31, 2023).

<sup>248</sup> Calculation: (6.2 percent Social Security + 1.45 percent Medicare) × 2 employee and employer losses = 15.3 percent total estimated tax transfer payment to government.

TABLE 10—RFEs RELATING TO 3-YEAR MAXIMUM STAY FOR H-2 WORKERS—Continued

Fiscal year	H-2A	H-2B
5-Year Average .....	169	298

SOURCE: USCIS Office of Policy and Strategy—C3, ELIS USCIS Data System as of Oct. 8, 2022.

While it is not clear how many RFEs are directly related to the calculation of interruptions while in H-2 status, as opposed to RFEs for those who may be reaching the maximum 3-year period of stay generally, DHS anticipates that eliminating the calculation for interrupted stays would at least render some RFEs unnecessary.<sup>249</sup> This would in turn reduce the burden on employers, workers, and adjudicators associated with calculating interruptions and through subsequent RFEs and petitions could be processed more expeditiously.

Collectively, Tables 6, 7, and 10 indicate very few H-2 workers approach the 3-year limitation despite existing potential to port from certified temporary labor need for 3 years before exiting the country for 90 days. Nevertheless, USCIS has considered as an upper bound, possible additional earnings and related labor market impacts should workers already approaching the 3-year limit respond to this proposed change by working 30 additional days at the end of their 1,095 days or at the start of their subsequent 3-year period. Recall that if the worker intended to return to their home country before 3-years, as most do upon completing their temporary labor for the initial petitioner, this change has no

<sup>249</sup> On July 25, 2022, USCIS extended its COVID-19-related flexibilities for responding to RFEs through October 23, 2022. This provides recipients an additional 60 calendar days after the due date on an RFE to provide a response. Ultimately, while this flexibility may prove helpful to petitioners it also adds up to an additional 2 months of time to the adjudication process. See USCIS, *USCIS Extends COVID-19-related Flexibilities* (July 25, 2022), <https://www.uscis.gov/newsroom/alerts/uscis-extends-covid-19-related-flexibilities>.

2B average wage for all occupations (upper bound): \$246.47 × 30 days = \$7,394 (rounded).

<sup>245</sup> See Quentin Fottrell, *More than 44 percent of Americans pay no federal income tax*, MarketWatch (Aug. 28, 2019), <https://www.marketwatch.com/story/81-million-americans-wont-pay-any-federal-income-taxes-this-year-heres-why-2018-04-16>.

<sup>246</sup> The various employment taxes are discussed in more detail at <https://www.irs.gov/businesses/small-businesses-self-employed/understanding-employment-taxes>. See Internal Revenue Service Publication 15, Circular E, Employer's Tax Guide

impact to the employer nor to wages earned by the worker. Multiplying the 169 H–2A subpopulation in Table 10 by \$4,234 in additional wages for 30 days in Table 9 bounds potential additional annual earnings at \$715,546.

Additionally, the 298 H–2B population in Table 10 multiplied by \$7,394 in Table 9 bounds additional annual H–2B earnings at \$2,203,412 with estimated tax transfers of \$337,122. For H–2A and H–2B workers, the total impact from this change is \$2,918,958 in additional earnings and \$337,122 in tax transfers (\$168,561 from workers + \$168,561 from employers).

#### d. Other Impacts of the Proposed Rule

##### (1) Form I–129 Updates

The costs for this form include filing costs and the opportunity costs of time to complete and file the form. The current filing fee for Form I–129 is \$460 and the estimated time needed to complete and file Form I–129 is 2.34 hours.<sup>250</sup> There is an additional \$150 fee for employers filing H–2B petitions.<sup>251</sup> There is also an estimated time burden of 2 hours for petitioners to complete the H classification supplement for Form I–129. The total time burden of 4.34 hours for Form I–129 also includes the time for reviewing instructions, to file and retain documents, and submit the request. In this proposed rule, the fees for Form I–129 and the H classification supplement and time burden for Form I–129 would remain unchanged, only the estimated burden to complete the H classification supplement would change. This proposed rule would increase the public reporting burden for the H Classification Supplement by 0.3 hours to a total 2.3 hours. This added time would result in a total time burden of 4.64 hours for Form I–129 H–2 petitioners. The petition must be filed by a U.S. employer, a U.S. agent, or a foreign employer filing through the U.S. agent. 8 CFR 214.2(h)(2). DHS was unable to obtain data on the number of Form I–129 H–2A and H–2B petitions filed directly by a petitioner and those that are filed by a lawyer on behalf of the petitioner. Therefore, DHS presents a range of estimated costs, including if only human resource (HR) specialists

<sup>250</sup> The public reporting burden for this form is 2.34 hours for Form I–129 and an additional 2 hours for H Classification Supplement. See Instructions for Petition for Nonimmigrant Worker Department of Homeland Security, USCIS Form I–129, OMB Control Number 1615–0009 (expires Nov. 30, 2025), <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf>.

<sup>251</sup> *Id.*

file Form I–129 or if only lawyers file Form I–129.<sup>252</sup> Further, DHS presents cost estimates for lawyers filing on behalf of petitioners based on whether all Form I–129 petitions are filed by in-house lawyers or by outsourced lawyers.<sup>253</sup> DHS presents an estimated range of costs assuming that only HR specialists, in-house lawyers, or outsourced lawyers file these forms, though DHS recognizes that it is likely that filing will be conducted by a combination of these different types of filers.

To estimate the total opportunity cost of time to petitioners who complete and file Form I–129, DHS uses the mean hourly wage rate of HR specialists of \$35.13 as the base wage rate.<sup>254</sup> If applicants hire an in-house or outsourced lawyer to file Form I–129 on their behalf, DHS uses the mean hourly wage rate of \$78.74 as the base wage rate.<sup>255</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 per hour wage is \$50.94 for an HR specialist and \$114.17 for an in-house lawyer.<sup>256</sup> In addition, DHS recognizes that an entity may not have in-house lawyers and therefore, seek outside counsel to complete and file Form I–129 on behalf of the petitioner. Therefore, DHS presents a second wage rate for lawyers labeled as outsourced lawyers. DHS estimates the total per hour wage is \$196.85 for an outsourced lawyer.<sup>257</sup> <sup>258</sup> If a lawyer submits Form

<sup>252</sup> For the purposes of this analysis, DHS assumes a human resource specialist, or some similar occupation, completes and files these forms as the employer or petitioner who is requesting the H–2 worker. However, DHS understands that not all entities have human resources departments or occupations and, therefore, recognizes equivalent occupations may prepare these petitions.

<sup>253</sup> For the purposes of this analysis, DHS adopts the terms “in-house” and “outsourced” lawyers as they were used in ICE, *Final Small Entity Impact Analysis: Safe-Harbor Procedures for Employers Who Receive a No-Match Letter*, at G–4 (posted Nov. 5, 2008), <http://www.regulations.gov/document/ICEB-2006-0004-0922>. The ICE analysis highlighted the variability of attorney wages and was based on information received in public comment to that rule. We believe the distinction between the varied wages among lawyers is appropriate for our analysis.

<sup>254</sup> See BLS, Occupational Employment and Wages, May 2022, Human Resources Specialist (13–1071), <https://www.bls.gov/oes/2022/may/oes131071.htm>.

<sup>255</sup> See BLS, Occupational Employment and Wages, May 2022, Lawyers (23–1011), <https://www.bls.gov/oes/2022/may/oes231011.htm>.

<sup>256</sup> Calculation for the total wage of an in-house lawyer: \$78.74 × 1.45 = \$114.17 (rounded).

<sup>257</sup> Calculation: Average hourly wage rate of lawyers × Benefits-to-wage multiplier for

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>259</sup> DHS estimates the time burden to complete and submit Form G–28 for a lawyer is 50 minutes (0.83 hours, rounded).<sup>260</sup>

Since only the time burden for the H Classification Supplement would change, this analysis only considers the additional opportunity cost of time for 0.3 hours as a direct cost of this rule. Therefore, the added opportunity cost of time for an HR specialist to complete and file Form I–129 for an H–2 petition is \$15.28, for an in-house lawyer to complete and file is \$34.25, and for an outsourced lawyer to complete and file is \$59.06.<sup>261</sup>

DHS expects this rule would impose costs on the population of employers that currently petition for H–2 workers; an estimated 36,758 petitioners.<sup>262</sup> We expect filing would be performed by a HR specialist, in-house lawyer, or outsourced lawyer, and this would be done at the same rate as petitioners who file a Form G–28;

To properly account for the costs associated with filing across the entire H–2 population, DHS must calculate a weighted average rate for G–28 filing across the separate H–2A and H–2B populations. Table 11 and Table 12 show the recent G–28 filing trends for each separate H–2 population.

outsourced lawyer = \$78.74 × 2.5 = \$196.85 (rounded).

<sup>258</sup> The ICE “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter” used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney based on information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis for that rule remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule, see <https://www.regulations.gov/document/ICEB-2006-0004-0922>, at page G–4 (Sept. 1, 2015).

<sup>259</sup> USCIS, *Filing Your Form G–28* (Aug. 10, 2020), <https://www.uscis.gov/forms/filing-your-form-g-28>.

<sup>260</sup> See USCIS, Form G–28 Instructions for Notice of Entry of Appearance as Attorney or Accredited Representative, OMB Control Number 1615–0105 (expires May 31, 2021), <https://www.uscis.gov/sites/default/files/document/forms/g-28instr.pdf>.

<sup>261</sup> HR specialist calculation: \$50.94 × (0.3 hours) = \$15.28.

*In-house lawyer calculation:* \$114.17 × (0.3 hours) = \$34.25.

*Outsourced lawyer calculation:* \$196.85 × (0.3) = \$59.06 (rounded).

<sup>262</sup> Calculation: 24,370 H–2A + 12,388 H–2B = 36,758 H–2 petitioners in FY 2022 as estimated as the population who would be most likely be affected by this rule.

TABLE 11—FORM I-129 H-2A PETITION RECEIPTS THAT WERE ACCOMPANIED BY A FORM G-28, FY 2017–2021

Fiscal year	Number of form I-129 H-2A petitions accompanied by a form G-28	Total number of form I-129 H-2A petitions received	Percent of form I-129 H-2A petitions accompanied by a form G-28
2017 .....	1,648	11,602	14.20
2018 .....	2,166	13,444	16.11
2019 .....	2,617	15,509	16.87
2020 .....	2,854	17,012	16.78
2021 .....	3,322	20,323	16.35
2017–2021 Total .....	12,607	77,890	16.19

SOURCE: USCIS, Office of Policy & Strategy—C3, ELIS USCIS Data System.

TABLE 12—FORM I-129 H-2B PETITION RECEIPTS THAT WERE ACCOMPANIED BY A FORM G-28, FY 2018–2022

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
2018 .....	2,625	6,148	42.70%
2019 .....	3,335	7,461	44.70
2020 .....	2,434	5,422	44.89
2021 .....	4,230	9,160	46.18
2022 .....	5,978	12,388	48.26
2018–2022 Total .....	18,602	40,579	45.84

SOURCE: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 10/2022, TRK 10638.

Using the data from Table 11 and Table 12, DHS calculates that the weighted average rate of G-28 filing across the entire H-2 population is 26.34%.<sup>263</sup>

Therefore, we estimate that 9,682 lawyers would incur additional filing costs and 27,076 HR specialists would incur additional filing costs.<sup>264</sup>

The estimated total opportunity cost of time for 27,076 HR specialists to file petitions under this proposed rule is approximately \$413,721.<sup>265</sup> The estimated annual opportunity cost of time for 9,682 lawyers to file petitions under this proposed rule is approximately \$331,609 if they are all in-house lawyers and \$571,819 if they are all outsourced lawyers.<sup>266</sup> The estimated annual opportunity costs of

time for petitioners or their representatives to file H-2 petitions under this proposed rule ranges from \$745,330 to \$985,540.<sup>267</sup>

(2) Technical Definitional Updates

There is a technical update proposed in this rule for clarification purposes to remove the phrase “abscond” and the definition of “abscondment.” DHS expects these proposed changes would have only marginal impacts.

(3) Familiarization Costs

DHS expects this rule would impose one-time familiarization costs associated with reading and understanding this rule on the population of employers that currently petition for H-2 workers; an estimated 36,758 petitioners.<sup>268</sup> We expect familiarization with the rule would be performed by a HR specialist, in-house lawyer, or outsourced lawyer, and this would be done at the same rate as petitioners who file a Form G-28. An estimated 26.34 percent would be performed by lawyers and the remaining 73.66 percent by an HR specialist.. Therefore, we estimate that 9,682

lawyers would incur familiarization costs and 27,076 HR specialists would incur familiarization costs.<sup>269</sup>

To estimate the cost of rule familiarization, we estimate the time it would take to read and understand the rule by assuming a reading speed of 238 words per minute.<sup>270</sup> This rule has approximately 56,000 words.<sup>271</sup> Using a reading speed of 238 words per minute, DHS estimates it would take approximately 3.92 hours to read and become familiar with this rule.<sup>272</sup> The estimated hourly total compensation for a HR specialist, in-house lawyer, and outsourced lawyer are \$50.94, \$114.17, and \$196.85 respectively. The estimated opportunity cost of time for each of these filers to familiarize themselves with the rule are \$199.68, \$447.55, and

<sup>263</sup> Calculation: Step 1. 12,607 H-2A petitions with G-28 + 18,602 H-2B petitions with G-28 = 31,209 H-2 petitions with G-28; Step 2. 77,890 total H-2A petitions + 40,579 total H-2B petitions = 118,469 total H-2 petitions; Step 3. 31,209 H-2 petitions with G-28/118,469 total H-2 petitions = .2634 (rounded).

<sup>264</sup> Calculation for lawyers: 36,758 H-2 petitioners × 26.34 percent represents by a lawyer = 9,682 (rounded) represented by a lawyer. Calculation for HR specialists: 36,758 H-2 petitioners—9,682 represented by a lawyer = 27,076 represented by a HR specialist.

<sup>265</sup> Calculation: \$15.28 additional burden × 27,076 HR specialists = \$413,721.

<sup>266</sup> Calculations: \$34.25 additional burden × 9,682 in-house lawyers = \$331,609; \$59.06 additional burden × 9,682 outsourced lawyers = \$571,819 (rounded).

<sup>267</sup> Calculation: HR specialists \$413,721 + in-house lawyers \$331,609 = \$745,330; HR specialists \$413,721 + outsourced lawyers \$571,819 = \$985,540.

<sup>268</sup> Calculation: 24,370 H-2A + 12,388 H-2B = 36,758 H-2 petitioners in FY 2022 as estimated as the population who would be most likely to read this rule.

<sup>269</sup> Calculation for lawyers: 36,758 H-2 petitioners × 44.43 percent represents by a lawyer = 9,682 (rounded) represented by a lawyer. Calculation for HR specialists: 36,758 H-2 petitioners × 9.682 represented by a lawyer = 27,076 represented by a HR specialist.

<sup>270</sup> Marc Brysbaert (April 12, 2019), *How many words do we read per minute? A review and meta-analysis of reading rate*, <https://doi.org/10.1016/j.jml.2019.104047> (accessed Dec. 15, 2022). We use the average speed for silent reading of English nonfiction by adults.

<sup>271</sup> Please note that the actual word count of the proposed rule may differ from the estimated length presented here.

<sup>272</sup> Calculation: 56,000 words/238 words per minute = 235 (rounded) minutes. 235 minutes/60 minutes per hour = 3.92 (rounded) hours.

\$771.65 respectively.<sup>273</sup> The estimated total opportunity cost of time for 27,076 HR specialists to familiarize themselves with this rule is approximately \$5,406,536. Additionally, the estimated total opportunity cost of time for 9,682 lawyers to familiarize themselves with this rule is approximately \$4,333,179 if they are all in-house lawyers or \$7,471,115 if they are all outsourced lawyers. Thus, the estimated total opportunity costs of time for petitioners or their representatives to familiarize themselves with this rule ranges from \$9,739,715 to \$12,877,651, incurred the first year of the period of analysis.<sup>274</sup>

#### e. Total Costs of the Rule

In the previous sections we presented the estimates of the impacts of the proposed rule. The quantifiable costs of this rule that would impact petitioners consistently and directly are the costs associated with an increased opportunity cost of time to complete Form I-129 H Classification Supplement and opportunity costs of time related to the rule's portability provision. Annual costs due to the rule range from \$890,036 to \$1,202,345 depending on the filer.<sup>275</sup> Over the 10-year period of analysis, DHS estimates the total costs of the proposed rule would be approximately \$18,640,075 to \$24,901,101 (undiscounted).<sup>276</sup> DHS estimates annualized costs of this proposed rule range from \$1,998,572 to \$2,668,028 at a 3-percent discount rate and \$2,186,033 to \$2,915,885 at a 7-percent discount rate. The midpoint of these ranges, \$2,333,300 at a 3-percent discount rate and \$2,550,959 at a 7-percent discount rate is presented as the primary estimate.

In addition, the rule results in transfers from consumers of goods and services to a limited number of H-2A

<sup>273</sup> Calculation: Total respective hourly compensation HR  $\$50.94 \times 3.5$  hours = \$199.68, In-house Lawyer  $\$114.17 \times 3.92$  = \$447.55, or Outsourced Lawyer  $\$196.85 \times 3.92$  hours = \$771.65.

<sup>274</sup> Calculation, lower bound: \$5,406,536 familiarization costs, HR Representative + \$4,333,179 familiarization costs, in-house lawyer = \$9,739,715. Calculation, upper bound: \$5,406,536 familiarization costs, HR Representative + \$7,471,115 familiarization costs, outsourced lawyer = \$12,877,651.

<sup>275</sup> Calculation, lower bound: \$745,330 annual costs from marginal OCT to file Forms I-129 + \$144,706 in costs due to the portability provision = \$890,036 annual costs in years 1 through 10. Calculation, upper bound: \$985,540 annual costs from marginal OCT to file Forms I-129 + \$216,805 in costs due to the portability provision = \$1,202,345 annual costs in years 1 through 10.

<sup>276</sup> Calculation, lower bound: familiarization costs of \$9,739,715 (year 1) + \$890,036 annual costs due to the rule (year 1-10) = \$18,640,075 over 10-year period of analysis. Calculation, upper bound: familiarization costs of \$12,877,651 (year 1) + \$1,202,345 annual costs due to the rule (year 1-10) = \$24,901,101 over 10-year period of analysis.

and H-2B workers that may choose to supply additional labor. The total annualized transfer amounts to \$2,918,958 in additional earnings at the 3-percent and 7-percent discount rate and related tax transfers of \$337,122 (\$168,561 from these workers + \$168,561 from employers).

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An "individual" is not defined by the RFA as a small entity and costs to an individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform an initial regulatory flexibility analysis of small entity impacts only when a rule directly regulates small entities. Consequently, any indirect impacts from a rule to a small entity are not considered to be costs for RFA purposes.

This proposed rule may have direct impacts to those entities that petition on behalf of H-2 workers. Generally, petitions are filed by a sponsoring employer who would incur some additional costs from the Form I-129 H Classification Supplement burden change and familiarization of the rule. Petitioning employers may also incur costs they would not have otherwise incurred if they opt to transport and house H-2A workers earlier as well as opportunity costs of time if they are selected to participate in compliance reviews or inspections that are necessary for the approval of a petition. Therefore, DHS examines the direct impact of this proposed rule on small entities in the analysis that follows.

#### 1. Initial Regulatory Flexibility Analysis (IRFA)

Small entities primarily impacted by this proposed rule are those that would incur additional direct costs to complete an H-2 petition. DHS conducted an analysis using a statistically valid sample of H-2 petitions to determine the number of small entities directly impacted by this proposed rule. These

costs are related to the additional opportunity cost of time for a selected small entity to complete the updated Form I-129 H Classification Supplement proposed in this rule. DHS welcomes any public comment on the methodology and conclusions on the number of small entities estimated and the impacts to those small entities.

#### a. A Description of the Reasons Why the Action by the Agency is Being Considered

The purpose of this rulemaking is to modernize and improve the regulations relating to the H-2A temporary agricultural worker program and the H-2B temporary nonagricultural worker program.

#### b. A Succinct Statement of The Objectives of, and Legal Basis for, the Proposed Rule

DHS objectives and legal authority for this proposed rule are discussed in the preamble of this proposed rulemaking.

#### c. A Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Changes Would Apply

DHS conducted the analysis using a statistically valid sample of H-2 petitions to determine the maximum potential number of small entities directly impacted by this proposed rule. DHS used a subscription-based online database of U.S. entities, Hoovers Online, as well as two other open-access, free databases of public and private entities, Manta and Cortera, to determine the North American Industry Classification System (NAICS) code, revenue, and employee count for each entity.<sup>277</sup> In order to determine the size of a small entity, DHS first classified each entity by its NAICS code, and then used Small Business Administration (SBA) guidelines to note the requisite revenue or employee count threshold for each entity.<sup>278</sup> Some entities were classified as small based on their annual revenue and some by number of employees.

<sup>277</sup> The Hoovers website can be found at <http://www.hoovers.com/>; the Manta website can be found at <http://www.manta.com/>; and the Cortera website can be found at <https://www.cortera.com/>. NAICS 2017 classifications were used for the purpose of this analysis as provided by these databases.

<sup>278</sup> The Small Business Administration (SBA) has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR, section 121.201. At the time this analysis was conducted, NAICS 2017 classifications were in effect. SBA size standards effective August 19, 2019, <https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards%20Effective%20Aug%202019%2C%202019.pdf>.

Using FY 2018 to FY 2022 data on H-2A petitions, DHS collected internal data for each filing organization.<sup>279</sup> Each entity may make multiple filings. For instance, there were 90,658 H-2A petitions filed over the 5 fiscal years, but only 13,244 unique entities that filed H-2A petitions. DHS devised a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. To achieve a 95 percent confidence level and a 5 percent

confidence interval on a population of 13,244 entities, DHS determined that a minimum sample size of 374 entities was necessary. However, DHS drew a sample size 10 percent greater than the minimum statistically valid sample for a sample size of 411 in order to increase the likelihood that our matches would meet or exceed the minimum required sample.<sup>280</sup> Of the 411 entities sampled, 387 instances resulted in entities defined as small (see Table 13). Of the 387 small entities, 344 entities were

classified as small by revenue or number of employees. The remaining 63 entities were classified as small because information was not found (either no petitioner name was found, or not enough information was found in the databases). A total of 24 entities were classified as not small. Therefore, of the 13,244 entities that filed at least one Form I-129 in FYs 2018 through 2022, DHS estimates that 96 percent or 15,636 entities are considered small based on SBA size standards.<sup>281</sup>

TABLE 13—SUMMARY AND RESULTS OF SMALL ENTITY ANALYSIS OF H-2A PETITIONS

Parameter	Quantity	Proportion of sample (percent)
Population—H-2A petitions	90,658	
Population—Unique H-2A Entities	13,244	
Minimum Required Sample	374	
Selected Sample	411	100
Entities Classified as “Not Small”:		
by revenue	23	6
by number of employees	1	0
Entities Classified as “Small”:		
by revenue	281	69
by number of employees	43	11
because not enough information found in databases	63	16
Total Number of Small Entities	387	<sup>a</sup> 96

Source: USCIS analysis.

<sup>a</sup> Calculation: 69 percent (Entities classified as small by revenue) + 11 percent (Entities classified as small by number of employees) + 16 percent (Entities classified as small because no information found in database) = 96 percent (total number of small entities, rounded).

As previously stated, DHS classified each entity by its NAICS code to determine the size of each entity. Table

14 shows a list of the top 10 NAICS industries that submit an H-2A petition.

TABLE 14—TOP 10 NAICS INDUSTRIES SUBMITTING FORM I-129 FOR H-2A PETITIONS, SMALL ENTITY ANALYSIS RESULTS

Rank	NAICS code	NAICS U.S. industry title	Frequency	Size standards in millions of dollars <sup>a</sup>	Size standards in number of employees <sup>a</sup>	Percent
1	111998	All Other Miscellaneous Crop Farming	79	\$1.0		19.2
2	N/A	Unclassified Establishments	25	8.0		6.1
3	561499	All Other Business Support Services	15	16.5		3.6
4	111331	Apple Orchards	12	1.0		2.9
5	112111	Beef Cattle Ranching and Farming	12	1.0		2.9
6	112990	All Other Animal Production	9	1.0		2.2
7	111421	Nursery and Tree Production	8	1.0		1.9
8	424910	Farm Supplies Merchant Wholesalers	8		200	1.9
9	112112	Cattle Feedlots	7	8.0		1.7
10	561990	All Other Support Services	7	12.0		1.7

Source: USCIS analysis.

The Small Business Administration (SBA) has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR, section 121.201. At the time this analysis was conducted, NAICS 2017 classifications were in effect.

DHS used the methodology developed for H-2A petitions for H-2B petitions as well. Using FY 2018 to FY 2022 data on H-2B petitions, DHS collected internal data for each filing organization.<sup>282</sup> Each

entity may make multiple filings. For instance, there were 40,579 H-2B petitions filed over these 5 fiscal years by 8,506 unique entities. DHS devised a methodology to conduct the small entity

analysis based on a representative, random sample of the potentially impacted population. To achieve a 95 percent confidence level and a 5 percent confidence interval on a population of

<sup>279</sup> USCIS Office of Policy and Strategy, C3, ELIS (Oct. 19, 2022).

<sup>280</sup> Calculation: 368 + (368 × 10 percent) = 405.

<sup>281</sup> Calculation: 13,244 entities × 96 percent = 12,714 small entities (rounded).

<sup>282</sup> USCIS Office of Policy and Strategy, C3, ELIS (Oct. 19, 2022).

8,506 entities, DHS determined that a minimum sample size of 368 entities was necessary. DHS created a sample size 10 percent greater than the minimum statistically valid sample for a sample size of 368 in order to increase the likelihood that our matches would meet or exceed the minimum required sample.<sup>283</sup> Of the 405 entities sampled,

384 instances resulted in entities defined as small (see Table 15). Of the 384 small entities, 307 entities were classified as small by revenue or number of employees. The remaining 46 entities were classified as small because information was not found (either no petitioner name was found, or not enough information was found in the

databases). A total of 21 entities were classified as not small. Therefore, of the 8,506 entities that filed at least one Form I-129 in FY 2018 through FY 2022, DHS estimates that 95 percent or 8,175 entities are considered small based on SBA size standards.<sup>284</sup>

TABLE 15—SUMMARY AND RESULTS OF SMALL ENTITY ANALYSIS OF H-2B PETITIONS

Parameter	Quantity	Proportion of sample (percent)
Population—H-2B petitions .....	40,579	.....
Population—Unique H-2B Entities .....	8,506	.....
Minimum Required Sample .....	368	.....
Selected Sample .....	405	100
Entities Classified as “Not Small”:		
by revenue .....	20	5
by number of employees .....	1	0
Entities Classified as “Small”:		
by revenue .....	307	76
by number of employees .....	31	8
because not enough information found in databases .....	46	11
Total Number of Small Entities .....	384	<sup>a</sup> 95

Source: USCIS analysis.

<sup>a</sup> Calculation: 76 percent (Entities classified as small by revenue) + 8 percent (Entities classified as small by number of employees) + 11 percent (Entities classified as small because no information found in database) = 95 percent (total number of small entities, rounded).

As previously stated, DHS classified each entity by its NAICS code to determine each business’ size. Table 16

shows a list of the top 10 NAICS industries that submit an H-2B petition.

TABLE 16—TOP 10 NAICS INDUSTRIES SUBMITTING FORM I-129 FOR H-2B PETITIONS, SMALL ENTITY ANALYSIS RESULTS

Rank	NAICS code	NAICS U.S. industry title	Frequency	Size standards in millions of dollars <sup>a</sup>	Size standards in number of employees <sup>a</sup>	Percent
1	561730	Landscaping Services .....	56	8.0	.....	13.8
2	541320	Landscape Architectural Services .....	55	8.0	.....	13.6
3	721110	Hotels (except Casino Hotels) and Motels .....	22	35.0	.....	5.4
4	N/A	Unclassified Establishments .....	19	8.0	.....	4.7
5	722511	Full-Service Restaurants .....	12	8.0	.....	3.0
6	713910	Golf Courses and Country Clubs .....	12	16.5	.....	3.0
7	236115	New Single-Family Housing Construction (except For-Sale Builders).	10	39.5	.....	2.5
8	424460	Fish and Seafood Merchant Wholesalers .....	9	.....	100	2.2
9	238160	Roofing Contractors .....	6	16.5	.....	1.5
10	561990	All Other Support Services .....	6	12.0	.....	1.5

Source: USCIS analysis.

<sup>a</sup> The Small Business Administration (SBA) has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR section 121.201. At the time this analysis was conducted, NAICS 2017 classifications were in effect.

Because the random sample is drawn from the H-2 petitioner population at-large, it is not practical to estimate small entities’ representation within this noncooperative subpopulation. Thus, the IRFA assumes 12 percent of small entities, like larger entities, may have underestimated the reasonable, existing compliance burden of site visits and

thus incur some additional compliance costs.

Petitioner-employers are not expected to be impacted by proposed changes to the interrupted stay calculation. USCIS cannot determine how beneficiaries’ behavior would change as a result of this simplification to the USCIS calculation. If indirectly impacted

industries have evidence to the contrary, this IRFA affords the public the opportunity to comment upon this rationale before DHS would begin work on the FRFA. DHS welcomes public comments on this issue. Similarly, DHS does not expect flexibilities that allow beneficiaries to arrive in-country earlier would impose any compliance costs

<sup>283</sup> Calculation: 368 + (368 × 10 percent) = 405.

<sup>284</sup> Calculation: 8,506 entities × 95 percent = 8,175 small entities (rounded).

upon industries that choose to petition for or employ H–2 workers.

Table 3 shows that an average 13,722 H–2A petitions are received annually. Table 13 shows that 96 percent of entities that petition for H–2A workers are considered small based on SBA size standards. Therefore, DHS reasonably assumes that of the 13,722 H–2A petitions received, 13,500<sup>285</sup> petitions are submitted by small entities.

Table 4 shows that USCIS receives an average of 6,866 H–2B petitions annually. Table 15 shows that 95 percent of entities that petition for H–2B workers are considered small based on SBA size standards. Therefore, DHS reasonably assumes that of the 6,866 H–2B petitions received, 6,523<sup>286</sup> petitions are submitted by small entities.

d. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills

This proposed rule does not impose any new or additional direct “reporting” or “recordkeeping” requirements on filers of H–2 petitions. The proposed rule does not require any new professional skills for reporting. As discussed, to the extent that existing statutorily and regulatorily authorized site visits described in the current Form I–129 instructions result in neither a finding of compliance nor noncompliance (described throughout this rule as noncooperation), the proposal to revoke or deny petitions may result in unquantified additional compliance burdens to those petitioners that underestimate the reasonable burden of compliance with unannounced site visits. Under the proposed rule, a petitioner that was selected for a site visit and would not have cooperated under the baseline would face an (up to) 1.7-hour marginal time burden (on average) in order to comply with the provisions of the rule. Also, the provisions of this proposed rule regarding prohibited fees and labor law violations (see proposed 8 CFR 214.2(h)(5)(xi)(A) through (C), 8 CFR 214.2(h)(6)(i)(B) through (D) regarding prohibited fees. See proposed 8 CFR 214.2(h)(10)(iii) regarding labor law violations) would subject petitioners, including small entities, to future bars to petition approval should they engage

in activities that are prohibited by the proposed rule.

Denial or revocation of petitions for noncooperation with existing site visit and verification requirements is expected to impact 12 percent of petitioners who, despite agreeing to permit the statutorily and regulatorily authorized site visits on their Form I–129 petition, yielded inconclusive (“not defined”) site visit results. Petitioners that do not cooperate with all site visit requirements may have underestimated the reasonable compliance burden they assented to, and, due to this proposed rule, would experience or expect to experience additional compliance burden associated with unchanged site visits and verification activities. DHS notes that employers who do not cooperate would face denial or revocation of their petition(s), which could result in costs to those businesses such as potential lost revenue or potential lost profits due to not having access to workers.

Furthermore, the proposed rule causes direct costs to accrue to affected petitioners due to opportunity costs of time from both marginal time burden increases (for H Classification Supplement to Form I–129) and increased filing volumes (additional Forms I–129 filed due to the rule’s portability provision).

The increase in cost per petition to file the H classification supplement for Form I–129 on behalf of an H–2 worker is the additional opportunity cost of time of 0.3 hours. As previously stated in Section d(1) of the regulatory impact analysis, this proposed rule will add \$15.28<sup>287</sup> in costs if an HR specialist files, \$34.25<sup>288</sup> in costs if an in-house lawyer files, and \$59.06<sup>289</sup> in costs if an outsourced lawyer files.

In all instances, USCIS acknowledges that several aspects of the rule impose costs on affected entities. USCIS has determined, however, that these costs are outweighed by the benefits of increased program integrity and compliance. USCIS has considered opportunities to achieve the rule’s stated objectives while minimizing costs to small entities and welcomes public comment.

e. An Identification of All Relevant Federal Rules, to the Extent Practical, That May Duplicate, Overlap, or Conflict With the Proposed Rule.

DHS is unaware of any duplicative, overlapping, or conflicting Federal rules, but invites any comment and information regarding any such rules.

f. Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

DHS considered alternatives to elements of the proposed rule that would minimize the impact on small entities while still accomplishing the rule’s objectives, such as improving the integrity and efficiency of the H–2 program. First, USCIS acknowledges that, as discussed above, the vast majority (approximately 96% of H–2A petitioners and 95% of H–2B petitioners) of affected petitioners are small businesses. Therefore, costs due to the rule would necessarily be borne by those small businesses. Minimizing any costs due to the rule would therefore compromise the ability of this regulation to effectively address the goals stated in the preamble.

USCIS considered not proposing regulations that would revoke or deny petitioners refusing to cooperate with current statutorily and regulatorily authorized USCIS site visit and verification activities. Roughly 12 percent of current H–2 site visits are inconclusive due to noncooperation on the part of petitioners. USCIS’s inability to reach a conclusion concerning compliance or noncompliance concerning petitioners that triggered a site visit is critical to oversight of the program and integrity measures. The compliance burden for a small entity is not the duration of the site visit and verification activities, but rather the discrepancy between what USCIS and the assenting petitioner estimated such reasonable compliance burdens to be. USCIS will not consider permitting any small entity to willfully violate the statutory and regulatory requirements explained in the existing Form I–129 instructions, thus the IRFA alternative considered was rejected for failing to meet the rule’s objective of improving H–2 program integrity. Furthermore, 12 percent of USCIS resources dedicated toward investigating noncompliance with H–2 program requirements are sunk, resulting in no findings. USCIS investigative officers are an important tool and a scarce resource. These investigatory resources could be made

<sup>285</sup> Calculation: 13,722 petitions received annually  $\times$  96 percent = 13,173 submitted by small entities (rounded).

<sup>286</sup> Calculation: 6,866 annually selected petitions  $\times$  95 percent = 6,523 submitted by small entities (rounded).

<sup>287</sup> HR specialist calculation:  $\$50.94 \times (0.3 \text{ hours}) = \$15.28$  (rounded).

<sup>288</sup> In-house lawyer calculation:  $\$114.17 \times (0.3 \text{ hours}) = \$34.25$  (rounded).

<sup>289</sup> Outsourced lawyer calculation:  $\$196.85 \times (0.3) = \$59.06$  (rounded).

more effective if, at some additional compliance costs to would-be noncooperative small entities, USCIS was able to reach a finding. For this reason, USCIS rejected the IRFA alternative for failing to meet the rule's objective of improving H-2 efficiency with respect to USCIS investigative resources.

Finally, an additional objective of the rule is enhancement of worker protections. The IRFA alternative of minimizing additional compliance burdens to 12 percent of entities from site visits and verification activities was rejected because it risks undermining the impacts of other proposed provisions of this rule that are expected to achieve greater protections for workers who report violations. Furthermore, DHS considered not expanding porting to minimize those impacts to small entities, but concluded that the availability of porting is integral to accomplishing the objectives of enhancing program integrity and increasing worker protections.

### C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule that may result in a \$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.<sup>290</sup>

In addition, the inflation-adjusted value of \$100 million in 1995 is approximately \$192 million in 2022 based on the Consumer Price Index for All Urban Consumers ("CPI-U").<sup>291</sup>

The term "Federal mandate" means a Federal intergovernmental mandate or a

Federal private sector mandate.<sup>292</sup> The term "Federal intergovernmental mandate" means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).<sup>293</sup> The term "Federal private sector mandate" means, in relevant part, a provision that would impose an enforceable duty upon the private sector (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).<sup>294</sup>

This proposed rule does not contain such a mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by this rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA.<sup>295</sup> The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA. DHS has, however, analyzed many of the potential effects of this action in the regulatory impact analysis above.

### D. Executive Order 13132 (Federalism)

E.O. 13132 was issued to ensure the appropriate division of policymaking authority between the States and the Federal Government and to further the policies of the Unfunded Mandates Act. This proposed rule would 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. DHS does not expect that this rule would impose substantial direct compliance costs on State and local governments or preempt State law. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

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

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

### F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This proposed rule would not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

### G. National Environmental Policy Act

DHS and its components analyze proposed actions to determine whether the National Environmental Policy Act<sup>296</sup> (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive 023-01, Rev. 01 (Directive) and Instruction Manual 023-01-001-01, Rev. 01 (Instruction Manual)<sup>297</sup> establish the procedures DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA.<sup>298</sup> The CEQ regulations allow Federal agencies to establish in their NEPA implementing procedures categories of actions ("categorical exclusions") that experience has shown normally do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS).<sup>299</sup> Instruction Manual, Appendix A, Table 1 lists the DHS categorical exclusions.

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

<sup>296</sup> See Public Law 91-190, 42 U.S.C. 4321 through 4347.

<sup>297</sup> See DHS, *Implementing the National Environmental Policy Act*, DHS Directive 023-01, Rev 01 (Oct. 31, 2014), and DHS Instruction Manual Rev. 01 (Nov. 6, 2014), <https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex>.

<sup>298</sup> See 40 CFR parts 1500 through 1508.

<sup>299</sup> See 40 CFR 1501.4(a).

<sup>290</sup> 2 U.S.C. 1532(a).

<sup>291</sup> See U.S. Department of Labor, BLS, "Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, all items, by month," available at [www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202212.pdf](http://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202212.pdf) (last visited Jan. 19, 2023). *Calculation of inflation:* (1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2022); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100 = [(Average monthly CPI-U for 2022 - Average monthly CPI-U for 1995)/(Average monthly CPI-U for 1995)] \* 100 = [(292.655 - 152.383)/152.383] \* 100 = (140.272/152.383) \* 100 = 0.92052263 \* 100 = 92.05 percent = 92 percent (rounded). *Calculation of inflation-adjusted value:* \$100 million in 1995 dollars \* 1.92 = \$192 million in 2022 dollars.

<sup>292</sup> See 2 U.S.C. 1502(1), 658(6).

<sup>293</sup> 2 U.S.C. 658(5).

<sup>294</sup> 2 U.S.C. 658(7).

<sup>295</sup> See 2 U.S.C. 1502(1), 658(6).

create the potential for a significant environmental effect.<sup>300</sup>

This proposed rule includes a number of proposed regulatory improvements. If finalized, it will improve program integrity while increasing flexibility, efficiency, and improving access to the H-2 programs. Specifically, DHS proposes to clarify the fees prohibited under H-2 regulations, strengthen the prohibition on collecting such fees from H-2 workers, extend grace periods for H-2 workers to give them the same amount of flexibility to come to the United States early and prepare for employment, and to remain in the U.S. after their employment ends to prepare for departure or seek new employment. The proposed rule also includes a new, longer grace period for H-2 workers whose employment terminated early. DHS also proposes to make portability permanent in the H-2 programs, and to allow H-2 workers to take steps toward becoming permanent residents of the United States while still maintaining lawful nonimmigrant status. DHS further proposes efficiencies in H-2 program administration by eliminating the H-2 eligible countries lists and the H-2 “interrupted stay” provisions and reducing the period of absence needed to reset a worker’s 3-year maximum period of stay.

DHS is not aware of any significant impact on the environment, or any change in the environmental effect from current H-2 program rules, that will result from the proposed rule changes. DHS therefore finds this proposed rule clearly fits within categorical exclusion A3 established in the Department’s implementing procedures. Instruction Manual, Appendix A.

The proposed amendments, if finalized, would be stand-alone rule changes for USCIS H-2 programs and are not a part of any larger action. In accordance with the Instruction Manual, DHS finds no extraordinary circumstances associated with the proposed rules that may give rise to significant environmental effects requiring further environmental analysis and documentation. Therefore, this action is categorically excluded and no further NEPA analysis is required.

#### H. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. In preparation for the submission, all agencies are required to submit the proposed new, revised or discontinued

information collections for public comment. The paragraphs below summarize the changes proposed to OMB Control Number 1615-0009, *Petition for Nonimmigrant Worker* (Form I-129).

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615-0009 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency’s estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize 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 (e.g., permitting electronic submission of responses).

#### *Overview of information collection:*

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for Nonimmigrant Worker.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* I-129; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

*Primary:* Business or other for-profit. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer (or agent, where applicable) uses this form

to petition USCIS for a noncitizen to temporarily enter as a nonimmigrant worker. An employer (or agent, where applicable) also uses this form to request an extension of stay or change of status on behalf of the nonimmigrant worker. The form serves the purpose of standardizing requests for nonimmigrant workers and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under certain nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I-129 is 294,751 and the estimated hour burden per response is 2.34 hours; the estimated total number of respondents for the information collection E-1/E-2 Classification Supplement to Form I-129 is 4,760 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement to Form I-129 is 3,057 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection H Classification Supplement to Form I-129 is 96,291 and the estimated hour burden per response is 2.3 hours; the estimated total number of respondents for the information collection H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement is 96,291 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection L Classification Supplement to Form I-129 is 37,831 and the estimated hour burden per response is 1.34 hours; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I-129 is 22,710 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Q-1 Classification Supplement to Form I-129 is 155 and the estimated hour burden per response is 0.34 hour; and the estimated total number of respondents for the information collection R-1 Classification Supplement to Form I-129 is 6,635 and

<sup>300</sup> See Instruction Manual, section V.B.2 (a-c).

the estimated hour burden per response is 2.34 hours.

Form name/form No.	Number of respondents	Currently approved burden estimates	Difference (in hours)	New burden estimates
		Avg. burden per response (in hours)		Avg. burden per response (in hours)
Petition for Nonimmigrant Worker (Form I-129) .....	294,751	2.34	0	2.34
E-/E-2 Classification Supplement to Form I-129 .....	4,760	0.67	0	0.67
Trade Agreement Supplement to Form I-129 .....	3,057	0.67	0	0.67
H Classification Supplement to Form I-129 .....	96,291	2	0.3	2.3
H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement ....	96,291	1	0	1
L Classification Supplement to Form I-129 .....	37,831	1.34	0	1.34
O and P Classifications Supplement to Form I-129 .....	22,710	1	0	1
Q-1 Classifications Supplement to Form I-129 .....	155	0.34	0	0.34
R-1 Classifications Supplement to Form I-129 .....	6,635	2.34	0	2.34

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,101,697 hours. This is an increase from the current estimate of 1,072,810 burden hours annually. The overall change in burden estimates reflects the proposed changes in the rule related to the removal of the list of countries of citizenship section on the form and eligible countries list from the instructions, addition of question on exception to the three-year limit and requests for evidence, rewriting of questions and instructional content on prohibited fees and evidence and other H-2A and H-2B violations, addition of clarifying language to H-2A and H-2B petitioner and employer obligations questions, addition of questions and reformatting for the joint employer section, removal of E-Verify and corresponding H-2A petitions instructions, addition of instructional content in the recruitment of H-2A and H-2B workers section, removal of instructional content on interrupted stays, and addition of clarifying language to the notification requirements instructional content.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is \$70,681,290.

**List of Subjects**

*8 CFR Part 214*

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

*8 CFR Part 274a*

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, Reporting and recordkeeping requirements, Students.

**Regulatory Amendments**

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

**PART 214—NONIMMIGRANT CLASSES**

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

**Authority:** 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1188, 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. Section 214.2 is amended by:
  - a. Revising paragraph (h)(2)(i)(D);
  - b. Redesignating paragraph (h)(2)(i)(I) as paragraph (h)(2)(i)(J), and adding a new paragraph (h)(2)(i)(I);
  - c. Revising paragraphs (h)(2)(ii) and (iii);
  - d. Removing paragraph (h)(5)(i)(F);
  - e. Removing and reserving paragraph (h)(5)(iii)(B);
  - f. Revising paragraphs (h)(5)(vi)(A), (B)(1)(i) and (iii), and removing (h)(5)(vi)(E);
  - g. Revising paragraphs (h)(5)(viii)(B) and (C) and adding (D);
  - h. Revising paragraphs (h)(5)(ix) and (xi);
  - i. Removing paragraph (h)(5)(xii);
  - j. Revising paragraphs (h)(6)(i)(B) through (D);

- k. Removing and reserving paragraph (h)(6)(i)(E);
- l. Revising paragraph (h)(6)(i)(F);
- m. Revising paragraph (h)(6)(vii);
- n. Adding paragraph (h)(10)(iii);
- o. Adding paragraph (h)(11)(iv);
- p. Revising paragraphs (h)(13)(i), (iv) and (v);
- q. Revising paragraph (h)(16)(ii) and adding (h)(16)(iii);
- r. Revising paragraph (h)(20); and
- s. Adding paragraph (h)(30).

The revisions and additions read as follows:

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

\* \* \* \* \*  
 (h) \* \* \*  
 (2) \* \* \*  
 (i) \* \* \*

(D) *Change of employers.* If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition for a nonimmigrant worker requesting classification and an extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay must conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. Except as provided in paragraph (h)(2)(i)(I) of this section, 8 CFR 274a.12(b)(21), or section 214(n) of the Act, 8 U.S.C. 1184(n), the alien is not authorized to begin the employment with the new petitioner until the petition is approved. An H-1C nonimmigrant alien may not change employers.

\* \* \* \* \*

(I) *H-2A and H-2B portability.* An eligible H-2A or H-2B nonimmigrant is

authorized to start new employment upon the proper filing, in accordance with 8 CFR 103.2(a), of a nonfrivolous H-2A or H-2B petition on behalf of such alien requesting the same classification that the nonimmigrant alien currently holds, or as of the requested start date, whichever is later.

(1) *Eligible H-2A or H-2B nonimmigrant.* For H-2A and H-2B portability purposes, an eligible H-2A or H-2B nonimmigrant is defined as an alien:

(i) Who has been lawfully admitted into the United States in, or otherwise provided, H-2A or H-2B nonimmigrant status;

(ii) On whose behalf a nonfrivolous H-2A or H-2B petition for new employment has been properly filed, including a petition for new employment with the same employer, with a request to amend or extend the H-2A or H-2B nonimmigrant's stay in the same classification that the nonimmigrant currently holds, before the H-2A or H-2B nonimmigrant's period of stay authorized by the Secretary of Homeland Security expires; and

(iii) Who has not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment.

(2) *Length of employment.* Employment authorized under this paragraph (h)(2)(i)(I) automatically ceases upon the adjudication or withdrawal of the H-2A or H-2B petition described in paragraph (h)(2)(i)(I)(1)(ii) of this section.

(3) *Application of H-2A or H-2B program requirements during the pendency of the petition.* The petitioner and any employer is required to comply with all H-2A or H-2B program requirements, as applicable under the relevant program, with respect to an alien who has commenced new employment with that petitioner or employer based on a properly filed nonfrivolous petition and while that petition is pending, even if the petition is subsequently denied or withdrawn. During the pendency of the petition, the alien will not be considered to have been in a period of unauthorized stay or employed in the United States without authorization solely on the basis of employment pursuant to the new petition, even if the petition is subsequently denied or withdrawn.

(4) *Successive H-2A or H-2B portability petitions.* (i) An alien maintaining authorization for employment under this paragraph (h)(2)(i)(I), whose status, as indicated on the Arrival-Departure Record (Form I-

94), has expired, will be considered to be in a period of stay authorized by the Secretary of Homeland Security for purposes of paragraph (h)(2)(i)(I)(1)(ii) of this section. If otherwise eligible under this paragraph (h)(2)(i)(I), such alien may begin working in a subsequent position upon the filing of another H-2A or H-2B petition in the same classification that the nonimmigrant alien currently holds or from the requested start date, whichever is later, notwithstanding that the previous H-2A or H-2B petition upon which employment is authorized under this paragraph (h)(2)(i)(I) remains pending and regardless of whether the validity period of an approved H-2A or H-2B petition filed on the alien's behalf expired during such pendency.

(ii) A request to amend the petition or for an extension of stay in any successive H-2A or H-2B portability petition requesting the same classification that the nonimmigrant alien currently holds cannot be approved if a request to amend the petition or for an extension of stay in any preceding H-2A or H-2B portability petition in the succession is denied, unless the beneficiary's previously approved period of H-2A or H-2B status remains valid.

(iii) Denial of a successive portability petition does not affect the ability of the H-2A or H-2B beneficiary to continue or resume working in accordance with the terms of an H-2A or H-2B petition previously approved on behalf of the beneficiary if that petition approval remains valid, and the beneficiary has either maintained H-2A or H-2B status, as appropriate, or been in a period of authorized stay and has not been employed in the United States without authorization.

(ii) *Multiple beneficiaries.* More than one beneficiary may be included in an H-1C, H-2A, H-2B, or H-3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period of time, and in the same location.

(iii) *Naming beneficiaries.* H-1B, H-1C, and H-3 petitions must include the name of each beneficiary. Except as provided in this paragraph (h), all H-2A and H-2B petitions must include the name of each beneficiary who is currently in the United States, but need not name any beneficiary who is not currently in the United States. Unnamed beneficiaries must be shown on the petition by total number. USCIS may require the petitioner to name H-2B beneficiaries where the name is needed to establish eligibility for H-2B

nonimmigrant status. If all of the beneficiaries covered by an H-2A or H-2B temporary labor certification have not been identified at the time a petition is filed, multiple petitions for subsequent beneficiaries may be filed at different times but must include a copy of the same temporary labor certification. Each petition must reference all previously filed petitions associated with that temporary labor certification.

\* \* \* \* \*

(5) \* \* \*

(vi) \* \* \*

(A) *Consent.* In filing an H-2A petition, a petitioner and each employer consents to allow Government access to all sites where the labor is being or will be performed and where workers are or will be housed and agrees to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by USCIS, including an on-site inspection of the employer's facilities, review of the employer's records related to the compliance with immigration laws and regulations, and interview of the employer's employees and any other individuals possessing pertinent information, which may be conducted in the absence of the employer or the employer's representatives, as a condition for the approval of the petition. The interviews may be conducted on the employer's property, or as feasible, at a neutral location agreed to by the employee and USCIS away from the employer's property. If USCIS is unable to verify facts, including due to the failure or refusal of the petitioner or employer to cooperate in an inspection or other compliance review, then such inability to verify facts, including due to failure or refusal to cooperate, may result in denial or revocation of any H-2A petition for H-2A workers performing services at the location or locations that are a subject of inspection or compliance review.

(B) \* \* \*

(1) \* \* \*

(i) An H-2A worker does not report to work within 5 workdays of the employment start date on the H-2A petition or within 5 workdays of the start date established by their employer, whichever is later;

\* \* \* \* \*

(iii) The H-2A worker does not report for work for a period of 5 consecutive workdays without the consent of the employer or is terminated prior to the completion of agricultural labor or services for which they were hired.

\* \* \* \* \*

(viii) \* \* \*

(B) *Period of admission.* An alien admissible as an H-2A nonimmigrant will be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to 10 days before the beginning of the approved period for the purpose of travel to the worksite, and up to 30 days subject to the 3-year limitation in paragraph (h)(5)(viii)(C) of this section following the expiration of the H-2A petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period of the petition.

(C) *Limits on an individual's stay.* Except as provided in paragraph (h)(5)(viii)(B) of this section, an alien's stay as an H-2A nonimmigrant is limited by the period of time stated in an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H-2A or H-2B status for a total of 3 years may not again be granted H-2A status until such time as they remain outside the United States for an uninterrupted period of at least 60 days. Eligibility under this paragraph (h)(5)(viii)(C) will be determined during adjudication of a request for admission, change of status or extension. An alien found eligible for a shorter period of H-2A status than that indicated by the petition due to the application of this paragraph (h)(5)(viii)(C) will only be admitted for that shorter period.

(D) *Period of absence.* An absence from the United States for an uninterrupted period of at least 60 days at any time will result in the alien becoming eligible for a new 3-year maximum period of H-2 stay. To qualify, the petitioner must provide evidence documenting the alien's relevant absence(s) from the United States, such as, but not limited to, arrival and departure records, copies of tax returns, and records of employment abroad.

(ix) *Substitution of beneficiaries after admission.* An H-2A petition may be filed to replace H-2A workers whose employment was terminated earlier than the end date stated on the H-2A petition and before the completion of work; who do not report to work within 5 workdays of the employment start date on the H-2A petition or within 5 workdays of the start date established by their employer, whichever is later; or who do not report for work for a period of 5 consecutive workdays without the consent of the employer. The petition must be filed with a copy of the temporary labor

certification, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (h)(5)(i)(D) of this section. It must also be filed with a statement giving the name, date and country of birth, termination date, and the reason for termination, if applicable, for such worker and the date that USCIS was notified that the worker was terminated or did not report for work for a period of 5 consecutive workdays without the consent of the employer. A petition for a replacement will not be approved where the requirements of paragraph (h)(5)(vi) of this section have not been met. A petition for replacements does not constitute the notification required by paragraph (h)(5)(vi)(B)(1) of this section.

\* \* \* \* \*

(xi) *Treatment of petitions and alien beneficiaries upon a determination that fees were collected from alien beneficiaries—(A) Denial or revocation of petition for prohibited fees.* As a condition to approval of an H-2A petition, no job placement fee, fee or penalty for breach of contract, or other fee, penalty, or compensation (either direct or indirect), related to the H-2A employment (collectively, “prohibited fees”) may be collected at any time from a beneficiary of an H-2A petition by a petitioner, a petitioner's employee, agent, attorney, facilitator, recruiter, or similar employment service, or by any employer (if different from the petitioner) or any joint employer, including a member employer if the petitioner is an association of U.S. agricultural producers. The passing of a cost to the beneficiary that, by statute or applicable regulations is the responsibility of the petitioner, constitutes the collection of a prohibited fee. This provision does not prohibit petitioners (including its employees), employers or any joint employers, agents, attorneys, facilitators, recruiters, or similar employment services from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(1) If USCIS determines that the petitioner or any of its employees, whether before or after the filing of the H-2A petition, has collected, or entered into an agreement to collect, a prohibited fee related to the H-2A employment, the H-2A petition will be denied or revoked on notice unless the petitioner demonstrates through clear and convincing evidence that extraordinary circumstances beyond the petitioner's control resulted in its failure

to prevent collection or entry into agreement for collection of prohibited fees, and that it has fully reimbursed all affected beneficiaries or the beneficiaries' designees. To qualify for this exception, a petitioner must first establish the circumstances were rare and unforeseeable, and that it had made significant efforts to prevent prohibited fees prior to the collection of or agreement to collect such fees. Further, a petitioner must establish that it took immediate remedial action as soon as it became aware of the payment of the prohibited fee. Moreover, a petitioner must establish that it has fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, that it has fully reimbursed their designees. A designee must be an individual or entity for whom the beneficiary has provided the petitioner or its successor in interest prior written authorization to receive such reimbursement, as long as the petitioner or its successor in interest, or its agent, employer (if different from the petitioner), or any joint employer, attorney, facilitator, recruiter, or similar employment service would not act as such designee or derive any financial benefit, either directly or indirectly, from the reimbursement.

(2) If USCIS determines that the beneficiary has paid or agreed to pay a prohibited fee related to the H-2A employment, whether before or after the filing of the H-2A petition, to any agent, attorney, employer, facilitator, recruiter, or similar employment service, or any joint employer, including a member employer if the petitioner is an association of U.S. agricultural producers, the H-2A petition will be denied or revoked on notice unless the petitioner demonstrates to USCIS through clear and convincing evidence that it did not know and could not, through due diligence, have learned of such payment or agreement and that all affected beneficiaries or their designees have been fully reimbursed. A written contract between the petitioner and the agent, attorney, facilitator, recruiter, similar employment service, or member employer stating that such fees were prohibited will not, by itself, be sufficient to meet this standard of proof.

(B) *1-year bar on approval of subsequent H-2A petitions.* USCIS will deny any H-2A petition filed by the same petitioner or a successor in interest within 1 year after the decision denying or revoking on notice an H-2A or H-2B petition on the basis of paragraph (h)(5)(xi)(A) or (h)(6)(i)(B), respectively, of this section. In addition, USCIS will deny any H-2A petition filed by the same petitioner or successor

in interest within 1 year after withdrawal of an H-2A or H-2B petition that was withdrawn following USCIS issuance of a request for evidence or notice of intent to deny or revoke the petition on the basis of paragraph (h)(5)(xi)(A) or (h)(6)(i)(B), respectively, of this section.

(C) *Reimbursement as condition to approval of future H-2A petitions*—(1) *Additional 3-year bar on approval of subsequent H-2A petitions.* For an additional 3 years after the 1-year period described in paragraph (h)(5)(xi)(B) of this section, USCIS will deny any H-2A petition filed by the same petitioner or successor in interest, unless the petitioner or successor in interest demonstrates to USCIS that the petitioner, successor in interest, or the petitioner's or successor in interest's agent, facilitator, recruiter, or similar employment service, or any joint employer, including a member employer if the petitioner is an association of U.S. agricultural producers, reimbursed in full each beneficiary, or the beneficiary's designee, of the denied or revoked petition from whom a prohibited fee was collected.

(2) *Successor in interest.* For the purposes of paragraphs (h)(5)(xi)(B) and (C) of this section, successor in interest means an employer that is controlling and carrying on the business of a previous employer regardless of whether such successor in interest has succeeded to all of the rights and liabilities of the predecessor entity. The following factors may be considered by USCIS in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

- (i) Substantial continuity of the same business operations;
- (ii) Use of the same facilities;
- (iii) Substantial continuity of the work force;
- (iv) Similarity of jobs and working conditions;
- (v) Similarity of supervisory personnel;
- (vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;
- (vii) Similarity in machinery, equipment, production methods, or assets required to conduct business;
- (viii) Similarity of products and services;
- (ix) Familial or close personal relationships between predecessor and successor owners of the entity; and
- (x) Use of the same or related remittance sources for business payments.

(6) \* \* \*

(i) \* \* \*

(B) *Denial or revocation of petition for prohibited fees.* As a condition of approval of an H-2B petition, no job placement fee, fee or penalty for breach of contract, or other fee, penalty, or compensation (either direct or indirect), related to the H-2B employment (collectively, "prohibited fees") may be collected at any time from a beneficiary of an H-2B petition by a petitioner, a petitioner's employee, agent, attorney, facilitator, recruiter, or similar employment service, or any employer (if different from the petitioner). The passing of a cost to the beneficiary that, by statute or applicable regulations is the responsibility of the petitioner, constitutes the collection of a prohibited fee. This provision does not prohibit petitioners (including its employees), employers, agents, attorneys, facilitators, recruiters, or similar employment services from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(1) If USCIS determines that the petitioner or any of its employees, whether before or after the filing of the H-2B petition, has collected or entered into an agreement to collect a prohibited fee related to the H-2B employment, the H-2B petition will be denied or revoked on notice unless the petitioner demonstrates through clear and convincing evidence that extraordinary circumstances beyond the petitioner's control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees, and that it has fully reimbursed all affected beneficiaries or the beneficiaries' designees. To qualify for this exception, a petitioner must first establish that the circumstances were rare and unforeseeable, and that it had made significant efforts to prevent prohibited fees prior to the collection of or agreement to collect such fees. Further, a petitioner must establish that it took immediate remedial action as soon as it became aware of the payment of the prohibited fee. Moreover, a petitioner must establish that it has fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, that it has fully reimbursed their designees. A designee must be an individual or entity for whom the beneficiary has provided the petitioner or its successor in interest prior written authorization to receive such reimbursement, as long as the petitioner or its successor in interest, or its agent, employer, attorney, facilitator, recruiter, or similar employment service

would not act as such designee or derive any financial benefit, either directly or indirectly, from the reimbursement.

(2) If USCIS determines that the beneficiary has paid or agreed to pay any employer, agent, attorney, facilitator, recruiter, or similar employment service a prohibited fee related to the H-2B employment, whether before or after the filing of the H-2B petition, the H-2B petition will be denied or revoked on notice unless the petitioner demonstrates to USCIS through clear and convincing evidence that it did not know and could not, through due diligence, have learned of such payment or agreement and that all affected beneficiaries or their designees have been fully reimbursed. A written contract between the petitioner and the facilitator, recruiter, or similar employment service stating that such fees were prohibited will not, by itself, be sufficient to meet this standard of proof.

(C) *1-year bar on approval of subsequent H-2B petitions.* USCIS will deny any H-2B petition filed by the same petitioner or a successor in interest within 1 year after the decision denying or revoking on notice an H-2B or H-2A petition on the basis of paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), respectively, of this section. In addition, USCIS will deny any H-2B petition filed by the same petitioner or successor in interest within 1 year after withdrawal of an H-2B or H-2A petition that was withdrawn following USCIS issuance of a request for evidence or notice of intent to deny or revoke the petition on the basis of paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), respectively, of this section.

(D) *Reimbursement as condition to approval of future H-2B petitions*—(1) *Additional 3-year bar on approval of subsequent H-2B petitions.* For an additional 3 years after the 1-year period described in paragraph (h)(6)(i)(C) of this section, USCIS will deny any H-2B petition filed by the same petitioner or successor in interest, unless the petitioner or successor in interest demonstrates to USCIS that the petitioner or successor in interest, or the petitioner's or successor in interest's agent, facilitator, recruiter, or similar employment service, reimbursed in full each beneficiary, or the beneficiary's designee, of the denied or revoked petition from whom a prohibited fee was collected.

(2) *Successor in interest.* For the purposes of paragraphs (h)(6)(i)(C) and (D) of this section, successor in interest means an employer that is controlling and carrying on the business of a previous employer regardless of

whether such successor in interest has succeeded to all of the rights and liabilities of the predecessor entity. The following factors may be considered by USCIS in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

- (i) Substantial continuity of the same business operations;
- (ii) Use of the same facilities;
- (iii) Substantial continuity of the work force;
- (iv) Similarity of jobs and working conditions;
- (v) Similarity of supervisory personnel;
- (vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;
- (vii) Similarity in machinery, equipment, production methods, or assets required to conduct business;
- (viii) Similarity of products and services;
- (ix) Familial or close personal relationships between predecessor and successor owners of the entity; and
- (x) Use of the same or related remittance sources for business payments.

\* \* \* \* \*

(F) *Petitioner agreements and notification requirements*—(1) *Agreements*. The petitioner must notify DHS, within 2 workdays, and beginning on a date and in a manner specified in a notice published in the **Federal Register** if: An H-2B worker does not report for work within 5 workdays after the employment start date stated on the petition; the nonagricultural labor or services for which H-2B workers were hired were completed more than 30 days early; or an H-2B worker does not report for work for a period of 5 consecutive workdays without the consent of the employer or is terminated prior to the completion of the nonagricultural labor or services for which they were hired. The petitioner must also retain evidence of such notification and make it available for inspection by DHS officers for a 1-year period beginning on the date of the notification.

(2) *Consent*. In filing an H-2B petition, the petitioner and each employer (if different from the petitioner) consent to allow Government access to all sites where the labor is being or will be performed and agrees to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by USCIS, including an on-site inspection of the employer's facilities, review of the

employer's records related to the compliance with immigration laws and regulations, and interview of the employer's employees and any other individuals possessing pertinent information, which may be conducted in the absence of the employer or the employer's representatives, as a condition for the approval of the petition. The interviews may be conducted on the employer's property, or as feasible, at a neutral location agreed to by the employee and USCIS away from the employer's property. If USCIS is unable to verify facts, including due to the failure or refusal of the petitioner or employer to cooperate in an inspection or other compliance review, then such inability to verify facts, including due to failure or refusal to cooperate, may result in denial or revocation of any H-2B petition for H-2B workers performing services at the location or locations that are a subject of inspection or compliance review.

\* \* \* \* \*

(vii) *Admission*—(A) *Period of admission*. An alien admissible as an H-2B nonimmigrant will be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to 10 days before the beginning of the approved period for the purpose of travel to the worksite, and up to 30 days subject to the 3-year limitation in paragraph (h)(6)(vii)(B) of this section following the expiration of the H-2B petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period of the petition.

(B) *Limits on an individual's stay*. Except as provided in paragraph (h)(6)(vii)(A) of this section, an alien's stay as an H-2B nonimmigrant is limited by the period of time stated in an approved petition. An alien may remain longer to engage in other qualifying temporary nonagricultural employment by obtaining an extension of stay. However, an individual who has held H-2A or H-2B status for a total of 3 years may not again be granted H-2B status until such time as they remain outside the United States for an uninterrupted period of at least 60 days. Eligibility under this paragraph (h)(6)(vii)(B) will be determined during adjudication of a request for admission, change of status or extension of stay. An alien found eligible for a shorter period of H-2B status than that indicated by the petition due to the application of this paragraph (h)(6)(vii)(B) will only be admitted for that shorter period.

(C) *Period of absence*. An absence from the United States for an uninterrupted period of at least 60 days at any time will result in the alien becoming eligible for a new 3-year maximum period of H-2 stay. The limitation in paragraph (h)(6)(vii)(B) of this section will not apply to H-2B aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitation in paragraph (h)(6)(vii)(B) of this section will not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify, the petitioner must provide evidence documenting the alien's relevant absence(s) from the United States, such as, but not limited to, arrival and departure records, copies of tax returns, and records of employment abroad.

(D) *Traded professional H-2B athletes*. In the case of a professional H-2B athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after the player's acquisition by the new organization, within which time the new organization is expected to file a new application or petition for H-2B nonimmigrant classification. If a new application or petition is not filed within 30 days, employment authorization will cease. If a new application or petition is filed within 30 days, the professional athlete will be deemed to be in valid H-2B status, and employment will continue to be authorized, until the petition is adjudicated. If the new petition is denied, employment authorization will cease.

\* \* \* \* \*

(10) \* \* \*

(iii) *H-2A and H-2B violators*—(A) USCIS will deny any H-2A or H-2B petition filed by a petitioner, or the successor in interest of a petitioner as defined in paragraphs (h)(5)(xi)(C)(2) and (h)(6)(i)(D)(2) of this section, that has been the subject of one or more of the following actions:

(1) A final administrative determination by the Secretary of Labor under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503 debarbing the petitioner from filing or receiving a future labor certification, or a final administrative determination by the Governor of Guam debarbing the petitioner from issuance of future labor certifications under applicable Guam regulations and rules, if the petition is

filed during the debarment period, or if the debarment occurs during the pendency of the petition; or

(2) A final USCIS denial or revocation decision with respect to a prior H-2A or H-2B petition that includes a finding of fraud or willful misrepresentation of a material fact during the pendency of the petition or within 3 years prior to filing the petition; or

(3) A final determination of violation(s) under section 274(a) of the Act during the pendency of the petition or within 3 years prior to filing the petition.

(B) Except as provided in paragraph (h)(10)(iii)(A) of this section, USCIS may deny any H-2A or H-2B petition filed by a petitioner, or the successor in interest of a petitioner as defined in paragraphs (h)(5)(xi)(C)(2) and (h)(6)(i)(D)(2) of this section, that has been the subject of one or more of the following actions during the pendency of the petition or within 3 years prior to filing the petition. USCIS may deny such a petition if it determines that the petitioner or successor has not established its intention or the ability to comply with H-2A or H-2B program requirements. The violation(s) underlying the following actions may call into question a petitioner's or successor's intention or ability to comply:

(1) A final administrative determination by the Secretary of Labor or the Governor of Guam with respect to a prior H-2A or H-2B temporary labor certification that includes:

(i) Revocation of an approved temporary labor certification under 20 CFR part 655, subpart A or B, or applicable Guam regulations and rules;

(ii) Debarment under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503, or applicable Guam regulations and rules, if the debarment period has concluded prior to filing the petition; or

(iii) Any other administrative sanction or remedy under 29 CFR part 501 or 503, or applicable Guam regulations and rules, including assessment of civil money penalties as described in those parts.

(2) A USCIS decision revoking the approval of a prior petition that includes one or more of the following findings: the beneficiary was not employed by the petitioner in the capacity specified in the petition; the statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, or was inaccurate; the petitioner violated terms and conditions of the approved petition; or the petitioner violated requirements of

section 101(a)(15)(H) of the Act or this paragraph (h); or

(3) Any final administrative or judicial determination (other than one described in paragraph (h)(10)(iii)(A) of this section) that the petitioner violated any applicable employment-related laws or regulations, including health and safety laws or regulations.

(C) In determining whether the underlying violation(s) in paragraph (h)(10)(iii)(B) of this section calls into question the ability or intention of the petitioner or its successor in interest to comply with H-2A or H-2B program requirements, USCIS will consider all relevant factors, including, but not limited to:

(1) The recency and number of violations;

(2) The egregiousness of the violation(s), including how many workers were affected, and whether it involved a risk to the health or safety of workers;

(3) Overall history or pattern of prior violations;

(4) The severity or monetary amount of any penalties imposed;

(5) Whether the final determination, decision, or conviction included a finding of willfulness;

(6) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential financial injury to the workers;

(7) Timely compliance with all penalties and remedies ordered under the final determination(s), decision(s), or conviction(s); and

(8) Other corrective actions taken by the petitioner or its successor in interest to cure its violation(s) or prevent future violations.

(D) For purposes of paragraph (h)(10)(iii) of this section, a criminal conviction or final administrative or judicial determination against any one of the following individuals will be treated as a conviction or final administrative or judicial determination against the petitioner or successor in interest:

(1) An individual acting on behalf of the petitioning entity, which could include, among others, the petitioner's owner, employee, or contractor; or

(2) With respect to paragraph (h)(10)(iii)(B) of this section, an employee of the petitioning entity who a reasonable person in the H-2A or H-2B worker's position would believe is acting on behalf of the petitioning entity.

(E)(1) With respect to denials under paragraph (h)(10)(iii)(A) of this section, USCIS will inform the petitioner of the right to appeal the denial under 8 CFR

103.3, and indicate in the denial notice that the mandatory ground of denial will also apply in the adjudication of any other pending or future H-2 petition filed by the petitioner or a successor in interest during the applicable time period.

(2) With respect to denials under paragraph (h)(10)(iii)(B) of this section, USCIS will inform the petitioner of the right to appeal the denial under 8 CFR 103.3, and indicate in the denial notice that the discretionary ground of denial may also apply in the adjudication of any other pending or future H-2 petition filed by the petitioner or a successor in interest during the applicable time period.

(11) \* \* \*

(iv) Effect of H-2A or H-2B petition revocation. Upon revocation of the approval of an employer's H-2A or H-2B petition, the beneficiary and their dependents will not be considered to have failed to maintain nonimmigrant status, and will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)), solely on the basis of the petition revocation for a 60-day period following the date of the revocation, or until the end of the authorized period of admission, whichever is shorter. During such a period, the alien may only work as otherwise authorized under 8 CFR 274a.12. The employer will be liable for the alien beneficiary's reasonable costs of return transportation to their last place of foreign residence abroad, unless such alien obtains an extension of stay based on an approved petition in the same classification filed by a different employer.

\* \* \* \* \*

(13) \* \* \*

(i) *General.* (A) An H-3 beneficiary will be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition.

(B) When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under section 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count toward fulfillment of the required time abroad.

A certain period of absence from the United States of H-2A and H-2B aliens, as set forth in 8 CFR 214.2(h)(5)(viii)(D) and 8 CFR 214.2(h)(6)(vii)(C), respectively, will provide a new total of 3 years that H-2A or H-2B status may be granted. The petitioner must provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to reside abroad.

(C) An alien admitted or otherwise provided status in H-2A or H-2B classification and their dependents will not be considered to have failed to maintain nonimmigrant status, and will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)), solely on the basis of a cessation of the employment on which the alien's classification was based, for 60 consecutive days or until the end of the authorized period of admission, whichever is shorter, once during each authorized period of admission. During such a period, the alien may only work as otherwise authorized under 8 CFR 274a.12.

(D) An alien in any authorized period described in paragraph (C) of this section may apply for and be granted an extension of stay under 8 CFR 214.1(c)(4) or change of status under 8 CFR 248.1, if otherwise eligible.

\* \* \* \* \*

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

(v) *Exceptions.* The limitations in paragraphs (h)(13)(iii) and (iv) of this section will not apply to H-1B and H-3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitations will not

apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

\* \* \* \* \*

(16) \* \* \*

(ii) *H-2A or H-2B classification.* The approval of a permanent labor certification, the filing of a preference petition for an alien, or an application by an alien to seek lawful permanent residence or an immigrant visa, will not, standing alone, be the basis for denying an H-2 petition, a request to extend such a petition, or an application for admission in, change of status to, or extension of stay in H-2 status. The approval of a permanent labor certification, filing of a preference petition, or filing of an application for adjustment of status or an immigrant visa will be considered, together with all other facts presented, in determining whether the H-2 nonimmigrant is maintaining his or her H-2 status and whether the alien has a residence in a foreign country which he or she has no intention of abandoning.

(iii) *H-3 classification.* The approval of a permanent labor certification, or the filing of a preference petition for an alien currently employed by or in a training position with the same petitioner, will be a reason, by itself, to deny the alien's extension of stay.

\* \* \* \* \*

(20) *Retaliatory action claims.* (i) If credible documentary evidence is provided in support of a petition seeking an extension of H-1B stay in or change of status to another classification indicating that the beneficiary faced retaliatory action from their employer based on a report regarding a violation of that employer's labor condition application obligations under section 212(n)(2)(C)(iv) of the Act, USCIS may consider a loss or failure to maintain H-1B status by the beneficiary related to such violation as due to, and commensurate with, "extraordinary circumstances" as defined by § 214.1(c)(4) and 8 CFR 248.1(b).

(ii) If credible documentary evidence is provided in support of a petition seeking an extension of H-2A or H-2B stay in or change of status to another classification indicating that the beneficiary faced retaliatory action from their employer based on a reasonable claim of a violation or potential violation of any applicable program requirements or based on engagement in another protected activity, USCIS may consider a loss or failure to maintain H-2A or H-2B status by the beneficiary related to such violation as due to, and commensurate with, "extraordinary circumstances" as defined by § 214.1(c)(4) and 8 CFR 248.1(b).

\* \* \* \* \*

(30) *Severability.* The Department intends that should any of the [amendments made by "Modernizing H-2 Program Requirements, Oversight, and Worker Protections"], be held to be invalid or unenforceable by their terms or as applied to any person or circumstance they should nevertheless be construed so as to continue to give the maximum effect to the provision(s) permitted by law. If, however, such holding is that the provision(s) is wholly invalid and unenforceable, the [amendments to those provision(s)] should be severed from the remainder of [the rule], and the holding should not affect the remainder of the sections amended [by the rule] or the application of the provision(s) to persons not similarly situated or to dissimilar circumstances

#### 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; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 114-74, 129 Stat. 599; Title VII of Pub. L. 110-229, 122 Stat. 754; Pub. L. 115-218, 132 Stat. 1547; 8 CFR part 2.

■ 4. Section 274a.12 is amended by revising paragraph (b)(21) to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(21) A nonimmigrant alien within the class of aliens described in 8 CFR 214.2(h)(1)(ii)(C) or 8 CFR 214.2(h)(1)(ii)(D) for whom a nonfrivolous petition requesting an extension of stay is properly filed pursuant to 8 CFR 214.2 and 8 CFR 103.2(a) requesting the same classification that the nonimmigrant alien currently holds. Pursuant to 8 CFR

214.2(h)(2)(i)(I), such alien is authorized to start new employment upon the proper filing of the nonfrivolous petition requesting an extension of stay in the same classification, or as of the requested start date, whichever is later. The employment authorization under this paragraph (b)(21) automatically ceases upon the adjudication or

withdrawal of the H-2A or H-2B petition;

\* \* \* \* \*

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

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