DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 274a

[CIS No. 2731–22, DHS Docket No. USCIS–2022–0015]

RIN 1615–AC82

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

[DOL Docket No. ETA–]

RIN 1205–AC14

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

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

ACTION: Temporary rule; request for comments.

SUMMARY: The Secretary of Homeland Security, in consultation with the Secretary of Labor, is exercising his time-limited Fiscal Year (FY) 2023 authority and increasing the total number of noncitizens who may receive an H–2B nonimmigrant visa by up to, but no more than, a total of 64,716 for the entirety of FY 2023. To assist U.S. businesses that need workers to begin work on different start dates, the Departments have decided to distribute the supplemental visas in several allocations, including two separate allocations for the second half of fiscal year 2023. Out of the total 64,716 visas made available in this rule, the Departments have decided to reserve 20,000 visas for nationals of Guatemala, El Salvador, Honduras, or Haiti. The Departments will make all 64,716 visas available only to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, as attested by the employer on a new attestation form. In addition to making the additional 64,716 visas available under the FY 2023 time-limited authority, DHS is exercising its general H–2B regulatory authority to again provide temporary portability flexibility by allowing H–2B workers who are already in the United States to begin work immediately after an H–2B petition (supported by a valid temporary labor certification) is received by USCIS, and before it is approved.

DATES:

Effective dates: The amendments to title 8 of the Code of Federal Regulations in this rule are effective from December 15, 2022 through December 15, 2025. The amendments to title 20 of the Code of Federal Regulations in this rule are effective from December 15, 2022 through September 30, 2023, except for 20 CFR 655.67 which is effective from December 15, 2022 through September 30, 2026.

Petition dates: DHS will not accept any H–2B petitions under provisions related to the FY 2023 supplemental numerical allocations after September 15, 2023, and will not approve any such H–2B petitions after September 30, 2023. The provisions related to portability are only available to petitioners and H–2B nonimmigrant workers initiating employment through the end of January 24, 2024.

Submission of public comments: The Departments are accepting written comments on the temporary final rule and on the new information collection. Please follow the instructions in the **ADDRESSES** section to ensure your comment is submitted to the correct docket.

Comments on the Rule: All public comments on the temporary final rule, identified by DHS Docket No. USCIS–2022–0015, must be submitted on or before February 13, 2023. The electronic Federal Docket Management System will accept comments prior to midnight eastern time at the end of that day.

Comments on the Information Collection: The Office of Foreign Labor Certification within the U.S. Department of Labor will accept comments in connection with the new information collection Form ETA–9142B–CAA–7 associated with this rule until February 13, 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 written comments on the temporary final rule and/or new information collection. Please follow the instructions directly below depending on whether you are submitting a comment on the rule or the DOL Information Collection.

Comments on the rule: You may submit comments on the entirety of this temporary final rule package, identified by DHS Docket No. USCIS–2022–0015, through the Federal eRulemaking Portal: *https://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 USCIS or DHS officials, will not be considered comments on the temporary final rule and may not receive a response. Please note that 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 not accepting mailed comments at this time. If you cannot submit your comment by using *https://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 (not a toll-free call) for alternate instructions.

Comments on the Information Collection: You may submit written comments on the new information collection Form ETA–9142B–CAA–7, identified by Regulatory Information Number (RIN) 1205–AC14, electronically by the following method:

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

Instructions: Include the agency's name and the RIN 1205–AC14 in your submission. All comments received will become a matter of public record and will be posted without change to *https://www.regulations.gov.* Please do not include any personally identifiable information or confidential business information you do not want publicly disclosed.

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

Regarding 20 CFR part 655 and Form ETA–9142B–CAA–7: Brian D. Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Ave. NW, Room N–5311, Washington, DC 20210, telephone (202) 693–8200 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone

numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

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I. Executive Summary

FY 2023 H–2B Supplemental Cap

With this temporary final rule (TFR), the Secretary of Homeland Security, following consultation with the Secretary of Labor, is authorizing the release of an additional 64,716 H–2B visas for FY 2023, subject to certain conditions. The 64,716 visas are divided into the following allocations:

- For the first half of FY 2023: 18,216 immediately available visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2020, 2021, or 2022, regardless of country of nationality. The-se petitions must request employment start dates on or before March 31, 2023;
- For the early second half of FY 2023 (April 1 to May 14): 16,500 visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2020, 2021, or 2022, regardless of country of nationality. These early second half of FY 2023 petitions must request employment start dates from April 1, 2023, to May 14, 2023. Furthermore, employers must file these petitions no earlier than 15 days after the second half statutory cap [1] is reached;
- For the late second half of FY 2023: (May 15 to September 30): 10,000 visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2020, 2021, or 2022, regardless of country of nationality. These late second half of FY2023 petitions must request employment start dates from May 15, 2023, to September 30, 2023. Furthermore, employers must file these petitions no earlier than 45 days after the second half statutory cap is reached; and
- For the entirety of FY 2023: 20,000 visas reserved for nationals of El Salvador, Guatemala, and Honduras (Northern Central American countries) and Haiti as attested by the petitioner (regardless of whether such nationals are returning workers). Employers requesting an employment start date in the first half of FY 2023 may file such petitions immediately after the publication of this TFR. Employers requesting an employment start date in the second half of FY 2023 must file such petitions no earlier than 15 days after the second half statutory cap is reached.

To qualify for the FY 2023 supplemental caps provided by this temporary final rule, eligible petitioners must:

- Meet all existing H–2B eligibility requirements, including obtaining an approved temporary labor certification (TLC) from DOL before filing the Form I–129, Petition for a Nonimmigrant Worker, with USCIS;
- Properly file the Form I–129, Petition for Nonimmigrant Worker, with USCIS at its California Service Center on or before September 15, 2023;
- Submit an attestation affirming, under penalty of perjury, that the employer is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on the petition, and that they are seeking to employ returning workers only, unless the H–2B worker is a Salvadoran, Guatemalan, Honduran, or Haitian national and counted towards the 20,000 cap exempt from the returning worker requirement;
- Prepare and retain a detailed written statement describing how the employer is suffering irreparable harm or will suffer impending irreparable harm and how evidence demonstrates irreparable harm and supports their application; and
- Agree to comply with all applicable labor and employment laws, including health and safety laws pertaining to COVID–19, such as any rights to time off or paid time off to obtain COVID–19 vaccinations [2] or rights to reimbursement for travel to and from the nearest available vaccination site, and to notify the workers, in a language understood by the worker as necessary or reasonable, of equal access of nonimmigrants to COVID–19 vaccines and vaccination distribution sites.

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

- No later than 1 business day after filing the petition, place a new job order with the relevant State Workforce Agency (SWA) for at least 15 calendar days;
- Contact the nearest American Job Center serving the geographic area where work will commence and request staff assistance in recruiting qualified U.S. workers;
- Contact the employer's former U.S. workers, including those the employer furloughed or laid off beginning on January 1, 2021, and until the date the H–2B petition is filed, disclose the terms of the job order and solicit their return to the job;
- Provide written notification of the job opportunity to the bargaining representative for the employer's employees in the occupation and area of employment, or post notice of the job opportunity at the anticipated worksite if there is no bargaining representative;
- Where the occupation is traditionally or customarily unionized, provide written notification of the job opportunity to the nearest American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) office covering the area of intended employment, by providing a copy of the job order and requesting assistance in recruiting qualified U.S. workers for the job opportunity;
- Contact in writing and in a language understood by the worker, all U.S. workers currently employed at the place of employment, disclose the terms of the job order, and request assistance in recruiting qualified U.S. workers for the job;
- Where the employer maintains a website for its business operations, post

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

[2] The term ''COVID–19 vaccinations'' also includes COVID–19 booster shots.

the job opportunity in a conspicuous location on the employer's website; and

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

Petitioners filing H–2B petitions under this FY 2023 supplemental cap must retain documentation of compliance with the attestation requirements for 3 years from the date DOL approved the TLC, and must provide the documents and records upon the request of DHS or DOL, as well as fully cooperate with any compliance reviews such as audits.

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

Such non-compliance can harm U.S. workers by undermining wages and working conditions. It also directly harms H–2B workers. Further, H–2B workers depend on ongoing employment with the petitioning employer to maintain status in the United States. This dependence creates a power imbalance between the employer and H–2B worker, making the H–2B worker particularly vulnerable to exploitation and violations. In recognition of the substantial impact that non-compliance can have on both U.S. workers and H–2B workers, DHS and DOL again intend to conduct a significant number of audits focusing on irreparable harm and other worker protection provisions. And as it did as part of the FY 2022 second half H–2B supplemental cap TFR, DHS will again subject employers that have committed labor law violations in the H–2B program to additional scrutiny in the supplemental cap petition process.[3] DHS intends for this additional scrutiny to help ensure compliance with H–2B program requirements and obligations.

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

DHS will not approve H–2B petitions filed in connection with the FY 2023 supplemental cap authority on or after October 1, 2023.

H–2B Portability

In addition to exercising its time-limited authority to make additional FY 2023 H–2B visas available, DHS is again providing additional flexibilities to H–2B petitioners under its general programmatic authority by allowing nonimmigrant workers in the United States[4] in valid H–2B status and who are beneficiaries of non-frivolous H–2B petitions received on or after January 25, 2023, or who are the beneficiaries of non-frivolous H–2B petitions that are pending as of January 25, 2023, to begin work with a new employer after an H–2B petition (supported by a valid TLC) is filed and before the petition is approved, generally for a period of up to 60 days. However, such employment authorization would end 15 days after USCIS denies the H–2B petition or such petition is withdrawn. This H–2B portability ends one year after the provision's effective date of January 25, 2023, in other words, at the end of January 24, 2024.

II. Background

A. Legal Framework

The Immigration and Nationality Act (INA), as amended, establishes the H–2B nonimmigrant classification for a nonagricultural temporary worker ''having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.'' INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). Employers must petition DHS for classification of prospective temporary workers as H–2B nonimmigrants. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). Generally, DHS must approve this petition before the beneficiary can be considered eligible for an H–2B visa. In addition, the INA requires that ''[t]he question of importing any alien as [an H–2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS],[5] after consultation with appropriate agencies of the Government.'' INA section 214(c)(1), 8 U.S.C. 1184(c)(1). The INA generally charges the Secretary of Homeland Security with the administration and enforcement of the immigration laws, and provides that the Secretary ''shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority'' under the INA. *See* INA section 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3); *see also* 6 U.S.C. 202(4) (charging the Secretary with ''[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States''). With respect to nonimmigrants in particular, the INA provides that ''[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe.'' INA section 214(a)(1), 8 U.S.C. 1184(a)(1); *see also* INA section 274A(a)(1) and (h)(3), 8 U.S.C. 1324a(a)(1) and (h)(3) (prohibiting employment of noncitizens[6] not authorized for employment). The Secretary may designate officers or employees to take and consider evidence concerning any matter that is material or relevant to the enforcement of the INA. INA sections 287(a)(1), (b), 8 U.S.C. 1357(a)(1), (b) and INA section 235(d)(3), 8 U.S.C. 1225(d)(3).

Finally, under section 101 of the HSA, 6 U.S.C. 111(b)(1)(F), a primary mission

[3] *See Temporary Rule, Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking to Change Employers,* 87 FR 30334, 30335 (May 18, 2022).

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

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

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

of DHS is to ''ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.''

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

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

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

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

B. H–2B Numerical Limitations Under the INA

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

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

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

[7] The FY 2022 second half H–2B supplemental cap TFR included a portability provision at 8 CFR 214.2(h)(28)(iii)(A)(*1*)–(*2*), which remains in effect through January 24, 2023. *See Temporary Rule, Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 30334 (May 18, 2022).

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

[9] The Federal Government's fiscal year runs from October 1 of the prior year through September 30 of the year being described. For example, fiscal year 2023 is from October 1, 2022, through September 30, 2023.

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

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

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

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

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

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

Continued

for the first time in more than a decade, USCIS received sufficient H–2B petitions to reach the first half of the fiscal year statutory cap before the start of the fiscal year.[16] This occurred even earlier in FY 2023, when USCIS received enough H–2B petitions to reach the FY 2023 first-half statutory cap on September 12, 2022.[17] There has also been a trend in recent years of increased demand for H–2B workers in the second half of the fiscal year.[18]

Congress, in recognition of historical and current demand has, for the last several fiscal years, authorized supplemental caps.[19] The authorization for the current supplemental cap is under section 101(6) of Division A of Public Law 117–180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023 (FY 2023 authority), which extended the authorization previously provided in section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117–103 (FY 2022 Omnibus), as discussed below.

C. FY 2022 Omnibus and FY 2023 Public Law 117–180

On March 15, 2022, President Joseph Biden signed the FY 2022 Omnibus, which contains a provision, section 204 of Division O, Title II, permitting the Secretary of Homeland Security, under certain circumstances and after consultation with the Secretary of Labor, to increase the number of H–2B visas available to U.S. employers, notwithstanding the otherwise-established statutory numerical limitation set forth in the INA. Specifically, section 204 provides that ''the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied in [FY] 2022 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor,'' may increase the total number of noncitizens who may receive an H–2B visa in FY 2022 by not more than the highest number of H–2B nonimmigrants who participated in the H–2B returning worker program in any fiscal year in which returning workers were exempt from the H–2B numerical limitation. The highest number of returning workers in any such fiscal year was 64,716, which represents the number of beneficiaries covered by H–2B returning worker petitions that were approved for FY 2007.[20] The Secretary of Homeland Security consulted with the Secretary of Labor and, on May 18, 2022, published a temporary final rule implementing the authority contained in section 204.[21]

On September 30, 2022, Congress passed Public Law 117–180, which authorizes the Secretary of Homeland Security to increase the number of H–2B visas available to U.S. employers in FY 2023 under the same terms and conditions provided in section 204 of Division O of the FY 2022 Omnibus.[22] In other words, Public Law 117–180 permits the Secretary of Homeland Security, after consultation with the Secretary of Labor, to provide up to 64,716 additional H–2B visas for FY 2023, notwithstanding the otherwise-established statutory numerical limitation set forth in the INA, for eligible employers whose employment needs for FY 2023 cannot be met under the general fiscal year statutory cap.[23] Under the Public Law 117–180 authority, DHS and DOL are jointly publishing this temporary final rule to authorize the issuance of no more than 64,716 additional visas for FY 2023 to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, as attested by the employer on a new attestation form. The authority to approve H–2B petitions under this FY 2023 supplemental cap expires at the end of

2017); USCIS, *USCIS Reaches H–2B Cap for the First Half of Fiscal Year 2018, https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018* (Dec. 21, 2017); USCIS, *USCIS Reaches H–2B Cap for the First Half of Fiscal Year 2019, https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2019 (Dec. 12, 2018); USCIS, USCIS Reaches H–2B Cap for the First Half of Fiscal Year 2020, https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2020 (Nov. 20, 2019); USCIS, USCIS Reaches H–2B Cap for the First Half of Fiscal Year 2021, https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021* (Nov. 18, 2020).

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

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

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

[19] *See* section 543 of Division F of the Consolidated Appropriations Act, 2017, Public Law 115–31 (FY 2017 Omnibus); section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115–141 (FY 2018 Omnibus); section 105 of Division H of the Consolidated Appropriations Act, 2019, Public Law 116–6 (FY 2019 Omnibus); section 105 of Division I of the Further Consolidated Appropriations Act, 2020, Public Law 116–94 (FY 2020 Omnibus); section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116–260 (FY 2021 Omnibus); section 105 of Division O of the Consolidated Appropriations Act, 2021, FY 2021 Omnibus, sections 101 and 106(3) of Division A of Public Law 117–43, Continuing Appropriations Act, 2022, and section 101 of Division A of Public Law 117–70, Further Continuing Appropriations Act, 2022 through February 18, 2022 (together, FY 2022 authority); and section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117–103 (FY 2022 Omnibus).

[20] DHS also considered using an alternative approach of calculating the highest number of H–2B nonimmigrants who participated in the H–2B returning worker program, under which DHS measured the number of H–2B returning workers admitted at the ports of entry (66,792 for FY 2007). However, DHS considers USCIS petition data more accurate and verifiable than admission data when measuring workers approved for a certain fiscal year, as admission data may not accurately reflect which cap year the worker was approved for.

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

[22] *See* Public Law 117–180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Division A, section 101(6) (providing DHS funding and other authorities, including the authority to issue supplemental H–2B visas that was provided under title II of Division O of Pub. L. 117–103, through December 16, 2022).

[23] Appropriations and authorities provided by the continuing resolutions are available for the needs of the entire fiscal year to which the continuing resolution applies, although DHS's ability to obligate funds or exercise such authorities may lapse at the sunset of such resolution. *See, e.g.,* Comments on Due Date and Amount of District of Columbia's Contributions to Special Employee Retirement Funds, B–271304 (Comp. Gen. Mar. 19, 1996) (explaining that ''a continuing resolution appropriates the full annual amount regardless of its period of duration. . . . Standard continuing resolution language makes it clear that the appropriations are available to the extent and in the manner which would be provided by the pertinent appropriations act that has yet to be enacted (unless otherwise provided in the continuing resolution).''). Consistent with this principle, DHS interprets the current continuing resolution to provide DHS with the ability to authorize additional H–2B visa numbers with respect to all of FY 2023 subject to the same terms and conditions as the FY 2022 authority at any time before the continuing resolution expires, notwithstanding the reference to FY 2022 in the FY 2022 Omnibus.

that fiscal year. Therefore, USCIS will not approve H–2B petitions filed in connection with this FY 2023 supplemental cap authority on or after October 1, 2023.

As noted above, since FY 2017, Congress has enacted a series of public laws providing the Secretary of Homeland Security with the discretionary authority to increase the H–2B cap beyond the annual numerical limitation set forth in section 214 of the INA. The previous statutory provisions were materially identical to section 204 of the FY 2022 Omnibus, which is the same authority provided for FY 2023 by the recent continuing resolution. During each fiscal year from FY 2017 through FY 2019, as well as during FY 2021 and FY 2022, the Secretary of Homeland Security, after consulting with the Secretary of Labor, determined that some American businesses could not satisfy their needs in such year with U.S. workers who were willing, qualified, and able to perform temporary nonagricultural labor. On the basis of these determinations, on July 19, 2017, and May 31, 2018, DHS and DOL jointly published temporary final rules for FY 2017 and FY 2018, respectively, each of which allowed an increase of up to 15,000 additional H–2B visas for those businesses that attested that if they did not receive all of the workers requested on the Petition for a Nonimmigrant Worker (Form I–129), they were likely to suffer irreparable harm, in other words, suffer a permanent and severe financial loss.[24] USCIS approved a total of 12,294 H–2B for H–2B classification under petitions filed pursuant to the FY 2017 supplemental cap increase.[25] In FY 2018, USCIS received petitions for more than 15,000 beneficiaries during the first 5 business days of filing for the supplemental cap and held a lottery on June 7, 2018. The total number of H–2B workers approved toward the FY 2018 supplemental cap increase was 15,788.[26] The vast majority of the H–2B petitions received under the FY 2017 and FY 2018 supplemental caps requested premium processing (Form I–907)[27] and were adjudicated within 15 calendar days.

On May 8, 2019, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 30,000 additional H–2B visas for the remainder of FY 2019.[28] The additional visas were limited to returning workers who had been counted against the H–2B cap or were otherwise granted H–2B status in the previous three fiscal years, and for those businesses that attested to a level of need such that, if they did not receive all of the workers requested on the Form I–129, they were likely to suffer irreparable harm, in other words, suffer a permanent and severe financial loss.[29] The Secretary determined that limiting returning workers to those who were issued an H–2B visa or granted H–2B status in the past 3 fiscal years was appropriate, as it mirrored the standard that Congress designated in previous returning worker provisions. On June 5, 2019, approximately 30 days after the supplemental visas became available, USCIS announced that it received sufficient petitions filed pursuant to the FY 2019 supplemental cap increase. USCIS did not conduct a lottery for the FY 2019 supplemental cap increase. The total number of H–2B workers approved towards the FY 2019 supplemental cap increase was 32,680.[30] The vast majority of these petitions requested premium processing and were adjudicated within 15 calendar days.

Although Congress provided the Secretary of Homeland Security with the discretionary authority to increase the H–2B cap in FY 2020, the Secretary did not exercise that authority. DHS initially intended to exercise its authority and, on March 4, 2020, announced that it would make available 35,000 supplemental H–2B visas for the second half of the fiscal year.[31] On March 13, 2020, then-President Trump declared a National Emergency concerning COVID–19, a communicable disease caused by the coronavirus SARS-CoV–2.[32] On April 2, 2020, DHS announced that the rule to increase the H–2B cap was on hold due to economic circumstances, and that DHS would not release additional H–2B visas until further notice.[33] DHS also noted that the Department of State had suspended routine visa services.[34]

In FY 2021, although the COVID–19 public health emergency remained in effect, DHS in consultation with DOL determined it was appropriate to increase the H–2B cap for FY 2021 coupled with additional protections (for example, post-adjudication audits, investigations, and compliance checks), based on the demand for H–2B workers in the second half of FY 2021, continuing economic growth, the improving job market, and increased visa processing capacity by the Department of State. Accordingly, on May 25, 2021, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 22,000 additional H–2B visas for the remainder of FY 2021.[35] The supplemental visas were available only to employers that attested they were likely to suffer irreparable harm without the additional workers. The allocation of 22,000 additional H–2B visas under that rule consisted of 16,000 visas available only to H–2B returning workers from one of the last three fiscal years (FY 2018, 2019, or 2020) and 6,000 visas that were initially reserved for Salvadoran, Guatemalan, and Honduran nationals, who were exempt from the returning worker requirement. By August 13, 2021, USCIS had received enough petitions for returning workers to reach the additional 22,000 H–2B visas made available under the FY 2021 H–2B supplemental visa temporary final

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

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

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

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

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

[29] *See* 84 FR at 20021.

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

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

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

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

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

[35] *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).

rule.[36] The total number of H–2B workers approved towards the FY 2021 supplemental cap increase was 30,742.[37] This total number included approved H–2B petitions for 23,937 returning workers, as well as 6,805 beneficiaries from the Northern Central American countries.[38]

On January 28, 2022, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 20,000 additional H–2B visas for FY 2022 positions with start dates on or before March 31, 2022.[39] These supplemental visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the additional workers. The allocation of 20,000 additional H–2B visas under that rule consisted of 13,500 visas available only to H–2B returning workers from one of the last three fiscal years (FY 2019, 2020, or 2021) and 6,500 visas reserved for Salvadoran, Guatemalan, Honduran, and Haitian nationals, who were exempted from the returning worker requirement. USCIS data show that the total number of H–2B workers approved towards the first half FY 2022 supplemental cap increase was 17,381, including 14,150 workers under the returning worker allocation, as well as 3,231 workers approved towards the Haitian/Northern Central American allocation.[40]

Finally, DHS in consultation with DOL determined it was appropriate to increase the H–2B cap for FY 2022 positions with start dates beginning on April 1, 2022 through September 30, 2022, based on the continued demand for H–2B workers for the remainder of FY 2022, continuing economic growth, increased labor demand, and increased visa processing capacity by the Department of State. Accordingly, on May 18, 2022, DHS and DOL jointly published a temporary final rule authorizing an increase of no more than 35,000 additional H–2B visas for the second half of FY 2022.[41] As in the January 2022 TFR, the supplemental visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the additional workers. The allocation of 35,000 additional H–2B visas under the rule applicable to the second half of FY 2022 consisted of 23,500 visas available only to H–2B returning workers from one of the last three fiscal years (FY 2019, 2020, or 2021) and 11,500 visas reserved for Salvadoran, Guatemalan, Honduran, and Haitian nationals, who were exempted from the returning worker requirement. By May 25, 2022, USCIS had received enough petitions for returning workers to reach the additional 23,500 H–2B visas made available under the second half FY 2022 H–2B supplemental visa temporary final rule.[42] USCIS data show that the total number of H–2B workers approved towards the second half FY 2022 supplemental cap increase was 43,798, including 31,480 workers under the returning worker allocation, as well as 12,318 workers approved towards the Haitian/Northern Central American allocation.[43]

Once again, DHS in consultation with DOL believes that it is appropriate to increase the H–2B cap for FY 2023 based on the demand for H–2B workers in the first half of FY 2023, anticipated demand for the second half of FY 2023, recent economic growth, and strong labor demand.[44] DHS and DOL also believe that it is appropriate and important to couple this cap increase with additional worker protections, as described below.

D. Joint Issuance of the Final Rule

As in FY 2017, FY 2018, FY 2019, FY 2021, and FY 2022, DHS and DOL (the Departments) have determined that it is appropriate to jointly issue this temporary final rule.[45] The determination to issue the temporary final rule jointly follows conflicting court decisions concerning DOL's authority to independently issue legislative rules to carry out its consultative and delegated functions pertaining to the H–2B program under the INA.[46] Although DHS and DOL each have authority to independently issue rules implementing their respective duties under the H–2B program,[47] the Departments are implementing the numerical increase in this manner to ensure there can be no question about the authority underlying the administration and enforcement of the temporary cap increase. This approach is consistent with rules implementing DOL's general consultative role under INA section 214(c)(1), 8 U.S.C. 1184(c)(1), and delegated functions under INA sections 103(a)(6) and 214(c)(14)(B), 8 U.S.C. 1103(a)(6), 1184(c)(14)(B).[48]

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

[37] The number of approved workers exceeded the number of additional visas authorized for FY 2021 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2022, TRK 10625.

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

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

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

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

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

[43] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, queried 10/2022, TRK 10710.

[44] The term ''strong labor demand'' in this context relies on the most recently released figure from a Bureau of Labor Statistics (BLS) survey at the time this TFR was written. The BLS Job Openings and Labor Turnover Survey (JOLTS) reports 10.7 million job openings in August 2022. See DOL, BLS, Job Openings and Labor Turnover—September, *https://www.bls.gov/news.release/archives/jolts_11012022.pdf* (last visited November 2, 2022).

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

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

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

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

III. Discussion

A. Statutory Determination

Following consultation with the Secretary of Labor, the Secretary of Homeland Security has determined that some U.S. employers cannot satisfy their needs in FY 2023 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor. In accordance with the FY 2023 continuing resolution extending the authority provided in section 204 of the FY 2022 Omnibus, the Secretary of Homeland Security has determined that it is appropriate, for the reasons stated below, to raise the numerical limitation on H–2B nonimmigrant visas through the end of FY 2023 by up to 64,716 additional visas for those American businesses that attest that they are suffering irreparable harm or will suffer impending irreparable harm, in other words, a permanent and severe financial loss, without the ability to employ all of the H–2B workers requested on their petition.[49] These businesses must retain documentation, as described below, supporting this attestation.

As in connection with the FY 2021 and FY 2022 H–2B supplemental visa temporary final rules, and consistent with existing authority, DHS and DOL intend to conduct a significant number of audits with respect to petitions filed under this TFR requesting supplemental H–2B visas during the period of temporary need. The Departments will use their discretion to select which petitions to audit, and the Departments will use the audits to verify compliance with H–2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule. If the Departments find that an employer's documentation does not meet the irreparable harm standard, or that the employer fails to provide evidence demonstrating irreparable harm or comply with the audit process, the Departments may consider it to be a substantial violation resulting in an adverse agency action against the employer, including revocation of the petition and/or TLC or program debarment. Of the audits completed so far, some audits conducted of employers that received visas under the supplemental caps in FY 2021 and FY 2022 revealed concerns surrounding payment of the promised wage, employment of returning workers, documentation of irreparable harm, and employment at the listed location, which may warrant further review and action.

As he did in FY 2021 and in FY 2022, the Secretary of Homeland Security has also again determined, following consultation with the Secretary of Labor, that for certain employers, additional recruitment steps are necessary to confirm that there are no qualified U.S. workers available for the positions. In addition, the Secretary of Homeland Security has determined, following consultation with the Secretary of Labor, that the supplemental visas will be limited to returning workers, with the exception that up to 20,000 of the 64,716 visas will be exempt from the returning worker requirement and will be reserved for H–2B workers who are nationals of El Salvador, Guatemala, Honduras, and Haiti.[50] DHS is reserving these 20,000 H–2B visas for nationals of El Salvador, Guatemala, and Honduras pursuant to INA section 214(a)(1), 8 U.S.C. 1184(a)(1), as well as to further the objectives of E.O. 14010, which, among other initiatives, instructs the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access to visa programs for nationals of the Northern Central American countries.[51] DHS is also including Haiti in this allocation to further promote and improve safety, security, and economic stability throughout the region.[52] DHS observed robust employer interest in response to the FY 2021 H–2B supplemental visa allocation for Salvadoran, Guatemalan, and Honduran nationals and the FY 2022 supplemental visa allocations for Salvadoran, Guatemalan, Honduran, and Haitian nationals, with USCIS approving petitions on behalf of 6,805 beneficiaries under the FY 2021 allocation,[53] 3,231 beneficiaries under the FY 2022 first half supplemental allocation,[54] and 12,318 beneficiaries for the second half of the fiscal year FY 2022.[55] In addition, DHS and the Biden administration have continued to conduct outreach efforts promoting the H–2B program as, among other things, a

[49] The FY 2023 Continuing resolution extending authority contained in section 204 of Division O, Title II, of the FY 2022 Omnibus, DHS, under certain circumstances and after consultation with DOL, may increase the number of H–2B visas available to U.S. employers. DHS has the authority to establish the irreparable harm standard in seeking a supplemental H–2B visa. *See, e.g.,* INA sections 103 and 214 (8 U.S.C. 1103, 1184).

[50] These conditions and limitations are not inconsistent with sections 214(g)(3) (''first in, first out'' H–2B processing) and (g)(10) (fiscal year H–2B allocations) because noncitizens covered by the special allocation under section 204 of the FY 2022 Omnibus are not ''subject to the numerical limitations of [section 214(g)(1)].'' *See, e.g.,* INA section 214(g)(3); INA section 214(g)(10); Continuing Appropriations Act, 2023, div. A, sec. 101(6) (extending the authority provided in FY 2022 Omnibus div. O, sec. 204 (''Notwithstanding the numerical limitation set forth in section 214(g)(1)(B) of the [INA] . . . .'')).

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

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

[53] While USCIS approved a greater number of beneficiaries from the Northern Central American countries than the 6,000 visas allocated under the FY 2021 supplemental cap for those countries, the Department of State issued 3,065 visas on behalf of nationals from those countries. *See* DHS, USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, VIBE, DOS Visa Issuance Data queried 11.2021, TRK 8598. This discrepancy can be attributed to adverse impacts on consular processing caused by the COVID–19 pandemic, travel restrictions, as well as lack of readily available processes to efficiently match workers from Northern Central American countries with U.S. recruiters/employers on an expedited timeline.

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

[55] *See* DHS, USCIS, Office of Performance and Quality, C3 Consolidated, queried 10/2022, TRK 10710. While USCIS approved a greater number of beneficiaries from the Northern Central American countries and Haiti than the 11,500 visas allocated under the FY 2022 second half supplemental cap for those countries, the Department of State issued approximately 7,212 visas on behalf of nationals from those countries. *See* DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2022, TRK 10625. DHS anticipates that the normalization of consular services, easing of travel restrictions, the issuance of this rule earlier in the fiscal year, as well as the fact that this is the third year that DHS will make a specific allocation available for workers from the Northern Central American countries, will contribute to even greater utilization of available visas under this allocation during FY 2023.

lawful pathway for nationals of El Salvador, Guatemala, Honduras, and Haiti to work in the United States.[56] The decision to again reserve an allocation of supplemental H–2B visas for these nationals, while providing an exemption from the returning worker requirement, will provide ongoing support for the President's vision of expanding access to lawful pathways for protection and opportunity for individuals from these countries.[57] DHS will not accept and will reject petitions submitted for the Northern Central American and Haiti allocation with a date of need on or after April 1, 2023 that are received earlier than 15 days after the INA section 214(g) cap for the second half of FY 2023 is met or are received after the applicable numerical limitation has been reached or after September 15, 2023. Requiring petitioners to wait to submit H–2B supplemental cap petitions with start dates of need on or after April 1, 2023 is consistent with the supplemental cap authority in section 204, as extended to FY 2023 by Public Law 117–180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, and will facilitate the orderly intake and processing of supplemental cap petitions for the Northern Central American countries and Haiti. As discussed above, similar limitations apply to the intake and processing of returning worker petitions with start dates of need on or after April 1, 2023.

Similar to the previous temporary final rules for the FY 2019, FY 2021 and FY 2022 supplemental caps, the Secretary of Homeland Security has also determined to limit the supplemental visas to H–2B returning workers,[58] unless the employer indicates on the new attestation form that it is requesting workers who are nationals of one of the Northern Central American countries or Haiti and who are therefore counted towards the 20,000 allotment regardless of whether they are new or returning workers. If the 20,000 returning worker exemption cap for Salvadoran, Guatemalan, Honduran, and Haitian nationals is reached and visas remain available under the returning worker cap, USCIS would reject a petition seeking workers under the 20,000 allocation and return any fees submitted to the petitioner. In such a case, a petitioner may continue to request workers who are nationals of one of the Northern Central American countries or Haiti, but the petitioner must file a new Form I–129 petition, with fee, and attest that these noncitizens will be returning workers, in other words, workers who were issued H–2B visas or were otherwise granted H–2B status in FY 2020, 2021, or 2022.[59] Like the temporary final rules for the first half and for the second half of FY 2022, if the 20,000 returning worker exemption cap for nationals of the Northern Central American countries and Haiti remains unfilled, DHS will *not* make unfilled visas reserved for Northern Central American countries and Haiti available to the general returning worker cap. The DHS decision not to make available unfilled visas from the allocation for nationals of the Northern Central American countries and Haiti to the general supplemental cap for returning workers is consistent with the Biden administration's goals of providing lawful pathway for nationals of El Salvador, Guatemala, Honduras, and Haiti to temporarily work in the United States. To that end, not permitting rollover into the returning worker allocation provides employers with more time to petition for, and bring in, workers from these countries and encourages full use of the 20,000 allocation for nationals of El Salvador, Guatemala, Honduras, and Haiti to meet employer needs. This, in turn, contributes to our country's efforts to promote and improve safety, security and economic stability in these countries to help stem the flow of irregular migration to the United States.

The Secretary of Homeland Security's determination to increase the numerical limitation is based, in part, on the conclusion that some businesses are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on their petition. In recent years, members of Congress have informed the Secretaries of Homeland Security and Labor about the needs of some U.S. businesses for H–2B workers (after the statutory cap for the relevant half of the fiscal year has been reached) and about the potentially negative impact on state and local economies if the cap is not increased.[60] U.S. businesses, chambers of commerce, employer organizations, and state and local elected officials have also expressed concerns in recent years to the DHS and Labor Secretaries regarding the unavailability of H–2B visas after the statutory cap was reached.[61] In addition, an employer association and a member of Congress have urged the Departments to publish one rule covering the entire fiscal year for 2023 in order to save time in the second half of the fiscal year, conserve limited agency resources, and reduce uncertainty for employers.[62]

After considering the full range of evidence and diverse points of view, the Secretary of Homeland Security has deemed it appropriate to take action to prevent further severe and permanent financial loss for those employers currently suffering irreparable harm and to avoid impending irreparable harm for other employers unable to obtain H–2B workers under the statutory cap, including potential wage and job losses by their U.S. workers, as well as other adverse downstream economic effects.[63] At the same time, the Secretary of Homeland Security believes it is appropriate to condition receipt of supplemental visas on adherence to additional worker protections, as discussed below.

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

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

[58] For purposes of this rule, these returning workers could have been H–2B cap exempt or extended H–2B status in FY 2020, 2021, or 2022. Additionally, they may have been previously counted against the annual H–2B cap of 66,000 visas during FY 2020, 2021, or 2022, or the supplemental caps in FY 2019, 2021, or 2022.

[59] The returning worker allocations are for workers who were issued H–2B visas or held H–2B status in fiscal years 2020, 2021, or 2022, regardless of country of nationality. Therefore, a petitioner may choose to petition for Salvadoran, Guatemalan, Honduran, and Haitian nationals who meet this requirement under an available returning worker allocation, regardless of whether the separate allocation for nationals of the Northern Central American countries and Haiti has been reached.

[60] *See* the docket for this rulemaking for access to these letters.

[61] *See* the docket for this rulemaking for access to these letters.

[62] *See* the docket for this rulemaking for access to these letters.

[63] *See, e.g.,* Impacts of the H–2B Visa Program for Seasonal Workers on Maryland's Seafood Industry and Economy, Maryland Department of Agriculture Seafood Marketing Program and Chesapeake Bay Seafood Industry Association (March 2, 2020), available at *https://mda.maryland.gov/documents/2020-H2B-Impact-Study.pdf* (last visited Apr. 5, 2022); H–2B Seasonal Worker Program Challenges Threaten Maryland's Crab Industry, Economy and Jobs (February, 2022), available at *https://governor.maryland.gov/wp-content/uploads/2022/02/2022-H-2B-Economic-Impact-Study.pdf* (last visited Oct. 2, 2022).

The decision to afford the benefits of this temporary cap increase to U.S. businesses that need H–2B workers because they are suffering irreparable harm already or will suffer impending irreparable harm, and that will comply with additional worker protections, rather than applying the cap increase to any and all businesses seeking temporary workers, is consistent with DHS's time-limited authority to increase the cap, as explained below. The Secretary of Homeland Security, in implementing section 204, as extended by Public Law 117–180, and determining the scope of any such increase, has broad discretion, following consultation with the Secretary of Labor, to identify the business needs that are most relevant, while bearing in mind the need to protect U.S. workers. Within that context, for the below reasons, the Secretary of Homeland Security has determined to allow an overall increase of up to 64,716 additional visas solely for the businesses facing permanent, severe financial loss or those who will face such loss in the near future.

First, DHS interprets the reference to ''the needs of American businesses'' in section 204, as extended by Public Law 117–180, as describing a need different from the need ordinarily required of employers in petitioning for an H–2B worker. Under the generally applicable H–2B program, each individual H–2B employer must demonstrate that it has a temporary need for the services or labor for which it seeks to hire H–2B workers. *See* 8 CFR 214.2(h)(6)(ii); 20 CFR 655.6. The use of the phrase ''needs of American businesses,'' which is not found in INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), or the regulations governing the standard H–2B cap, authorizes the Secretary of Homeland Security in allocating additional H–2B visas under section 204, as extended by Public Law 117–180, to require that employers establish a need above and beyond the normal standard under the H–2B program, that is, an inability to find sufficient qualified U.S. workers willing and available to perform services or labor and that the employment of the H–2B worker will not adversely affect the wages and working conditions of U.S. workers, *see* 8 CFR 214.2(h)(6)(i)(A). DOL concurs with this interpretation. Accordingly, the Secretaries have determined that it is appropriate, within the limits discussed below, to tailor the availability of this temporary cap increase to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, in other words, those facing permanent and severe financial loss.

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

In sum, this rule increases the numerical limitation by up to 64,716 additional H–2B visas for the entirety of FY 2023, but also restricts the availability of those additional visas by prioritizing only the most significant business needs, and limiting eligibility to H–2B returning workers, unless the worker is a national of one of the Northern Central American countries or Haiti counted towards the 20,000 allocation that are exempt from the returning worker limitation. This rule also distributes the supplemental visas in several allocations to assist U.S. businesses that need workers to begin work on different start dates. These provisions are each described in turn below.

B. Numerical Increase and Allocations for Fiscal Year 2023

Making the Maximum Number of Visas Available

The increase of up to 64,716 visas will help address the urgent needs of eligible employers for additional H–2B workers for those employers with employment needs in fiscal year 2023.[64] The determination to allow up to 64,716 additional H–2B visas reflects a balancing of a number of factors including: the demand for H–2B visas during the first half of FY 2023 and expected demand for the second half of FY 2023; current labor market conditions; the general trend of increased demand for H–2B visas from FY 2017 to FY 2022; H–2B returning worker data; the amount of time for employers to hire and obtain H–2B workers in this fiscal year; concerns from Congress, state and local elected officials, U.S. businesses, chambers of commerce, and employer organizations expressing a need for additional H–2B workers; and the objectives of E.O. 14010. DHS believes the numerical increase both addresses the needs of U.S. businesses and, as explained in more detail below, furthers the foreign policy interests of the United States.

Section 204 of the FY 2022 Omnibus, as extended by Public Law 117–180, sets the highest number of H–2B returning workers who were exempt from the cap in certain previous years as the maximum limit for any increase in the H–2B numerical limitation for FY 2022.[65] Consistent with the statute's reference to H–2B returning workers, in determining the appropriate number by which to increase the H–2B numerical limitation, the Secretary of Homeland Security focused on the number of visas allocated to such workers in years in which Congress enacted returning worker exemptions from the H–2B numerical limitation. During each of the years the returning worker provision was in force, U.S. employers' standard business needs for H–2B workers exceeded the statutory 66,000 cap. The highest number of H–2B returning workers approved was 64,716 in FY 2007. In setting the number of additional H–2B visas to be made available for FY 2023, DHS considered this number, overall indications of increased need, and the availability of U.S. workers, as discussed below. On the basis of these considerations, DHS determined that it is appropriate to make available up to 64,716 additional visas, which is the maximum allowed, under the FY 2023 supplemental cap authority. The Secretary further considered the objectives of E.O. 14010, which among other initiatives, instructs the Secretary of Homeland Security and

[64] In contrast with section 214(g)(1) of the INA, 8 U.S.C. 1184(g)(1), which establishes a cap on the number of individuals who may be issued visas *or otherwise provided H–2B status* (emphasis added), and section 214(g)(10) of the INA, 8 U.S.C. 1184(g)(10), which imposes a first half of the fiscal year cap on H–2B issuance with respect to the number of individuals who may be issued visas *or are accorded [H–2B] status*'' (emphasis added), section 204 only authorizes DHS to increase the number of available H–2B *visas.* Accordingly, DHS will not permit individuals authorized for H–2B status pursuant to an H–2B petition approved under section 204 to change to H–2B status from another nonimmigrant status. *See* INA section 248, 8 U.S.C. 1258; *see also* 8 CFR part 248. If a petitioner files a petition seeking H–2B workers in accordance with this rule and requests a change of status on behalf of someone in the United States, the change of status request will be denied, but the petition will be adjudicated in accordance with applicable DHS regulations. Any noncitizen authorized for H–2B status under the approved petition would need to obtain the necessary H–2B visa at a consular post abroad and then seek admission to the United States in H–2B status at a port of entry.

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

the Secretary of State to implement measures to enhance access to visa programs for nationals of the Northern Central American countries, as well as to address some of the root causes of and manage migration throughout both North and Central America, which includes migration by Haitian nationals. Accordingly, the Secretary determined that it is appropriate to reserve up to 20,000 of the up to 64,716 additional visas and exempt this number from the returning worker requirement for nationals of the Northern Central American countries or Haiti.

In past years, the number of beneficiaries covered by H–2B petitions filed exceeded the number of additional visas allocated under recent supplemental caps. In FY 2018, USCIS received petitions for approximately 29,000 beneficiaries during the first 5 business days of filing for the 15,000 supplemental cap. USCIS therefore conducted a lottery on June 7, 2018, to randomly select petitions that it would accept under the supplemental cap. Of the selected petitions, USCIS issued approvals for 15,672 beneficiaries.[66] In FY 2019, USCIS received sufficient petitions for the 30,000 supplemental cap on June 5, 2019, but did not conduct a lottery to randomly select petitions that it would accept under the supplemental cap. Of the petitions received, USCIS issued approvals for 32,717 beneficiaries. In FY 2021, USCIS received a sufficient number of petitions for the 22,000 supplemental cap on August 13, 2021, including a significant number of workers from Northern Central American countries.[67] Of the petitions received, USCIS issued approvals for 30,742 beneficiaries, including approvals for 6,805 beneficiaries under the allocation for the nationals of the Northern Central American countries.[68]

In FY 2022, DHS made the supplemental cap available twice, once in January 2022 and again in May 2022. Under the earlier FY 2022 supplemental cap for petitions with start dates in the first half of FY 2022, USCIS had issued approvals for 17,381 beneficiaries, including approvals for 3,231 beneficiaries under the allocation for nationals of the Northern Central American countries and Haiti.[69] For the second half of FY 2022, within the first five business days of filing, USCIS received petitions for more beneficiaries than the additional 23,500 supplemental visas made available for returning workers, thus necessitating a random selection of petitions to meet the returning worker allotment.[70] Of the petitions received for the second half of FY 2022, USCIS issued approvals for 43,798 beneficiaries, including approvals for 12,318 beneficiaries under the allocation for nationals of the Northern Central American countries and Haiti.[71]

Data for the first half of FY 2023 clearly indicate an immediate need for additional supplemental H–2B visas for employers with start dates on or before March 31, 2023. USCIS received a sufficient number of H–2B petitions to reach the first half of the FY 2023 fiscal year statutory cap on September 12, 2022.[72] Further, the date on which USCIS received sufficient H–2B petitions to reach the first half semiannual statutory cap has trended earlier in recent years. In fiscal years 2017 through 2023, USCIS received a sufficient number of H–2B petitions to reach or exceed the relevant first half statutory cap on January 10, 2017, December 15, 2017, December 6, 2018, November 15, 2019, November 16, 2020, September 30, 2021, and September 12, 2022, respectively.[73]

In addition, although the public health emergency due to COVID–19 still exists,[74] DHS believes that issuing additional H–2B visas is appropriate in the context of the nation's economic recovery from the ongoing pandemic. For example, the unemployment rate declined to 3.7% in October 2022 from a pandemic high of 14.7% in April 2020.[75] In March 2020, the U.S. labor market was severely affected by the onset of the COVID–19 pandemic, pushing the national unemployment rate to near record levels and resulting in millions of U.S. workers being displaced from work.[76]

In fiscal year 2022, approximately 87.7 percent of H–2B filings were for positions within just 5 sectors.[77] NAICS 56 (Administrative and Support and Waste Management and Remediation Services) accounted for 40.0% of filings,

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

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

[68] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2022, TRK 10625. The number of approved workers exceeded the number of additional visas authorized for FY 2018, FY 2019, as well as for FY 2021 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. Unlike these past supplemental cap TFRs, petitions filed under the first half FY 2022 TFR did not exceed the additional allocation of 20,000 H–2B visas provided by that rule.

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

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

[71] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, queried 10/2022, TRK 10710.

[72] *See* USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2023, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023* (last updated Sept. 14, 2022).

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

[74] *See* HHS, *Renewal of Determination That A Public Health Emergency Exists, https://aspr.hhs.gov/legal/PHE/Pages/covid19-13Oct2022.aspx* (Oct. 13, 2022).

[75] *See* BLS Employment Situation News Release, *https://www.bls.gov/news.release/archives/empsit_11042022.htm* (November 4, 2022); BLS, *Labor Force Statistics from the Current Population Survey, https://data.bls.gov/timeseries/LNS14000000* (data extracted November 4, 2022).

[76] The April 2020 unemployment rate was 14.7%. *See https://www.bls.gov/new.release/archives/empsit_05082020.htm* (Oct. 21,2022).

[77] USCIS analysis of DOL OLFC Performance data.

NAICS 71 (Accommodation and Food Services) accounted for 11.0%, NAICS 72 (Arts, Entertainment, and Recreation) accounted for 22.0%, NAICS 23 (Construction) accounted for 12.0%, and NAICS 11 (Agriculture, Forestry, Fishing and Hunting) accounted for 2.7% of filings.

Within these industries, DOL data show higher labor demand relative to recent history. More specifically, Bureau of Labor Statistics (BLS) data from the November 1, 2022 Job Openings and Labor Turnover Survey (JOLTS) show that the rate of job openings [78] for all 5 industries was higher in September 2022 than the average over the last 36 months. In September 2022 the job opening rate for NAICS 56 [79] was 7.9 percent, which is 0.92 percentage points higher than its 3-year average of 6.98 percent, while the job opening rate for NAICS 71 was 8.4 percent which is 3.49 percentage points higher than its 3-year average of 4.91 percent. The September 2022 job opening rate for NAICS 72 was 3.60 percentage points higher than its 3-year average of 5.90 percent while the rate for NAICS 23 was 1.09 percentage points higher than its 3-year average of 4.11 percent. The job opening rate for NAICS 11 [80] was 0.43 percentage points higher than its 3-year average of 3.87 percent. For comparison, the job opening rate for all industries was 6.5 percent in September 2022.[81]

JOLTS: 36-Month Average of Job Opening Rate				
NAICS 11*	NAICS 23	NAICS 56*	NAICS 71	NAICS 72
3.87	4.11	6.98	4.91	5.90
*Supersectors are being used as a proxy, see footnotes 82 and 83.				

JOLTS: September 2022 Job Opening Rate				
NAICS 11*	NAICS 23	NAICS 56*	NAICS 71	NAICS 72
4.30	5.20	7.90	8.40	9.50
*Supersectors are being used as a proxy, see footnotes 82 and 83.				

The continued strength in the job openings rate across these industries is a clear indication of a strong labor demand within these industries. The Departments believe that the supplemental allocation of H–2B visas described in this temporary final rule will help to meet demand from job openings in these industries.

Other economy-wide data also indicate that labor-market tightness exists. The most recent Employment Situation released by the Bureau of Labor Statistics (BLS) stated that the unemployment rate decreased to 3.7% in October 2022.[82] Historically, the availability of H–2B visas addressed a need in the labor market during periods of lower unemployment. Chart 1 [83] shows that the H–2B visa allocations for Fiscal Year 2023 [84] made by this rule are slightly higher than the historical trend, but are generally consistent with what the current unemployment rate alone would predict. Additionally, when the unemployment rate is below 6%, there is greater variance in the total number of H–2B visas issued in a given year; for example, in years 2022, 2007 and 2006, when the unemployment rate ranged from approximately 3.5% to 4.6%, the total number of H–2B visas issued were comparable to what is planned for 2023. The data presented in chart 1 is meant to provide additional context and to demonstrate that the total allocation of H–2B visas is reasonable given labor market conditions.

[78] The JOLTS News Release states that the job openings rate is calculated by dividing the number of job openings by the sum of employment and job openings and multiplying that quotient by 100. *See https://www.bls.gov/news.release/archives/jolts_11012022.pdf* (last visited November 2, 2022).

[79] JOLTS data presented here are for the Professional and Business Services Supersector, which is comprised of NAICS 54, NAICS 55 and NAICS 56. *See https://www.bls.gov/iag/tgs/iag60.htm.* As such, the data presented here should be understood to be the best possible proxy for changes in NAICS 56 and not a direct measurement of any specific change in the actual underlying sectors. The latest data available, for October 2022, from the Department of Labor's Current Employment Statistics program indicates that NAICS 56 accounted for just under 43% of employment in Professional Business Services. All data accessed November 16, 2022.

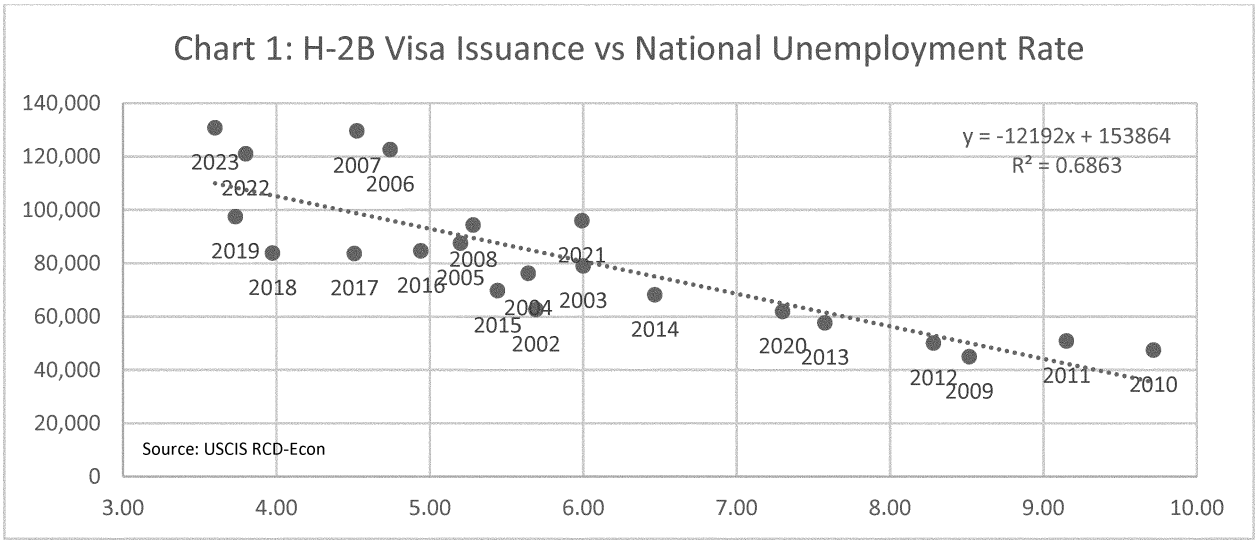
[80] JOLTS data presented here are for Mining and Logging, which is part of the Natural Resources and Mining Supersector. This supersector is comprised of NAICS 11 (Agriculture, Forestry, Fishing and Hunting) and NAICS 21 (Mining, Quarrying, and Oil and Gas Extraction). *See https://www.bls.gov/iag/tgs/iag10.htm.* As such, the data presented here should be understood to be the best possible proxy for changes in NAICS 11 and not a direct measurement of any specific change in the actual underlying sectors. The latest data available, for October 2022, from the Department of Labor's Current Employment Statistics program indicates that NAICS 11 accounted for just over 7% of employment in Natural Resources and Mining. All data accessed November 16, 2022.

[81] *See https://www.bls.gov/news.release/archives/jolts_11012022.pdf* (last visited November 2, 2022).

[82] *See* DOL, BLS, *The Employment Situation—October 2022, https://www.bls.gov/news.release/archives/empsit_11042022.pdf* (Nov. 4, 2022).

[83] Annual data presented here is on a fiscal year basis. Fiscal year averages were calculated by taking the average of the monthly unemployment rate for the months in each respective fiscal year (October–September). Data for 2022 are based on data for October 2021–September 2022.

[84] Estimated visas issued for Fiscal Year 2023 is based on the sum of the fiscal year statutory cap for H–2B workers (66,000) and the supplemental allocation for this rule (64,716), for a total H–2B visa allocation of 130,716.



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

Making Allocations For All of FY 2023 in a Single Rule

This rule is the first time that DHS has made supplemental visas available for an entire fiscal year in a single rule. DHS believes that it is appropriate to issue a single rule for the entire fiscal year for multiple reasons.[85] First, DHS expects that there is demand for supplemental visas in the first half of FY 2023. As previously discussed, USCIS already received enough petitions to reach the congressionally mandated cap on H–2B visas for temporary nonagricultural workers for the first half of FY 2023.[86] Further, the date on which USCIS received sufficient H–2B petitions to reach the first half semiannual statutory caps has trended earlier in recent years. In fiscal years 2017 through 2023, USCIS received a sufficient number of H–2B petitions to reach or exceed the relevant first half statutory cap on January 10, 2017, December 15, 2017, December 6, 2018, November 15, 2019, November 16, 2020, September 30, 2021, and September 12, 2022, respectively.[87]

Second, based on relevant data, DHS expects that USCIS will reach the statutory cap for the second half of FY 2023 and that there will accordingly be demand for supplemental visas in the second half of FY 2023. For example, in fiscal years 2017 through 2022, USCIS received a sufficient number of H–2B petitions to reach or exceed the relevant second half statutory cap on March 13, 2017, February 27, 2018, February 19, 2019, February 18, 2020, February 12, 2021, and February 25, 2022.[88] In addition, DOL data shows consistently high demand in recent years, particularly during the second half of the fiscal year. In recent years, DOL has received an increasing number of TLC applications for an increasing number of H–2B workers with April 1 start dates: DOL received 4,500 applications on January 1, 2018, covering more than 81,600 worker positions; DOL received 5,276 applications by January 8, 2019, covering more than 96,400 worker positions; DOL received 5,677 applications during the initial three-day filing window in 2020 covering 99,362 worker positions; DOL received 5,377 applications during the initial three-day filing window in 2021 covering 96,641 worker positions; and DOL received 7,875 applications by January 7, 2022, covering 136,555 worker positions.[89]

Publishing one rule that addresses all the visas available for FY 2023 benefits the regulated public by giving more notice and certainty of what will become available for the second half. This allows businesses to better plan ahead for their seasonal workforce needs.[90]

Filing Deadline of September 15, 2023 for all Petitions

The authority to approve H–2B petitions under this FY 2023 supplemental cap expires at the end of the fiscal year, *i.e.,* the end of September 30, 2023. Therefore, DHS is requiring employers requesting any supplemental visas under this TFR, regardless of the employment start date(s), to properly file their H–2B petition with USCIS no

[85] Further, DHS believes that 64,716 is an appropriate number of supplemental visas to make available, as this rule will cover both the first and second half of FY 2023.

[86] *See* USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2023, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023#:~:text=U.S.%20Citizenship%20and%20Immigration%20Services,fiscal%20year%20(FY)%202023* (Sep. 14, 2022).

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

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

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

[90] See the letter from the H–2B Workforce Coalition contained in the docket for this rulemaking.

later than September 15, 2023. USCIS will reject any cases that are received after September 15, 2023. *See* new 8 CFR 214.2(h)(6)(xiii)(C). Because DHS believes that 15 days from the end of the fiscal year is the minimum time needed for petitions to be adjudicated, DHS has set September 15, 2023 as the latest filing date to provide USCIS with adequate time for petition processing before the expiration of the authority at the end of the fiscal year, although USCIS cannot guarantee that a 15-day period will be sufficient for adjudication of petitions in all cases.

In addition, the filing deadline will be earlier than September 15, 2023 if the applicable numerical limit for the relevant supplemental visa allocation is reached before that date. *See* new 8 CFR 214.2(h)(6)(xiii)(C). In such a case, USCIS will also reject any cases that are received after the applicable numerical limitation has been reached.

Returning Worker Allocation for the First Half of FY 2023 (October 1, 2022 Through March 31, 2023)

For the first half of FY 2023, DHS will make 18,216 visas immediately available upon publication of this TFR that are limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2020, 2021, or 2022, regardless of country of nationality. These petitions must request a date of need starting on or before March 31, 2023. *See* new 8 CFR 214.2(h)(6)(xiii)(C).

DHS anticipates that employers will use all of the first half allocation for returning workers, given how quickly USCIS reached the FY 2023 first half statutory cap. As noted previously, USCIS received enough H–2B petitions to reach the FY 2023 first half statutory cap on September 12, 2022, which is several weeks earlier than when USCIS reached the FY 2022 first half statutory cap on September 30, 2021 [91] and is the earliest the first half cap has been reached since at least FY 2017. In addition, the relatively early publication of this rule will provide interested employers more time to prepare their petitions, increasing the likelihood that the first half allocation for returning workers will be used.[92] To the extent that the first half allocation for returning workers is used, this TFR may provide affected employers with some relief by making available a separate allocation of visas for nationals of El Salvador, Guatemala, Honduras, and Haiti, which will be available for the entirety of FY 2023.

In the event that USCIS approves insufficient petitions to use all 18,216 visas, the unused numbers will not carry over for the second half allocation because DHS believes that the operational burdens of calculating and administering a process to carry over unused visas, combined with the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations, would outweigh the benefits. In order to make any unused first half visas available for employers with second half start dates, DHS would need to set a filing cutoff date prior to September 15, 2023 for the first half allocation, upon which it would stop accepting such petitions and make a calculation of how many visas should be re-released for second half employers. Calculating visas to be re-released could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which would significantly increase operational burdens. In addition to increasing operational burdens, DHS believes that the opening, closing, and potential re-opening of this allocation (and/or other cap allocations) could cause confusion for the public and adjudicators. Furthermore, not setting a filing cutoff date prior to September 15, 2023 will maximize employers' opportunity to avail themselves of the first half allocation. While DHS acknowledges that this approach could potentially result in some employers with a demonstrated business need in the second half of the fiscal year losing the opportunity to receive a supplemental visa, it is DHS's expectation that there will be sufficient demand from employers with first half start dates to use the entire allocation.

Initial Returning Worker Allocation for the Early Second Half (April 1, 2023, Through May 14, 2023)

For the second half of FY 2023, DHS will initially make available 16,500 visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2020, 2021, or 2022, regardless of country of nationality. These petitions must request a date of need starting on or after April 1, 2023, through and including May 14, 2023. Limiting this allocation to employers with employment start dates on or before May 14, 2023 reflects DHS's intentions to give employers with needs later in the season a better opportunity to access the H–2B program, and to prevent employers from petitioning under both of the second-half allocations to fill the same need.

To mitigate complications from concurrent administration of the statutory second half cap, these petitions must be filed no earlier than 15 days after the second half statutory cap is reached, a date that USCIS will identify in a public announcement.[93] When USCIS announces that it has received a sufficient number of petitions to reach the second half statutory cap, it will also announce the earliest possible filing date (15 days after the second half statutory cap) for this allocation. Concurrent administration of the second half statutory cap with the second half supplemental cap would pose significant operational challenges, particularly considering the volume of H–2B petitions USCIS would have to process at the same time. A cushion of 15 days after the second half statutory cap is reached should provide USCIS with sufficient time to process H–2B petitions filed under the second half statutory cap and prepare to process petitions under this supplemental cap, and should also provide petitioners not selected under the statutory cap with enough time to refile under this supplemental cap. Furthermore, making this allocation available *after* the second half statutory cap has been reached builds in flexibility to account for variations in the timing of that cap being reached. DHS cannot predict with certainty when the FY 2023 second half statutory cap will be reached (or if it will be reached), and therefore, did not specify a date for when to first allow petitioners to file for FY 2023 second half supplemental visas. In the event that the statutory second half FY 2023 cap is not reached, the supplemental allocation for returning workers for the second half of FY 2023 will not become available.

Based on historical data showing increasingly high demand for H–2B workers with April 1 start dates, DHS expects all 16,500 visas to be used quickly once the supplemental allocation becomes available. However, in the event that USCIS approves insufficient petitions to use all 16,500

[91] *See https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022* (Oct 12, 2021); *https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023* (Sept. 14, 2022).

[92] Compare the publication date of this rule with January 28, 2022, the date the temporary final rule increasing the supplemental cap for the first half of FY2022 was first published.

[93] Pursuant to new 8 CFR 214.2(h)(6)(xiii)(C)(*2*), USCIS will reject petitions filed pursuant to paragraph (h)(6)(xii)(A)(*1*)(*b*) of this section requesting employment start dates from April 1, 2023 to May 14, 2023 that are received earlier than 15 days after the INA section 214(g) cap for the second half FY 2023 has been met.

visas, the unused numbers will not carry over for petition approvals for employment start dates beginning on or after May 15, 2023. DHS chose to limit these 16,500 visas to start dates on or before May 14, 2023, without the ability for these visas to be carried over into the next allocation. As previously stated, DHS believes that the operational burdens of calculating and administering a process to carry over unused visas, combined with the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations, would outweigh the benefits. In order to make any unused visas from this allocation available for late second half of FY 2023 petitions, DHS would need to set a filing cutoff date that would be after the cutoff for the first half allocation but prior to any cutoff for late second half of FY 2023 petitions and prior to September 15, 2023, upon which it would stop accepting petitions and make a calculation of how many visas should be re-released for late second half employers. Calculating visas to be re-released could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which would significantly increase operational burdens. In addition to increasing operational burdens, DHS believes that the opening, closing, and potential re-opening of this allocation (and/or other cap allocations) could cause confusion for the public and adjudicators. Furthermore, not setting a filing cutoff date prior to September 15, 2023 will maximize employers' opportunity to avail themselves of the early second half allocation. While DHS acknowledges that this approach could result in employers in the late second half losing the opportunity to receive a supplemental visa, it is DHS's expectation that there will be sufficient demand from employers to use this entire allocation.

Additional Returning Worker Allocation for the Late Second Half (On or After May 15, 2023, Through September 30, 2023)

For the late second half of FY 2023, DHS will make available an additional allocation of 10,000 visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2020, 2021, or 2022, regardless of country of nationality. To assist employers needing workers to begin work during the late spring and summer seasons in the fiscal year (also referred to as ''late season employers''), these petitions must request a date of need starting on or after May 15, 2023. These petitions must be filed no sooner than 45 days after the second half statutory cap is reached, a date that USCIS will identify in a public announcement.[94] When USCIS announces that it has received a sufficient number of petitions to reach the second half statutory cap, it will also announce the earliest possible filing date (45 days after the second half statutory cap) for this allocation. The cushion of 45 days after the second half statutory cap is reached is intended to provide USCIS with sufficient time to process H–2B petitions filed under the second half statutory cap that remain pending, as well as to process the expected influx of petitions under the early second half supplemental cap that will begin 15 days after the second half statutory cap is reached.[95] By allowing USCIS to manage its workload in this way, the 45-day period will help USCIS prepare to process petitions under the late second half supplemental cap and to mitigate the complications from concurrent administration of these various caps.

This is the first supplemental cap reserved for late season employers that need workers to begin work during the late spring and summer seasons in the fiscal year. By regulation, employers may only apply for a TLC 75 to 90 days before the start date of need,[96] and, as such, employers needing workers to begin work on or after May 15 are not eligible to file TLC applications until on or after February 15. In past years, because of this requirement and the strong demand for H–2B workers in recent years to begin work on the earliest employment start date (*i.e.,* April 1), late season employers were unable to receive cap-subject H–2B workers because they did not have an opportunity to file visa petitions for cap-subject H–2B workers before the second semiannual statutory cap was reached. Since, based on recent years' data,[97] USCIS has typically received sufficient H–2B petitions to meet the statutory cap for the second half of the fiscal year around mid-February, many of these late season employers may have decided to not file a TLC application. Therefore, DHS, in consultation with DOL, has determined that it is appropriate to make a separate allocation available for late season employers whose late season labor needs may have put them at a disadvantage in accessing H–2B workers in recent years. DHS, in consultation DOL, has determined that authorizing two allocations for the second half of FY 2023 based on an employer's start date of need, in addition to requiring that the employer's start date of need on the Form I–129 match the start date of need on the approved TLC,[98] will provide employers with late season needs a better opportunity to receive H–2B workers to avoid irreparable harm. Specifically, employers with early season needs that need work to begin on or after April 1 will have the opportunity to file H–2B petitions under both the statutory cap and the first allocation of the supplemental cap, while employers with late season needs do not have that opportunity.

A review of TLC requests for employment start dates on or after May 15 through September 30 of FY 2016, which was the last year in which Congress enacted the returning worker exemption, indicates that OFLC received approximately 892 applications from late season employers requesting TLCs for more than 17,650 H–2B positions and, of this, certified approximately 13,200 H–2B positions. However, for the last six fiscal years, Congress has not enacted a returning worker exemption, and the statutory second half semiannual visa allocation was reached months in advance of May. Accordingly, this has given rise to the concern that the intense competition for H–2B visas among employers requesting TLCs for the earliest possible employment start date of April 1 has resulted in the semiannual allocation of H–2B visas being effectively unavailable for many employers who need workers to start late in the season.

To mitigate complications from concurrent administration of the additional returning worker allocation for the second half of the fiscal year for late season employers and either the statutory second half cap or the initial supplemental allocation for returning

[94] Pursuant to new 8 CFR 214.2(h)(6)(xiii)(C)(*3*), USCIS will reject petitions filed pursuant to paragraph (h)(6)(xii)(A)(*1*)(*c*) of this section requesting employment start dates from May 15, 2023 to September 30, 2023, that are received earlier than 45 days after the INA section 214(g) cap for the second half FY 2023 has been met.

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

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

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

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

workers for the second half of the fiscal year (or both), these petitions must be filed no earlier than 45 days after the second half statutory cap is reached. When USCIS announces that it has received a sufficient number of petitions to reach the second half statutory cap, it will also announce the earliest possible filing date (45 days after the second half statutory cap) for this allocation. In the event that the statutory second half FY 2023 cap is not reached, this supplemental allocation for late season filers workers will not become available. Furthermore, in the event that USCIS does not approve sufficient petitions to use all 10,000 visas for late season employers, DHS will not carry over the unused numbers for petition approvals for any other allocation. For example, any unused numbers would not carry over to petitions for workers from El Salvador, Guatemala, Honduras, or Haiti. As noted above, DHS believes the operational burdens of calculating and administering a process to carry over unused visas would outweigh the benefits because of the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations. A process to carry over unused visas could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which significantly increase operational burdens and may add further confusion to the public and adjudicators.

Allocation for Nationals of El Salvador, Guatemala, Honduras, and Haiti

DHS will make available 20,000 additional visas that are reserved for nationals of El Salvador, Guatemala, and Honduras (Northern Central American countries) and Haiti as attested by the petitioner (regardless of whether such nationals are returning workers). These 20,000 visas will be available for petitioners requesting an employment start date before the end of FY 2023, up to and including September 30, 2023.

While prior years' allocations for nationals of the Northern Central American countries and Haiti have not been reached, DHS anticipates a higher likelihood that the 20,000 visas allocated for these nationals by this rule will be reached by the end of this fiscal year. As discussed above, DHS observed robust employer interest in response to the FY 2021 H–2B supplemental visa allocation for Salvadoran, Guatemalan, and Honduran nationals and the FY 2022 supplemental visa allocations for Salvadoran, Guatemalan, Honduran, and Haitian nationals, and the data show a trend of increased participation by Haitian, Salvadoran, Guatemalan, and Honduran workers in the H–2B program.[99] Furthermore, the publication of this rule relatively early in the fiscal year, and the availability of this allocation for the entirety of FY 2023, also increase the likelihood that the 20,000 visas will be used.

Employers requesting workers from one of the Northern Central American countries or Haiti with an employment start date in the first half of FY 2023 may file their petitions immediately after the publication of this TFR. Employers requesting workers from one of the Northern Central American countries or Haiti with an employment start date in the second half of FY 2023 must file their petitions no earlier than 15 days after the second half statutory cap is reached. The requirement to file the petition no earlier than 15 days after the second half statutory cap is reached is consistent with the approach taken for the initial returning worker allocation for the early second half of the fiscal year, and is in line with the Departments' interpretation of their authority to make available supplemental (or in other words, additional) visas as contingent upon the exhaustion of visas under the statutory cap.[100]

The Departments have decided not to further divide the 20,000 visas for workers from one of the Northern Central American countries or Haiti into separate allocations for the first and second half of the fiscal year. The Departments intend for this additional flexibility of allowing any employment start date within FY 2023 to encourage U.S. employers that are suffering irreparable harm or will suffer impending irreparable harm to seek out workers from such countries, and, at the same time, increase interest among nationals of the Northern Central American countries and Haiti seeking a legal pathway for temporary employment in the United States. While this approach could potentially result in employers with start dates in the first half of FY 2023 using all 20,000 visas for nationals of the Northern Central American countries and Haiti, and consequently, employers with start dates in the second half of FY 2023 losing the opportunity to utilize this particular allocation, DHS believes that the benefits of increasing the flexibility of this allocation outweighs the potential risk. Moreover, employers with start dates in the second half of FY 2023 seeking to employ nationals of the Northern Central American countries and Haiti may request a visa under one of the two second half supplemental allocations which are available for returning workers regardless of country of nationality.

In the event that USCIS does not approve sufficient petitions to use all 20,000 visas limited to nationals of the Northern Central American countries and Haiti by the end of FY 2023, DHS will not carry over the unused numbers for petition approvals for any other allocation. For example, any unused numbers would not carry over to petitions for returning workers with employment start dates in the second half of FY 2023. As noted above, DHS believes the operational burdens of calculating and administering a process to carry over unused visas would outweigh the benefits because of the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations. A process to carry over unused visas could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which significantly increase operational burdens and may add further confusion to the public and adjudicators. Further, this single filing cutoff approach provides employers with incentive and more time to petition for, and bring in, workers from El Salvador, Guatemala, Honduras, and Haiti to meet employer needs, consistent with the Biden administration's efforts and outreach to promote and improve safety, security, and economic stability in these countries.

Process if Cap Allocations Are Reached

Finally, recognizing the high demand for H–2B visas, it is plausible that the additional H–2B supplemental allocations provided in this rule will be reached prior to September 15, 2023. Specifically, the following scenarios may still occur:

• The 18,216 supplemental cap visas limited to returning workers that will be

[99] As previously noted, USCIS approved petitions on behalf of 6,805 beneficiaries under the FY 2021 allocation, 3,231 beneficiaries under the FY 2022 first half supplemental allocation, and 12,318 beneficiaries for the second half of the fiscal year FY 2022. *See* DHS, USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, VIBE, DOS Visa Issuance Data queried 11.2021, TRK 8598; DHS, USCIS, Office of Performance and Quality, C3 Consolidated, queried 10/2022, TRK 10710; DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2022, TRK 10625.

[100] Pursuant to new 8 CFR 214.2(h)(6)(xiii)(C)(*4*), USCIS will reject petitions filed pursuant to paragraph (h)(6)(xii)(A)(*2*) of this section that have a date of need on or after April 1, 2023 and are received earlier than 15 days after the INA section 214(g) cap for the second half of FY 2023 is met.

immediately available for employers with dates of need on or after October 1, 2022, through March 31, 2023, will be reached before September 15, 2023;

- The 16,500 supplemental cap visas limited to returning workers that will be available for employers with dates of need starting on or after April 1, 2023, through May 14, 2023, will be reached before September 15, 2023;
- The 10,000 supplemental cap visas limited to returning workers that will be available for late season employers with dates of need on or after May 15, 2023, through September 30, 2023, will be reached before September 15, 2023; or
- The 20,000 supplemental cap visas limited to nationals of the Northern Central American countries and Haiti will be reached before September 15, 2023.

Under this rule, new 8 CFR 214.2(h)(6)(xiii)(D) reaffirms the existing processes that are in place when H–2B numerical limitations under INA section 214(g)(1)(B) or (g)(10), 8 U.S.C. 1184(g)(1)(B) or (g)(10), are reached,[101] as applicable to each of the scenarios described above that involve numerical limitations of the supplemental cap. Specifically, for each of the scenarios mentioned above, DHS will monitor petitions received, and make projections of the number of petitions necessary to achieve the projected numerical limit of approvals. USCIS will also notify the public of the dates that USCIS has received the necessary number of petitions (the ''final receipt dates'') for each of these scenarios. The day the public is notified will not control the final receipt dates. Moreover, USCIS may randomly select, via computer-generated selection, from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals for each of the scenarios involving numerical limitations to the supplemental cap. USCIS may, but will not necessarily, conduct a lottery if: the 18,216 supplemental cap visas limited to returning workers that will be immediately available for employers with dates of need on or after October 1, 2022, through March 31, 2023, is reached before September 15, 2023; the 16,500 supplemental cap visas limited to returning workers that will be available for employers with dates of need on or after April 1, 2023, through May 14, 2023, is reached before September 15, 2023; the 10,000 supplemental cap visas limited to returning workers that will be available for late season employers with dates of need on or after May 15, 2023, through September 30, 2023, is reached before September 15, 2023; or the 20,000 visas limited to nationals of the Northern Central American countries and Haiti is reached before September 15, 2023. Similar to the processes applicable to the H–2B semiannual statutory cap, if the final receipt date is any of the first 5 business days on which petitions subject to the applicable numerical limit may be received (in other words, if the numerical limit is reached on any one of the first 5 business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those 5 business days.

C. Returning Workers

As noted above, to address the increased and, in some cases, impending need for H–2B workers in this fiscal year, the Secretary of Homeland Security, in consultation with the Secretary of Labor, has determined that employers may petition for supplemental visas on behalf of up to 44,716 workers who were issued an H–2B visa or were otherwise granted H–2B status in FY 2020, 2021, or 2022. This temporal limitation mirrors the prior fiscal year's temporal limitation in the returning worker definition [102] and the temporal limitation Congress imposed in previous returning worker statutes.[103] Such workers (in other words, those who recently participated in the H–2B program and who now seek a new H–2B visa from DOS) may obtain their new visas through DOS and begin work more expeditiously because they have previously obtained H–2B visas and therefore have been vetted by DOS and would have departed the United States as generally required by the terms of their nonimmigrant admission.[104] DOS has informed DHS that, in general, H–2B visa applicants who are able to demonstrate clearly that they have previously abided by the terms of their status granted by DHS have a higher visa issuance rate when applying to renew their H–2B visas, as compared with the overall visa applicant pool from a given country. Furthermore, consular officers are authorized to waive the in-person interview requirement for certain nonimmigrant visa applicants, including certain H–2B applicants renewing visas in the same classification within 48 months of the prior visa's expiration, who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h).[105] Limiting the supplemental cap to returning workers is beneficial because these workers have generally followed immigration law in good faith and demonstrated their willingness to return home when they have completed their temporary labor or services or their period of authorized stay, which is a condition of H–2B status. The returning worker condition therefore provides a basis to believe that H–2B workers under this cap increase will again abide by the terms and conditions of their visa or nonimmigrant status.

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

To ensure compliance with the requirement that additional visas only be made available to returning workers, DHS will require petitioners seeking H–2B workers under the supplemental cap to attest that each employee requested or instructed to apply for a visa under the FY 2023 supplemental cap was issued an H–2B visa or otherwise granted H–2B status in FY 2020, 2021, or 2022, unless the H–2B worker is a national of one of the Northern Central American countries or Haiti and is counted towards the 20,000 cap. This

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

[102] *See, e.g.,* 87 FR 30334 (defining ''returning workers'' as ''those who were issued H–2B visas or held H–2B status in fiscal years 2019, 2020, or 2021'').

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

[104] The previous review of an applicant's qualifications and current evidence of lawful travel to the United States will generally lead to a shorter processing time of a renewal application.

[105] The interview waiver authority for certain H–2B applicants renewing visas in the same classification within 48 months of the prior visa's expiration has no sunset date. Currently, certain first-time H–2B visa applicants or certain H–2B visa applicants previously issued any type of visa within the last 48 months may be eligible for an interview waiver; however, the authority for these interview waivers are set to expire on December 31, 2022. *See* DOS, *Important Announcement on Waivers of the Interview Requirement for Certain Nonimmigrant Visas, https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-waivers-of-the-interview-requirement-for-certain-nonimmigrant-visas.html* (last updated Dec. 23, 2021); DOS, *Expanded Interview Waivers for Certain Nonimmigrant Visa Applicants, https://www.state.gov/expanded-interview-waivers-for-certain-nonimmigrant-visa-applicants/* (last updated Dec. 23, 2021).

attestation will serve as prima facie initial evidence to DHS that each worker, unless a national of one of the Northern Central American countries or Haiti who is counted against the 20,000 cap, meets the returning worker requirement. DHS and DOS retain the right to review and verify that each beneficiary is in fact a returning worker any time before and after approval of the petition or visa. DHS has authority to review and verify this attestation during the course of an audit or investigation, as otherwise discussed in this rule.

With respect to satisfying the returning worker requirement, employers must maintain evidence that the employer requested and/or instructed that each of the workers petitioned by the employer in connection with this temporary rule were issued H–2B visas or otherwise granted H–2B status in FY 2020, 2021, or 2022, unless the H–2B worker is a national of one of the Northern Central American countries or Haiti counted towards the 20,000 cap. Such evidence would include, but is not limited to, a date-stamped written communication from the employer to its agent(s) and/or recruiter(s) that instructs the agent(s) and/or recruiter(s) to only recruit and provide instruction regarding an application for an H–2B visa to those foreign workers who were previously issued an H–2B visa or granted H–2B status in FY 2020, 2021, or 2022.

D. Returning Worker Exemption for up to 20,000 Visas for Nationals of Guatemala, El Salvador, and Honduras (Northern Central American Countries) and Haiti

As described above, the Secretary of Homeland Security has determined that up to 20,000 additional H–2B visas will be limited to workers who are nationals of one of the Northern Central American countries or Haiti. These 20,000 visas will be exempt from the returning worker requirement. Because the returning worker allocations have no restrictions related to a worker's country of nationality, if the 20,000 visa limit has been reached and the 44,716 returning worker cap has not, petitioners may continue to request workers who are nationals of one of the Northern Central American countries or Haiti, but these noncitizens must be specifically requested as returning workers who were issued H–2B visas or were otherwise granted H–2B status in FY 2020, 2021, or 2022.

While DHS reiterates the benefits of allocating visas under the supplemental cap to returning workers, the Secretary of Homeland Security has determined that the 20,000 limitation and exemption from the returning worker requirement for nationals of the Northern Central American countries or Haiti is beneficial for several reasons. First, it strikes a balance between furthering the U.S. foreign policy interests of expanding access to lawful pathways to nationals of the Northern Central American countries and Haiti seeking economic opportunity in the United States and addressing the needs of certain H–2B employers that are suffering irreparable harm or will suffer impending irreparable harm. The Secretary has determined that both the 20,000 limitation and the exemption from the returning worker requirement for nationals of the Northern Central American countries is again beneficial in light of President Biden's February 2, 2021 E.O. 14010, which instructed the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access for nationals of the Northern Central American countries to visa programs, as appropriate and consistent with applicable law. Further, E.O. 14010 directs relevant government agencies to create a comprehensive regional framework to address the causes of migration, and to manage migration throughout North and Central America.[106] The availability of workers from the Northern Central American countries and Haiti may promote safe and lawful immigration to the United States, as well as help provide U.S. employers with additional labor from neighboring countries with whom the Biden administration and DHS have engaged in outreach efforts to promote the H–2B program.[107] DHS believes that including nationals of Haiti in this allocation of up to 20,000 supplemental visas will further promote and improve safety, security, and economic stability throughout this region.[108]

Additionally, DOS will work with the relevant countries to facilitate consular interviews, if required,[109] and channels for reporting incidents of fraud and abuse within the H–2 programs. Further, each country's own consular networks will maintain contact with the workers while in the United States and ensure the workers know their rights and responsibilities under the U.S. immigration laws, which are all valuable protections to the immigration system, U.S. employers, U.S. workers, and workers entering the country on H–2 visas. DHS has determined that reserving 20,000 supplemental H–2B visas for nationals of the Northern Central American countries or Haiti is a reasonable allocation given the progressively increasing use of H–2B visas among this population in recent years, as noted above. Additionally, with the option to apply for visas in this category for the entire fiscal year, rather than dividing the allocation in two halves, there will be more time to reach the increased allocation. DHS believes these aspects will encourage U.S. employers that are suffering irreparable harm or will suffer impending irreparable harm to seek out workers from such countries, while, at the same time, increase interest among nationals of the Northern Central American countries and Haiti seeking a legal pathway for temporary employment in the United States. DHS also believes its outreach efforts with the governments of the Northern Central American

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

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

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

[109] As noted previously, consular officers may waive the in-person interview requirement for H–2B applicants whose prior visa expired within a specific timeframe and who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h). The expanded authority allowing for waiver of interview of certain H–2 (temporary agricultural and non-agricultural workers) applicants is extended through the end of 2022. Certain applicants renewing a visa in the same classification within 48 months of the prior visa's expiration are also eligible for interview waiver. DOS, *Important Announcement on Waivers of the Interview Requirement for Certain Nonimmigrant Visas, https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-waivers-of-the-interview-requirement-for-certain-nonimmigrant-visas.html* (last updated Dec. 23, 2021).

countries and Haiti, along with efforts in some of these countries by the United States Agency for International Development (USAID) to increase access to the H–2B program, support the decision to provide a higher reservation of H–2B visas for these countries than it has in prior recent TFRs. USAID has worked to build government capacity in Northern Central America to facilitate access to temporary worker visas under the H–2 program. Collaborating closely with the governments of El Salvador, Guatemala, and Honduras, USAID has strengthened the capacity of relevant government ministries to transparently and efficiently match qualified workers to temporary labor opportunities in the United States. In Fiscal Years 2021 and 2022, USAID increased funding to expand capacity building activities in El Salvador, Guatemala, and Honduras in response to the increased demand generated by the supplemental allocations of H–2B visas for Northern Central American nationals included in the FY 2021 and FY 2022 TFRs. The acceleration of USAID's activities likely helped increase uptake of H–2B visas issuance under the FY 2021 and FY 2022 TFRs, as H–2B visa issuances to Salvadorans, Guatemalans and Hondurans increased significantly over prior years, [110] and USAID's assistance helped reduce the average period of time to match qualified workers from these three countries to requests from U.S. employers— from 42 days to 14 days in El Salvador, 55 days to 20 days in Guatemala, and 24 days to 8 days in Honduras.[111] USAID's programs also strengthen worker protections by helping crowd out unethical recruiters and providing labor rights education and resources to seasonal workers.

DOS issued a combined total of approximately 26,630 H–2B visas to nationals of the Northern Central American countries or Haiti from FY 2015 through FY 2020, an average of approximately 4,400 per year.[112] In FY 2021, the first year in which supplemental H–2B visas were reserved for nationals of Northern Central American countries, DOS issued a combined total of 6,277 H–2B visas to nationals of those countries.[113] In FY 2022, DOS issued a combined total of 15,058 H–2B visas to nationals of Haiti and the Northern Central American countries.[114] This increase is likely due in part to the additional H–2B visas made available to nationals of these countries by the FY 2021 and FY 2022 H–2B supplemental visa temporary final rules. In addition, based in part on the vital U.S. interest of promoting sustainable development and the stability of Haiti, in November 2021, DHS added Haiti to the list of countries whose nationals are eligible to participate in the H–2A and H–2B programs.[115] Therefore, as previously stated, DHS has determined that the additional increase in FY 2023 will not only provide U.S. businesses that have been unable to find qualified and available U.S. workers with potential workers, but also promote further expansion of lawful immigration and lawful employment authorization for nationals of Northern Central American countries and Haiti.

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

USCIS will stop accepting petitions received under the allocation for the Northern Central American countries and Haiti after September 15, 2023. This end date should provide H–2B employers ample time, should they choose, to petition for, and bring in, workers under the allocation for the Northern Central American countries and Haiti. This, in turn, provides an opportunity for employers to contribute to our country's efforts to promote and improve safety, security and economic stability in these countries to help stem the flow of irregular migration to the United States. Nothing in this rule will limit the authority of DHS or DOS to deny, revoke, or take any other lawful action with respect to an H–2B petition or visa application at any time before or after approval of the H–2B petition or visa application.

E. Business Need Standard—Irreparable Harm and FY 2023 Attestation

To file any H–2B petition under this rule, petitioners must meet all existing H–2B eligibility requirements, including having an approved, valid, and unexpired TLC. *See* 8 CFR 214.2(h)(6) and 20 CFR part 655, subpart A. The TLC process focuses on establishing whether a petitioner has a temporary need for workers and whether there are U.S. workers who are able, willing, qualified, and available to perform the temporary service or labor, and does not address the harm a petitioner is facing or will face in the absence of such workers; the attestation addresses this question. In addition, under this rule, the petitioner must submit an attestation to USCIS in which the petitioner affirms, under penalty of perjury, that it meets the business need standard—that they are suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H–2B workers requested on their petition.[116] In addition to asserting that it meets the business need standard, the employer must attest that, by the time of submission of the petition to USCIS, they have prepared and retained a detailed written statement describing how the evidence gathered in support of their application demonstrates that irreparable harm is occurring or

[110] *See* DOS, *Monthly NIV Issuances by Nationality and Visa Class, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html* (last visited Oct. 15, 2022); *Monthly Nonimmigrant Visa Issuance Statistics, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics/monthly-nonimmigrant-visa-issuances.html* (last visited Oct. 15, 2022).

[111] *See* USAID, *Additional H–2B Visa Allocations for Northern Central America and Haiti to Address Irregular Migration, https://www.usaid.gov/news-information/press-releases/oct-12-2022-additional-h-2b-visa-allocations-northern-central-america-and-haiti#:~:text=Collaborating%20closely%20with,eight%20in%20Honduras* (Oct. 12, 2022).

[112] The ''combined total'' includes all H–2B visas and are not limited to visas issued under supplemental caps. *See* DOS, *Monthly NIV Issuances by Nationality and Visa Class, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html* (last visited Mar. 15, 2022); DOS, *Monthly Nonimmigrant Visa Issuance Statistics, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visastatistics/monthly-nonimmigrant-visaissuances.html* (last visited Mar. 15, 2022).

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

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

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

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

impending. The employer must also attest that, upon request, it will provide to DHS and/or DOL all documentary evidence that supports its claim of irreparable harm, along with the detailed written statement it prepared by the time of submitting the petition to USCIS, describing how such evidence demonstrates irreparable harm. The petitioner must submit the attestation directly to USCIS, together with Form I–129, the approved and valid TLC,[117] and any other necessary documentation. As in the rules implementing the FY 2017, FY 2018, FY 2019, FY 2021, and the FY 2022 temporary cap increases, employers will be required to complete the new attestation form which can be found at: *https://www.foreignlaborcert.doleta.gov/form.cfm.*[118]

Prior to the first half FY 2022 temporary final rule, petitioners were only required to attest that they were likely to suffer irreparable harm if they were unable to employ all of the H–2B workers requested on their I–129 petition submitted under H–2B cap increase rules. In the temporary final rule for the first half of FY 2022, the Departments changed the standard to require employers to instead attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on the petition filed under the rule. This change was designed to focus more directly on the actual irreparable harm employers are suffering or the impending irreparable harm they will suffer as a result of their inability to employ H–2B workers, rather than on just the possibility of such harm. The Departments applied this standard again in the temporary final rule for the second half of FY 2022. The Departments are also applying this standard to the instant temporary final rule, and are again requiring employers to attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on the petition filed under this rule.

As noted above, Congress authorized the Secretary of Homeland Security, in consultation with the Secretary of Labor, to increase the total number of H–2B visas available ''upon the determination that the needs of American businesses cannot be satisfied'' with U.S. workers under the statutory visa cap.[119] The irreparable harm standard in this rule aligns with this determination that Congress requires DHS to make before increasing the number of H–2B visas available to U.S. employers. In particular, requiring employers to attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the requested H–2B workers is directly relevant to the needs of the business—if an employer is suffering or will suffer irreparable harm, then their needs are not being satisfied. The prior standard, on the other hand, required only that the employer attest that harm was *likely* to occur at some point in the future, which created uncertainty as to whether that employer's needs were truly unmet or would not be met without being able to employ the requested H–2B workers. Because the authority to increase the statutory cap is tied to the needs of businesses, the Departments think it is reasonable for employers to attest that they are suffering irreparable harm or that they will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on their petition. If such employers are unable to attest to such harm and retain and produce (upon request) documentation of that harm, it calls into question whether the need set forth in this rule cannot in fact be satisfied without the ability to employ H–2B workers.

The ''are suffering irreparable harm or will suffer impending irreparable harm'' standard is also informed by the Departments' experiences in implementing the prior business need standard. In the Departments' experiences, the ''likely to suffer irreparable harm'' standard was difficult to assess and administer in the context of prior supplemental cap rules. For example, employers reported confusion with the standard, including some employers that were not able to provide adequate evidence of the prospective ''likelihood of irreparable harm'' when selected for an audit. The Departments therefore believe that asking employers to provide evidence of harm, as described in more detail later, that is occurring or is impending without the ability to employ all of the H–2B workers requested on their petition is a better means of ensuring compliance.

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

This requirement is informed by the Departments' experiences in assessing the irreparable harm standard in previous years. When conducting an audit or investigation under the previous temporary final rules, DOL has discovered that some employers are unfamiliar with the irreparable harm standard and recordkeeping requirements, despite their signed attestation. DOL has found that employers either cannot describe or explain their irreparable harm (whether it occurred or was impending at the time of signing the attestation form), or state that irreparable harm neither occurred nor was impending because the employer ultimately was able to employ H–2B workers. The latter response reflects a misunderstanding of the current irreparable harm standard, because irreparable harm must have been occurring or impending at the time the employer petitioned for supplemental visas. The attestation that irreparable harm is occurring or is impending cannot be based on a speculative analysis that permanent or severe financial loss ''may occur'' or ''is likely to occur.'' Rather, as of the time of submission to DHS, employers must have concrete evidence establishing that severe and permanent financial loss is occurring, with the scope and severity of harm clearly articulable, or that severe and permanent financial loss will occur in the near future without access to the supplemental visas. Even if no irreparable harm ultimately occurs because the employer is approved for supplemental visas under this rule, the employer must be able to articulate how permanent and severe financial loss was

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

[118] The attestation requirement does not apply to workers who have already been counted under the H–2B statutory cap for the second half of fiscal year 2023 (33,000). Further, the attestation requirement does not apply to noncitizens who are exempt from the fiscal year 2023 H–2B statutory cap, including those who are extending their stay in H–2B status. Accordingly, petitioners that are filing on behalf of such workers are not subject to the attestation requirement.

[119] *See* section 204 of Pulic aw. 117–103, as extended by Public Law 117–180.

impending at the time of filing. Additionally, in DOL's experience, employers sometimes do not retain the documentation they specifically attested they would retain, or will not or cannot explain how this documentation demonstrates the relevant irreparable harm to which they attested, which indicates that some of the employers seeking to benefit from hiring H–2B workers are not thoughtfully considering, or considering at all, whether their business needs qualify them for supplemental H–2B visas under these rules.

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

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

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

(2) Evidence that the business is suffering or will suffer in the near future permanent and severe financial loss, as compared to prior years, such as financial statements (including profit/loss statements) comparing the employer's period of need to prior years; bank statements, tax returns, or other documents showing evidence of current and past financial condition; and relevant tax records, employment records, or other similar documents showing hours worked and payroll comparisons from prior years to the current year;

(3) Evidence showing the number of workers needed in the previous three seasons (FY 2020, 2021, and 2022) to meet the employer's need as compared to those currently employed or expected to be employed at the beginning of the start date of need. Such evidence must indicate the dates of their employment, and their hours worked (for example, payroll records) and evidence showing the number of H–2B workers it claims are needed, and the workers' actual dates of employment and hours worked; and/or

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

These examples are not exhaustive, nor will they necessarily establish that the business meets the irreparable harm standard; petitioners may retain other types of evidence they believe will satisfy these standards. Such evidence must be maintained and provided, with the written statement, to DOL or DHS upon request.

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

The attestation form will serve as prima facie initial evidence to DHS that the petitioner's business is suffering irreparable harm or will suffer impending irreparable harm. USCIS may reject in accordance with 8 CFR 103.2(a)(7)(ii) or deny in accordance with 8 CFR 103.2(b)(8)(ii), as applicable, any petition requesting H–2B workers under this FY 2023 supplemental cap that is lacking the requisite attestation form. Although this regulation does not require submission of evidence and/or a detailed written statement at the time of filing of the petition, other than an attestation, the employer must have such evidence and the accompanying detailed written statement on hand and ready to present to DHS or DOL at any time starting with the date of filing the I–129 petition, through the prescribed document retention period discussed below.

As with petitions filed under the FY 2021 and FY 2022 Supplemental TFRs, the Departments intend to select a significant number of petitions approved for audit examination to verify compliance with program requirements, including the irreparable harm standard and recruitment provisions implemented through this rule. The Departments may consider failure to provide evidence demonstrating irreparable harm, to prepare or provide the detailed written statement explaining irreparable harm, or to comply with the audit process to be a substantial violation resulting in an adverse agency action on the employer, including assessment of a civil money penalty, revocation of the petition and/or TLC, or program debarment. Similarly, failure to cooperate with any compliance review, evaluation, verification, or inspection conducted by DHS or DOL as required by 8 CFR 214.2(h)(6)(xiii)(B)(*2*)(*vi*) and (*vii*) may constitute a violation of the terms and

conditions of an approved petition and lead to petition revocation under 8 CFR 214.2(h)(11)(iii)(A)(*3*).

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

(1) meets all other eligibility criteria for the available visas, including the returning worker requirement, unless exempt because the H–2B worker is a national of one of the Northern Central American countries or Haiti who is counted against the 20,000 visas reserved for such workers;

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

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

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

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

It is the view of the Secretaries of Homeland Security and Labor that requiring a post-TLC attestation to USCIS is the most practical approach to applying the eligibility requirements of this rule without causing undue delays in the filing or adjudication processes for those employers with start dates in the first half of the fiscal year, many of whom will have already begun or completed the TLC application process. The Departments have determined that, if such employers were required to submit the attestation form to DOL before filing a petition with DHS, the attendant delays would negatively impact the ability of American businesses to timely get the help that they need given TLC processing timeframes. For consistency and to avoid confusion, the Departments will also maintain the post-TLC attestation process for employers with start dates in the second half of the fiscal year that seek supplemental H–2B visas under this rule. This approach, in conjunction with additional integrity safeguards, has been used consistently in prior supplemental H–2B temporary final rules, and the Departments will continue to monitor its effectiveness and sufficiency. As in prior years, all employers under this rule are required to retain documentation, which the employer must provide upon request by DHS or DOL, supporting the new attestations regarding (1) the irreparable harm standard; (2) the returning worker requirement, or, alternatively, documentation supporting that the H–2B worker(s) requested is a national of one of the Northern Central American countries or Haiti who is counted against the 20,000 (which may be satisfied by the separate Form I–129 that employers are required to file for such workers in accordance with this rule); and (3) a recruitment report for any additional recruitment required under this rule for a period of 3 years. *See* new 20 CFR 655.67. Although the employer must have such documentation on hand at the time it files the petition, the Departments do not believe it is necessary or efficient for all employers to submit such documentation to USCIS at the time of filing the petition. However, as noted above, the Departments will employ program integrity measures, including additional scrutiny by DHS of employers that have committed labor law violations in the H–2B program and continue to conduct audits, investigations, and/or post-adjudication compliance reviews on a significant number of H–2B petitions. As part of that process, USCIS may issue a request for additional evidence, a notice of intent to revoke, or a revocation notice, based on the review of such documentation, *see* 8 CFR 103.2(b) and 8 CFR 214.2(h)(11), and DOL's OFLC and WHD will be able to review this documentation and enforce the attestations during the course of an audit examination or investigation.

In accordance with the attestation requirements, under which petitioners attest that they meet the irreparable harm standard, that they are seeking to employ only returning workers (unless exempt as described above), and that they meet the document retention requirements at new 20 CFR 655.67, petitioners must retain documents and records fulfilling their responsibility to demonstrate compliance with this rule for 3 years from the date the TLC was approved, and must provide the documents and records upon the request of DHS or DOL. With regard to the irreparable harm standard, employers attesting that they are suffering irreparable harm must be able to provide concrete evidence establishing severe and permanent financial loss that is occurring; the scope and severity of the harm must be clearly articulable. Employers attesting that they will suffer impending irreparable harm must be able to demonstrate that severe and permanent financial loss will occur in the near future without access to the supplemental visas. It will not be enough to provide evidence suggesting that such harm may or is likely to occur; rather, the documentary evidence must show that impending harm is occurring or will occur and document the form of such harm. Examples of possible types of evidence to be maintained are listed earlier in this section.

When a petition is selected for audit examination, or investigation, DHS or DOL will review all evidence available to it to confirm that the petitioner properly attested to DHS, at the time of filing the petition, that their business was suffering irreparable harm or would suffer impending irreparable harm, and that they petitioned for and employed only returning workers, unless the H–2B worker is a national of one of the Northern Central American countries or Haiti counted towards the 20,000 cap, among other attestations. If DHS subsequently finds that the evidence does not support the employer's attestations, DHS may deny or, if the petition has already been approved, revoke the petition at any time consistent with existing regulatory authorities. DHS may also, or alternatively, refer the petitioner to DOL for further investigation. In addition, DOL may independently take enforcement action, including by, among other things, debarring the petitioner from the H–2B program for not less than one year or more than five years from the date of the final agency decision, which also disqualifies the debarred party from filing any labor certification applications or labor condition applications with DOL for the same period set forth in the final debarment decision. *See, e.g.,* 20 CFR 655.73; 29 CFR 503.20, 503.24.[120]

[120] Pursuant to the statutory provisions governing enforcement of the H–2B program, INA section

Continued

Evidence reflecting a preference for hiring H–2B workers over U.S. workers may warrant an investigation by additional agencies enforcing employment and labor laws, such as the Immigrant and Employee Rights Section (IER) of the Department of Justice's Civil Rights Division. *See* INA section 274B, 8 U.S.C. 1324b (prohibiting certain types of employment discrimination based on citizenship status or national origin). Moreover, DHS and DOL may refer potential discrimination to IER pursuant to applicable interagency agreements. *See* IER, Partnerships, *https://www.justice.gov/crt/partnerships* (last visited Oct. 25, 2022). In addition, if members of the public have information that a participating employer may be abusing this program, DHS invites them to notify USCIS by completing the online fraud tip form, *https://www.uscis.gov/report-fraud/uscis-tip-form* (last visited Oct. 25, 2022).[121]

DHS, in exercising its statutory authority under INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), and section 204 of the FY 2022 Omnibus, as extended by Public Law 117–180, is responsible for adjudicating eligibility for H–2B classification. As in all cases, the burden rests with the petitioner to establish eligibility by a preponderance of the evidence. INA section 291, 8 U.S.C. 1361. *Matter of Chawathe,* 25 I&N Dec. 369, 375–76 (AAO 2010). Accordingly, as noted above, where the petition lacks initial evidence, such as a properly completed attestation, DHS may, as applicable, reject the petition in accordance with 8 CFR 103.2(a)(7)(ii) or deny the petition in accordance with 8 CFR 103.2(b)(8)(ii). Further, where the initial evidence submitted with the petition contains inconsistencies or is inconsistent with other evidence in the petition and the underlying TLC, DHS may issue a Request for Evidence, Notice of Intent to Deny, or Denial in accordance with 8 CFR 103.2(b)(8). In addition, where it is determined that an H–2B petition filed pursuant to the FY 2022 Omnibus, as extended by Public Law 117–180, was granted erroneously, the H–2B petition approval may be revoked. *See* 8 CFR 214.2(h)(11).

Because of the particular circumstances of this regulation, and because the attestation and other requirements of this rule play a vital role in achieving the purposes of this rule, DHS and DOL intend that the attestation requirement, DOL procedures, and other aspects of this rule be non-severable from the remainder of the rule, including the increase in the numerical allocations.[122] Thus, if the attestation requirement or any other part of this rule is enjoined or held invalid, the Departments intend for the remainder of the rule, with the exception of the retention requirements being codified in new 20 CFR 655.67, to cease operation in the relevant jurisdiction, without prejudice to workers already present in the United States under this regulation, as consistent with law.

F. Portability

As an additional option for employers that cannot find U.S. workers, and as an additional flexibility for H–2B employees seeking to begin work with a new H–2B employer, this rule allows petitioners to immediately employ certain H–2B workers who are present in the United States in H–2B status without waiting for approval of the H–2B petition, generally for a period of up to 60 days. Such workers must be beneficiaries of a timely, non-frivolous H–2B petition requesting an extension of stay received on or after January 25, 2023, but no later than 1 year after that date.[123] In addition, such workers must have been lawfully admitted to the United States and have not worked without authorization subsequent to such lawful admission. Additionally, petitioners may immediately employ individuals who are beneficiaries of a non-frivolous H–2B petition requesting an extension of the worker's stay that is pending as of January 25, 2023 without waiting for approval of the H–2B petition. To be eligible for portability, employers must have received an approved TLC demonstrating that they have completed a test of the U.S. labor market, and that DOL determined that there were no qualified U.S. workers available to fill these temporary positions. DHS is making this portability available for an additional one-year period in order to provide greater certainty for H–2B employers and workers, as well as to provide stability for H–2B employers amidst continuing uncertainties surrounding the COVID–19 pandemic including possible future impacts of COVID–19 variants.[124]

The portability provision at new 8 CFR 214.2(h)(29)(iii)(A)(*1*)–(*2*) is substantively the same as the portability provision offered in the prior second half FY 2022 H–2B supplemental visa temporary final rule, which was codified at 8 CFR 214.2(h)(28)(iii)(A)(*1*)–(*2*), and will begin upon the expiration of that provision. *See* new 8 CFR 214.2(h)(29)(iii)(A)(*1*)–(*2*). Additionally, the provision is similar to temporary flexibilities that DHS has used previously to improve employer access to noncitizen workers during the COVID–19 pandemic.[125]

The employment authorization provided under this provision would end 15 days after USCIS denies the H–2B petition or such petition is withdrawn. During the entire period of

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

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

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

[123] Individuals who are the beneficiaries of petitions filed on the basis of 8 CFR 214.1(c)(4) are not eligible to port to a new employer under 8 CFR 214.2(h)(29).

[124] *See* Carolyn Y. Johnson, *XBB, BQ.1.1, BA.2.75.2—a variant swarm could fuel a winter surge,* Washington Post, *https://www.washingtonpost.com/health/2022/10/18/covid-variants-xbb-bq1-bq11/* (Oct. 18, 2022). *See also,* CDC, *Variants of the Virus, https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html* (last updated Aug. 11, 2021); CDC, *Frequently Asked Questions About COVID–19 Vaccination, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html* (last updated Oct. 13, 2022).

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

the employment authorization, including this 15-day period, the new employer is obligated to comply with all applicable labor laws and regulations. This 15-day period of employment following an H–2B petition denial or withdrawal is consistent with prior H–2B supplemental cap temporary final rules, as well as the 15-day period of employment following petition denial under existing DHS regulations at 8 CFR 274a.12(b)(21) for certain E-Verify participants to employ H–2A workers. As in the prior temporary final rules, the 15-day period is intended to account for the passage of time between USCIS denial of the H–2B petition and the petitioner receiving notice of such denial, but the Departments will continue to assess the necessity and effectiveness of this grace period.[126]

The portability provision is in part intended to mitigate the harm that petitioners may experience resulting from the continuing COVID–19 pandemic by allowing petitioners to employ such H–2B workers so long as they were lawfully admitted to the United States and if they have not worked unlawfully after their admission. In the context of this rule, DHS believes this flexibility will help some U.S. employers address the challenges related to the limitations imposed by the cap, as well as due to the ongoing disruptions caused by the COVID–19 pandemic.

In addition to resulting in a devastating loss of life, the worldwide pandemic of COVID–19 has impacted the United States in myriad ways, disrupting daily life, travel, and the operation of individual businesses and the economy at large. On January 31, 2020, the Secretary of the U.S. Department of Health and Human Services (HHS) declared a public health emergency dating back to January 27, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247d).[127] This determination that a public health emergency exists due to COVID–19 has subsequently been renewed ten times: on April 21, 2020, on July 23, 2020, on October 2, 2020, on January 7, 2021, on April 15, 2021, on July 19, 2021, on October 15, 2021, on January 14, 2022, on July 15, 2022, and most recently on October 13, 2022.[128] As well, on March 13, 2020, then-President Trump declared a National Emergency concerning the COVID–19 outbreak to control the spread of the virus in the United States.[129] The proclamation declared that the emergency began on March 1, 2020. On February 18, 2022, President Biden issued a continuation of the National Emergency concerning the COVID–19 pandemic.[130] As of October 4, 2022, there have been over 615 million confirmed cases of COVID–19 identified globally, resulting in more than 6.5 million deaths.[131] Approximately 95,112,569 cases have been identified in the United States, with approximately 1,048,387 reported deaths due to the disease.[132]

Due to the possibility that some H–2B workers may be unavailable due to travel restrictions, including those intended to limit the spread of COVID–19, or may become unavailable due to COVID–19 related illness, U.S. employers that have approved H–2B petitions or that will be filing H–2B petitions in accordance with this rule might not receive all of the workers requested to fill the temporary positions. Portability provides an alternative for such employers by allowing them to more expeditiously employ H–2B workers who are already in the United States. DHS is strongly committed not only to protecting U.S. workers and helping U.S. businesses receive the documented workers authorized to perform temporary nonagricultural services or labor that they need, but also to protecting the rights and interests of H–2B workers (consistent with Executive Order 13563 and in particular its reference to ''equity,'' ''fairness,'' and ''human dignity''). In the FY 2020 DHS Further Consolidated Appropriations Act (Pub. L. 116–94), Congress directed DHS to provide options to improve the H–2A and H–2B visa programs, to include options that would protect worker rights.[133] DHS has determined that providing H–2B nonimmigrant workers with the flexibility of being able to begin work with a new H–2B petitioner immediately and avoid a potential job loss or loss of income while the new H–2B petition is pending, is equitable and fair to H–2B workers who may have found themselves in situations that warrant a change in employers.[134] This flexibility also provides an alternative to H–2B petitioners who have not been able to find U.S. workers and who have not been able to obtain H–2B workers subject to the statutory or supplemental caps who have the skills to perform the job duties. In that sense as well, it is equitable and fair to employers.

G. COVID–19 Worker Protections

It is the policy of DHS and its Federal partners to support equal access to the COVID–19 vaccines and vaccine distribution sites, irrespective of an individuals' immigration status.[135] This policy promotes fairness and equity (see Executive Order 13563). Accordingly, DHS and DOL encourage all individuals, regardless of their immigration status, to receive the COVID–19 vaccine.

U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) do not conduct enforcement actions at or near vaccine distribution sites or clinics. Consistent with DHS' protected areas policy, ICE and CBP generally do not carry out enforcement actions in or near protected areas, including at medical or

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

[127] *See* HHS, *Determination of Public Health Emergency,* 85 FR 7316 (Feb. 7, 2020).

[128] *See* HHS, *Renewal of Determination That A Public Health Emergency Exists, https://aspr.hhs.gov/legal/PHE/Pages/COVID19-13Oct2022.aspx* (Oct. 13, 2022).

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

[130] *See Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID–19) Pandemic,* 87 FR 10289 (Feb. 23, 2022); *Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID–19) Outbreak,* 85 FR 15337.

[131] *See* World Health Organization, *WHO Coronavirus (COVID–19) Dashboard, https://covid19.who.int* (last visited Oct. 5, 2022).

[132] *See id.*

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

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

[135] *See* DHS, *Statement on Equal Access to COVID–19 Vaccines and Vaccine Distribution Sites, https://www.dhs.gov/news/2021/02/01/dhs-statement-equal-access-covid-19-vaccines-and-vaccine-distribution-sites* (Feb. 1, 2021) (last accessed Oct. 17, 2022).

mental healthcare facilities, such as a hospital, doctor's office, health clinic, vaccination or testing site, urgent care center, site that serves pregnant individuals, or community health center.[136]

This TFR reflects that policy by providing as follows:

Supplemental H–2B Visas: With respect to petitioners who wish to qualify to receive supplemental H–2B visas pursuant to the FY 2023 Omnibus, the Departments are using the DOL Form ETA–9142–B–CAA–7 to support equal access to vaccines in two ways. First, the Departments are requiring such petitioners to attest on the DOL Form ETA–9142–B–CAA–7 that, consistent with such petitioners' obligations under generally applicable H–2B regulations, they will comply with all Federal, State, and local employment-related laws and regulations, including, where applicable, health and safety laws and laws related to COVID–19 worker protections and any right to time off or paid time off for COVID–19 vaccination, or to reimbursement for travel to and from the nearest available vaccination site. *See* new 8 CFR 214.2(h)(6)(xiii)(B)(*2*)(*iii*) and 20 CFR 655.65(a)(4). Second, the Departments are requiring such petitioners to also attest that they will notify any H–2B workers approved under the supplemental cap, in a language understood by the worker as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID–19 vaccines and vaccine distribution sites. WHD has published a poster for employers' optional use for this notification.[137] Because petitioners will submit the attestation to USCIS as initial evidence with Form I–129, DHS considers the attestation to be evidence that is incorporated into and a part of the petition consistent with 8 CFR 103.2(b)(1). Accordingly, USCIS may deny or revoke, as applicable, a petition based on or related to statements made in the attestation, including, but not limited to, because the employer violated an applicable employment-related law or regulation, or failed to notify workers regarding equal access to COVID–19 vaccines and vaccine distribution sites.

Other H–2B Employers: While there is no additional attestation with respect to H–2B petitioners that do not avail themselves of the supplemental H–2B visas made available under this rule, the Departments remind all H–2B employers that they must comply with all Federal, State, and local employment-related laws and regulations, including, where applicable, health and safety laws and laws related to COVID–19 worker protections and any right to time off or paid time off for COVID–19 vaccination, or to reimbursement for travel to and from the nearest available vaccination site. Failure to comply with such laws and regulations would be contrary to the attestation 7 on ETA 9142B—Appendix B, and therefore may be a basis for DHS to revoke the petition under 8 CFR 214.2(h)(11)(iii)(A)(*3*) for violating terms and conditions of the approved petition.[138] This obligation is also reflected as a condition of H–2B portability under this rule. *See* new 8 CFR 214.2(h)(29)(iii)(B).

President Biden, in his speech to Joint Session of Congress on April 21, 2021, made the following statement: ''[T]oday, I'm announcing a program to address [the issue of COVID vaccinations] . . . nationwide. I'm calling on every employer, large and small, in every state, to give employees the time off they need, with pay, to get vaccinated and any time they need, with pay, to recover if they are feeling under the weather after the shot.'' [139] More recently, the Biden Administration reiterated its call on employers to provide paid time off to their employees to get booster shots.[140] Consistent with the President's statements, the Departments strongly urge, but do not require, that all employers seeking H–2B workers (not limited to those under this TFR) make every effort to ensure that all their workers, including nonimmigrant workers, be afforded an opportunity to take the time off needed to receive their COVID–19 vaccinations, as well as time off, with pay, to recover from any temporary side effect. In Proclamation 10294 of October 25, 2021, the President barred the entry of nonimmigrants into the United States via air transportation unless they are fully vaccinated against COVID–19, with certain exceptions.[141] On January 22, 2022, similar requirements entered into force at land ports of entry and ferry terminals.[142] The Departments therefore expect that H–2B nonimmigrants who enter the United States under this rule will generally be fully vaccinated against COVID–19. The Departments note, however, that some H–2B nonimmigrants (such as nonimmigrants who are already in the United States) may not yet be vaccinated or may nonetheless be eligible for booster shots.

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

In addition, the Departments strongly encourage all petitioners to facilitate and provide flexibilities, to the greatest extent possible, to all their workers who wish to receive COVID–19 vaccinations.

H. DHS Petition Procedures

To petition for H–2B workers under the supplemental allocations in this rule, the petitioner must file a Form I–129 at the USCIS California Service Center in accordance with applicable regulations and form instructions, along with an unexpired TLC and the attestation Form ETA–9142–B–CAA–7. Petitions filed for supplemental allocations under this rule at any

[136] *See* ICE, *FAQs: Protected Areas and Courthouse Arrests, https://www.ice.gov/about-ice/ero/protected-areas* (last visited Oct. 17, 2022).

[137] *See* DOL, *Employee Rights—H–2B Workers and COVID–19, https://www.dol.gov/sites/dolgov/files/WHD/posters/H2B_COVID.pdf* (English) (last visited Oct. 17, 2022); *https://www.dol.gov/sites/dolgov/files/WHD/posters/H2B_COVID_SPA.pdf* (Spanish) (last visited Oct. 17, 2022).

[138] During the period of employment specified on the Temporary Labor Certification, the employer must comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. 20 CFR 655.20(z). By submitting the Temporary Labor Certification as evidence supporting the petition, it is incorporated into and considered part of the benefit request under 8 CFR 103.2(b)(1).

[139] *See* The White House, *Remarks by President Biden on the COVID–19 Response and the State of Vaccinations, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/21/remarks-by-president-biden-on-the-covid-19-response-and-the-state-of-vaccinations-2/* (Apr. 21, 2021).

[140] *See* The White House, *FACT SHEET: Biden Administration Outlines Plan to Get Americans an Updated COVID–19 Vaccine Shot and Manage COVID–19 this Fall, https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/08/fact-sheet-biden-administration-outlines-plan-to-get-americans-an-updated-covid-19-vaccine-shot-and-manage-covid-19-this-fall/* (Sept. 8, 2022); *see also* The White House, *President Biden Announces New Actions to Protect Americans Against the Delta and Omicron Variants as We Battle COVID–19 this Winter, https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/02/fact-sheet-president-biden-announces-new-actions-to-protect-americans-against-the-delta-and-omicron-variants-as-we-battle-covid-19-this-winter/* (Dec. 2, 2021).

[141] *See Advancing the Safe Resumption of Global Travel During the COVID–19 Pandemic,* 86 FR 59603 (Oct. 28, 2021) (Presidential Proclamation); *see also Amended Order Implementing Presidential Proclamation on Advancing the Safe Resumption of Global Travel During the COVID–19 Pandemic,* 86 FR 61224 (Nov. 5, 2021) (implementing CDC Order).

[142] *See Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico,* 87 FR 3425 (Jan. 24, 2022); *Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada,* 87 FR 3429 (Jan. 24, 2022); *Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico,* 87 FR 24048 (Apr. 22, 2022).

location other than the USCIS California Service Center will be rejected and the filing fees will be returned. For all petitions filed under this rule and the H–2B program, generally, employers must establish, among other requirements, that insufficient qualified U.S. workers are available to fill the petitioning H–2B employer's job opportunity and that the foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly-employed U.S. workers. INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D); 20 CFR 655.1. To meet this standard of protection for U.S. workers and, in order to be eligible for additional visas under this rule, employers must have applied for and received a valid TLC in accordance with 8 CFR 214.2(h)(6)(iv)(A) and (D) and 20 CFR part 655, subpart A. Under DOL's H–2B regulations, TLCs are valid only for the period of employment certified by DOL and expire on the last day of authorized employment. 20 CFR 655.55(a).

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

All H–2B petitions must state the nationality of all the requested H–2B workers, whether named or unnamed, even if there are beneficiaries from more than one country. *See* 8 CFR 214.2(h)(2)(iii). If filing multiple Forms I–129 based on the same TLC (for instance, one requesting returning workers and another requesting workers who are nationals of one of the Northern Central American countries or Haiti), each H–2B petition must include a copy of the TLC and reference all previously-filed or concurrently-filed petitions associated with the same TLC. The total number of requested workers may not exceed the total number of workers indicated on the approved TLC.

Petitioners seeking H–2B classification for nationals of the Northern Central American countries or Haiti under the 20,000 visa allocation that are exempt from the returning worker provision must file a separate Form I–129 for those nationals of the Northern Central American countries and Haiti only. *See* new 8 CFR 214.2(h)(6)(xiii). In this regard, a petition must be filed with a single Form ETA–9142–B–CAA–7 that clearly indicates that the petitioner is only requesting nationals from a Northern Central American country or Haiti who are exempt from the returning worker requirement. Specifically, if the petitioner checks the first box of Form ETA–9142–B–CAA–7, then the petition accompanying that form *must* be filed only on behalf of nationals of one or more of the Northern Central American countries or Haiti, and not other countries. In such a case if the Form I–129 petition is requesting beneficiaries from countries other than Northern Central American countries or Haiti, then USCIS may reject it or issue a request for evidence, notice of intent to deny, or denial, or, in the case of a non-frivolous petition, a partial approval limiting the petition to the number of beneficiaries who are from one of the Northern Central American countries or Haiti. Requiring the filing of separate petitions to request returning workers and to request workers who are nationals of the Northern Central American countries or Haiti is necessary to ensure the operational capability to properly calculate and manage the respective additional cap allocations and to ensure that all corresponding visa issuances are limited to qualifying applicants, particularly when such petitions request unnamed beneficiaries or are relied upon for subsequent requests to substitute beneficiaries in accordance with 8 CFR 214.2(h)(6)(viii).

The attestations must be filed on Form ETA–9142–B–CAA–7, Attestation for Employers Seeking to Employ H–2B Nonimmigrant Workers Under Section 204 of Division O of the Further Consolidated Appropriations Act, 2022, Public Law 117–103, and Public Law 117–180. *See* new 20 CFR 655.65. Petitioners are required to retain a copy of such attestations and all supporting evidence for 3 years from the date the associated TLC was approved, consistent with 20 CFR 655.56 and 29 CFR 503.17. *See* new 20 CFR 655.67. Petitions submitted to DHS pursuant to Public Law 117–180, which extended the FY 2022 Omnibus, will be processed in the order in which they were received within the relevant supplemental allocation, and pursuant to processes parallel to those in place for when numerical limitations are reached under INA section 214(g)(1)(B) or (g)(10), 8 U.S.C. 1184(g)(1)(B) or (g)(10).

USCIS is implementing a change in the filing location for petitions filed under the supplemental allocations in this rule, with all such filings at a single location. Under standard processes, H–2B petitions are filed at one of two USCIS service centers generally based on the state in which the petitioner's primary office is located. To manage the additional workload from the supplemental allocations provided by this rule, all such filings will be centralized at the USCIS California Service Center. USCIS will reject petitions filed under the supplemental allocations in this rule at any location other than the USCIS California Service Center and will return the filing fees for any such petition.

Immediately upon publication of the rule, but no earlier than that date, USCIS will begin accepting returning worker H–2B petitions requesting dates of need starting on or before March 31, 2023, as well as H–2B petitions for workers from the Northern Central American Countries and Haiti with dates of need in the first half of FY 2023.[143] Beginning no earlier than 15 days after the second half statutory cap is reached, USCIS will begin accepting H–2B petitions requesting work to begin on or after April 1, 2023, through May 14, 2023, as well as H–2B petitions for workers from the Northern Central American Countries and Haiti with dates of need on or after April 1, 2023 through September 30, 2023. Finally, beginning no earlier than 45 days after the second half statutory cap is reached, USCIS will begin accepting H–2B petitions requesting work to begin on or after May 15 through September 30, 2023.

USCIS will reject any returning worker petition that is received after September 15, 2023, or after the applicable numerical limitation has been reached. DHS believes that 15 days

[143] DHS has determined, and USCIS will separately announce on its website, consistent with 8 CFR 106.4(g) and historical practice, that circumstances prevent the completion of processing of a significant number of H–2B supplemental cap petitions with start dates of need on or before March 31, 2023 that will be filed on or after the effective date of this rule within the 15-day premium processing timeframe. USCIS will therefore temporarily suspend premium processing for those petitions. This suspension will affect H–2B petitions filed under the NCA/Haiti allocation with start dates of work on or before March 31, 2023, as well as H–2B petitions filed under the returning worker allocation for the first half of FY 2023 (*i.e.,* those with start dates on or before March 31, 2023). DHS will resume premium processing of these petitions on January 3, 2023 at which time it will begin to accept premium processing requests for these petitions on Form I–907. This temporary suspension was considered when establishing filing periods for H–2B supplemental cap petitions with start dates on or after April 1, 2023.

from the end of the fiscal year is the minimum time needed for petitions to be adjudicated, although USCIS cannot guarantee the time period will be sufficient in all cases. Therefore, even if the Northern Central American/Haitian allocation and second half supplemental allocations provided in this rule have not yet been reached, USCIS will stop accepting petitions under those allocations that are received after September 15, 2023. *See* new 8 CFR 214.2(h)(6)(xiii)(C). Such petitions will be rejected and the filing fees will be returned. Petitioners may choose to request premium processing of their petitions under 8 CFR 103.7(e), which allows for expedited processing for an additional fee.

Based on the time-limited authority granted to DHS by Public Law 117–180, on the same terms as section 204 of the FY 2022 Omnibus, DHS is notifying the public that USCIS cannot approve petitions seeking H–2B workers under this rule on or after October 1, 2023. *See* new 8 CFR 214.2(h)(6)(xiii)(C). Petitions pending with USCIS that are not approved before October 1, 2023 will be denied and any fees will not be refunded. *See* new 8 CFR 214.2(h)(6)(xiii)(C).

I. DOL Procedures

As noted above, all employers are required to have an approved and valid TLC from DOL in order to file a Form I–129 petition with DHS. *See* 8 CFR 214.2(h)(6)(iv)(A) and (D). The standards and procedures governing the submission and processing of Applications for Temporary Employment Certification for employers seeking to hire H–2B workers are set forth in 20 CFR part 655, subpart A. An employer that seeks to hire H–2B workers must request a TLC in compliance with the application filing requirements set forth in 20 CFR 655.15 and meet all the requirements of 20 CFR part 655, subpart A, to obtain a valid TLC, including the criteria for certification set forth in 20 CFR 655.51. *See* new 20 CFR 655.65(a) and 655.50(b). Employers with an approved TLC have conducted recruitment, as set forth in 20 CFR 655.40 through 655.48, to determine whether U.S. workers are qualified and available to perform the work for which employers sought H–2B workers.

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

Emergency Procedures

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

Additional Recruitment

In addition to the recruitment already conducted in connection with a valid TLC, in order to ensure the recruitment has not become stale, employers that wish to obtain visas for their workers under 8 CFR 214.2(h)(6)(xiii), and who file an I–129 petition 30 or more days after the certified start date of work on the TLC must conduct additional recruitment for U.S. workers. As noted in the 2015 H–2B Interim Final Rule, U.S. workers seeking employment in temporary or seasonal nonagricultural jobs typically do not search for work months in advance and cannot make commitments about their availability for employment far in advance of the work start date. *See* 80 FR 24041, 24061, 24071. Given that the temporary labor certification process generally begins 75 to 90 days in advance of the employer's start date of work, employer recruitment efforts typically occur between 40 and 60 days before that date with an obligation to provide employment to any qualified U.S. worker who applies until 21 days before the date of need. Therefore, employers with TLCs containing a start date of work on April 1, 2022, for example, likely conducted their positive recruitment beginning around late-January and ending around mid-February 2022, and continued to consider U.S. worker applicants and referrals only until March 11, 2022.

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

An employer that files an I–129 petition under 8 CFR 214.2(h)(6)(xiii) fewer than 30 days after the certified start date of work on the TLC must submit the TLC and a completed Form ETA–9142B–CAA–7 but is not required to conduct additional recruitment for U.S. workers beyond the recruitment already conducted as a condition of certification. Only those employers with

still-valid TLCs with a certified start date of work that is 30 or more days before the date they file a petition will be required to conduct recruitment in addition to that conducted prior to being granted a TLC and attest that the recruitment will be conducted, as follows.

Placement of New Job Orders With State Workforce Agencies

Employers that are required to engage in additional recruitment must place a new job order for the job opportunity with the State Workforce Agency (SWA) serving the area of intended employment no later than the next business day after submitting an I–129 petition for H–2B workers to USCIS, and inform the SWA that the job order is being placed in connection with a previously submitted and certified Application for Temporary Employment Certification for H–2B workers by providing the SWA with the unique OFLC TLC case number. Under this rule, employers must also provide the OFLC NPC with the unique TLC case number concurrently with their placement of new job orders with the SWAs. This notification will allow OFLC to cross reference and repost information about the job opportunities that are provided on the employers' certified Applications for Temporary Labor Certification and posted by OFLC on *SeasonalJobs.dol.gov,* which is DOL's electronic job registry authorized under 20 CFR 655.34. Once posted by OFLC, information about the employer's certified job opportunity will remain posted for a period of at least 15 calendar days, which is consistent with the period of time SWAs post job orders for intrastate and interstate clearance to recruit U.S. workers, as discussed below. The Departments believe this additional notification is a reasonable and cost-efficient method of disseminating available job opportunities to a wider audience and those U.S. workers who may be interested in applying. While not meant to recreate it, this action will serve the same functional purpose as the posting on *Seasonal Jobs.* To help employers who must conduct this notification requirement, DOL encourages employers to notify the OFLC NPC, at the same time notification is sent to the SWA, by sending an email to *H-2Bsupplementalvisas@dol.gov,* and including the words ''H–2B TFR 2023 Recruitment'' followed by the unique TLC case number in the subject line of the email.

The new job order placed with the SWA must contain the job assurances and contents set forth in 20 CFR 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 15 calendar days. The employer must also follow all applicable SWA instructions for posting job orders and receive applications in all forms allowed by the SWA, including online applications. The Departments have concluded that keeping the job order posted for a period of at least 15 calendar days, during the period the employer is conducting the additional recruitment steps explained below and OFLC reposts the job opportunity information, will effectively ensure U.S. workers are apprised of the job opportunity and are referred for employment, if they are willing, qualified, and available to perform the work. The minimum 15 calendar day period also is consistent with the employer-conducted recruitment activity period applicable under 20 CFR 655.40(b).

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

Contact With American Job Centers

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

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

or ''affiliate'' center. Employers must contact the nearest ''comprehensive'' AJC serving the area of intended employment where work will commence or, where a ''comprehensive'' AJC is not available, the nearest ''affiliate'' AJC. A ''comprehensive'' AJC tends to be a large office that offers the full range of employment and business services, and an ''affiliate'' AJC typically is a smaller office that offers a self-service career center, conducts hiring events, and provides workshops or other select employment services for workers. Because a ''comprehensive'' AJC may not be available in many geographic areas, particularly among rural communities, this rule permits employers to contact the nearest ''affiliate'' AJC serving the area of intended employment where a ''comprehensive'' AJC is not available. As explained on the locator website, some AJCs may continue to offer virtual or remote services due to the pandemic with physical office locations temporarily closed for in-person and mail processing services. Therefore, this rule requires that employers utilize available electronic methods for the nearest AJC to meet the contact and disclosure requirements in this rule.

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

Second, when a job is in a traditionally or customarily unionized occupation or industry, during the time the SWA is actively circulating the job order the employer must affirmatively contact the nearest American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) office covering the area of intended employment to provide written notice of the job opportunity and request assistance in recruiting qualified U.S. workers who may be interested in applying for the job opportunity. The employer must provide the AFL–CIO office (by mail, email, or other effective written means) a copy of the job order placed with the SWA. To determine which occupations are traditionally or customarily unionized, and to obtain information about the proper AFL–CIO office to contact,[144] employers should search the resources available on the OFLC website, under the ''Customarily Unionized H–2B Occupations'' tab on the lefthand side of the OFLC homepage: *https://www.dol.gov/agencies/eta/foreign-labor.*[145] In addition, to help employers who must conduct this additional recruitment step, employers may also contact the national AFL–CIO and request assistance in circulating the job order to the nearest AFL–CIO office covering the area of intended employment to advertise and recruit U.S. workers for the job opportunity. The most effective means of contacting the national AFL–CIO is to email the job order and request for assistance to *H-2B@aflcio.org,* but employers may also visit *https://aflcio.org* to obtain information on other effective means of contacting the organization for assistance. As with the May 2022 TFR, upon receipt, the national AFL–CIO will distribute a copy of the job order, on behalf of the employer, to the most appropriate AFL–CIO office(s) serving the area of intended employment for that job opportunity. The Department believes that this approach will be more straightforward and simpler for employers, and therefore encourages employers to meet the notification requirement by contacting the national AFL–CIO directly.

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

We believe the requirement that employers contact the AFL–CIO in occupations or industries that are traditionally or customarily unionized will complement the requirement that SWAs circulate the job order to the State Federation of Labor and local unions in such situations, thereby increasing the likelihood that a U.S. worker will be recruited for the job opportunity. This is because in traditionally or customarily unionized industries and occupations, unions serve as an essential conduit for communications between U.S. workers and hiring employers and have traditionally been recognized as a reliable source of referrals of U.S. workers. Unionized applicants may additionally share information about the job opportunity with nonunionized applicants, resulting in more referrals of qualified applicants to the job opportunity. Within this context, the two requirements complement each other as the State Federations of Labor and local unions that SWAs would circulate relevant job orders to, based on their knowledge of the local labor market, are comprised of various union organizations and may not always

[144] The Departments have determined that the requirement for employers to contact the nearest AFL–CIO office properly balances the goal of increasing U.S. worker outreach in those H–2B job opportunities that are in traditionally or customarily unionized occupations, while still providing employers with necessary guidance on recruitment requirements. The AFL–CIO is a voluntary federation of 58 national and international labor unions covering a substantial number of union employees. AFL–CIO, About Us, *https://aflcio.org/about-us* (last visited Nov. 9, 2022). The H–2B job opportunities in traditionally or customarily unionized occupations most frequently fall within those industries most likely to be organized or represented by AFL–CIO member unions.

Additionally, the AFL–CIO's status as the largest federation of unions in the United States provides for comprehensive national coverage and increases the chances that a U.S. worker will be hired. *See* AFL–CIO Press Release, *https://aflcio.org/press/releases/afl-cio-teams-wilmington-trust-and-bny-mellon-expand-retirement-planning-options* (last visited Nov. 21, 2022) (noting the AFL–CIO is ''the nation's largest federation of labor unions''). As discussed below, the SWAs circulation of relevant job orders based on their knowledge of the local labor market would provide effective outreach to other federations of unions and non-affiliated unions.

[145] These resources were developed based on recent information received from stakeholders indicating that collective bargaining agreements now exist in certain occupations, such as landscaping. In addition, the occupations or industries listed are ones in which the Department has typically observed substantial union presence in its program administration experience, such as occupations involved in public sector employment, construction and extraction activities, and service-related industries, where historical Bureau of Labor Statistics data has demonstrated a presence of union affiliated workers. *See* BLS, Economic News Release, Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry (Jan. 20, 2022), *https://www.bls.gov/news.release/union2.t03.htm.*

include the AFL–CIO. Since H–2B job opportunities in traditionally or customarily unionized occupations tend to fall within those industries most likely to be organized or represented by AFL–CIO member unions, this requirement increases outreach to qualified U.S. workers. Moreover, this requirement offers a chance for hiring employers to directly contact a potential pool of U.S. workers who are qualified and interested in the job opportunity, which can strengthen the probability that employers will locate U.S. workers suited for the job opportunity. For example, potential U.S. workers may be more inclined to contact an employer directly upon learning of the job opportunity rather than utilize the SWA as an intermediary since the application process could be quicker and demonstrate a willingness by employers to consider union workers. Direct contact between employers and unions may also initiate a dialogue between employers and unions that could lead to a future working relationship that fulfills the workforce needs of employers. Therefore, in providing timely and meaningful notice of job opportunities in traditionally or customarily unionized industries to the AFL–CIO, employers build on efforts by SWAs to circulate job orders to state and local unions, which may differ from the AFL–CIO, and thus broaden the scope of their U.S. worker outreach.

Contact With Former U.S. Workers

Third, during the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of new 20 CFR 655.65 for intrastate clearance, the employer must make reasonable efforts to contact (by mail or other written effective means) its former U.S. workers that it employed in the occupation at the place of employment (except those who were dismissed for cause or who abandoned the worksite) during the period beginning January 1, 2021, until the date the I–129 petition required under 8 CFR 214.2(h)(6)(xiii) is submitted. Among the employees the employer must contact are those who have been furloughed or laid off during this period. The employer must disclose to its former employees the terms of the job order placed with the SWA, and solicit their return to the job. The employer must provide the contact and disclosures required by this paragraph in a language understood by the worker, as necessary or reasonable, and in writing to ensure the recruitment effort is effective and meaningful in reaching each former U.S. worker. While previous rules have not specified how employers should make the contact and disclosure, the Departments have found that employers are often using methods of written disclosure (such as emails or letters sent through certified mail), and are clarifying in this rule that the contact and disclosure with former workers must be written. The Departments believe that written contact and disclosure of the terms of the job order is more effective than oral disclosure, and provides greater assurance that workers understand the terms and working conditions of the job opportunity and can more effectively pursue redress if they do not receive the disclosed terms and working conditions. The Departments also believe that this change will make it easier for employers to establish compliance with this requirement, if necessary.

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

Contact With the Bargaining Representative or Posting of the Job Order

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

New Recruitment Requirements for FY 2023

Finally, as discussed below and as a change from prior TFRs, employers under this rule must expand their recruitment efforts by contacting U.S. workers currently employed at the place of employment to inform them of the job opportunity and request their assistance in recruiting qualified U.S. workers who may be seeking employment and, where employers maintain a company website, by posting the job opportunity in a conspicuous location on that site. Given the number of current U.S. workers who remain unemployed, including those marginally attached to the labor force, and mainstream estimates that labor shortages may ease somewhat due to rising unemployment during 2023, the Departments believe it is reasonable and appropriate to require employers seeking to access the supplemental visas during FY 2023 to expand their efforts in attracting qualified U.S. workers who are likely to apply for the job opportunity.

Although the unemployment rate has remained historically low and in a narrow range of 3.5% to 3.7% since March 2022, the BLS recently reported that the number of unemployed persons rose by 306,000 to 6.1 million in October 2022. The BLS also noted that there were another 5.7 million persons in the labor force, including those marginally attached to the labor force, who are not counted as unemployed and currently want a job.[146] The number of discouraged workers, a subset of all persons marginally attached to the labor force and who believed that no jobs were available for them, decreased by 114,000 to 371,000 in October 2022, providing evidence that an increasing number of U.S. workers are making decisions to reenter the workforce.

Concurrently, some employers have been responding to recent trends in the labor market by intensifying and expanding their efforts to attract

[146] U.S. Department of Labor, Bureau of Labor Statistics, *The Employment Situation Report—October 2022,* available at *https://www.bls.gov/news.release/archives/empsit_11042022.htm* (accessed Nov. 6, 2022). BLS reports that the number of persons not in the labor force who currently want a job was little changed at 5.7 million in October and remains above its pre-pandemic February 2020 level of 5.0 million. These individuals were not counted as unemployed because they were not actively looking for work during the 4 weeks preceding the survey or were unavailable to take a job. Among those not in the labor force who wanted a job, the number of persons marginally attached to the labor force was little changed in October at 1.5 million. These individuals wanted and were available for work and had looked for a job sometime in the prior 12 months but had not looked for work in the 4 weeks preceding the survey.

qualified U.S. workers. For example, a recent report published by the Federal Reserve Bank of Richmond, which leveraged data based on a June 2022 survey of employer hiring behavior, noted that the intensity of employer recruiting has substantially increased, with more employers reporting expansions of their recruiting efforts in the past year and compared to pre-pandemic levels.[147] In particular, the report noted that tightness of the labor market has resulted in not only an increase in the number of open jobs per unemployed worker but, as employers continue to compete for a smaller pool of qualified applicants, they are exerting more effort and using a broader array of recruiting methods to reach qualified candidates for job vacancies. Additionally, a majority of employers reported expanding the geographic scope of their recruitment efforts and using enhanced word-of-mouth recruiting (*e.g.,* recommendations from professional contacts, friends and family), targeting different job fairs, and holding virtual career fairs to reach qualified candidates. The Federal Reserve Bank of Richmond noted that these changes in employer hiring behavior were broad-based and consistent across industry and firm size as well as the level of skills required for the job opportunities.

Finally, while the Departments cannot predict with certainty what labor market conditions will be during calendar year 2023, mainstream estimates of labor market conditions for calendar year 2023 suggest that labor shortages may ease somewhat due to rising unemployment (although they are expected to persist to some degree in the coming years). For example, in conjunction with its Federal Open Market Committee meeting held on September 20 and 21, 2022, the Federal Reserve Board released its projections of the most likely outcomes for the U.S. economy and labor market, predicting that the unemployment rate will increase from an estimated average of 3.8% in 2022 to approximately 4.4% in 2023.[148] Similarly, in its October 12, 2022 publication, the Conference Board predicts that the unemployment rate will likely rise to an estimated 3.9% by the end of this year and peak at 4.4% during 2023. Although unemployment will remain low by historical standards, these estimates suggest that an increasing number of U.S. workers will likely be unemployed and actively searching for work during 2023, when compared to labor conditions within the past year.

Given the most recent labor market data, mainstream estimates of labor market conditions for calendar year 2023, and evidence that employers have been responding to recent labor market dynamics by intensifying and expanding their recruitment efforts, the Departments believe it is reasonable and appropriate, at this time, to require employers seeking H–2B workers under this rule to expand their recruitment efforts both in methods to locate qualified U.S. workers, especially as the supplemental visas are meant for those businesses that have encountered or would encounter truly dire circumstances due to an inability to access the supplemental visas. Without these additional, reasonable recruitment actions, it is possible that the supplemental visas could be provided to employers that could find qualified U.S. workers, frustrating Congress' intent.

New Recruitment Requirement for FY 2023: Contact With Current U.S. Workers

During the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of new 20 CFR 655.65 for intrastate clearance, the employer must make reasonable efforts to contact (by mail or other effective written means) all U.S. workers it currently employs at the place(s) of employment under the certified TLC. The employer must disclose to each of its current U.S. workers the terms of the job order placed with the SWA, and request assistance in recruiting qualified U.S. workers who may be interested in applying for the job opportunity. The contacts, disclosures, and requests for assistance required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable, and in writing to ensure the recruitment effort is effective and meaningful in reaching each current U.S. worker.

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

Given the evolving conditions of the U.S. labor market and changing behavior by employers to intensify and expand their recruitment efforts, as described above, the Departments believe this recruitment step is a reasonable and cost-effective method of broadening dissemination of available job opportunities and increasing the likelihood that qualified U.S. workers will apply. We believe the requirement that employers contact their current U.S. workers employed at the place(s) of employment and solicit their assistance in recruiting other qualified U.S. workers will complement the requirement that employers post the job order in the places and manner described in 20 CFR 655.45(b), enhance word-of-mouth recruiting that is a common method of soliciting referrals of qualified U.S. workers, and increase the likelihood of locating U.S. workers suited for the job opportunity more quickly and efficiently. U.S workers currently employed by the employer, who are more likely to be familiar with the nature of the employer's business operations and services or labor to be performed, will generally refer other U.S. workers who are qualified and may be more inclined to contact an employer

[147] Claudia Macaluso, and Sonya Ravindranath Waddell, *Changing Recruiting Practices and Methods in a Tight Labor Market,* Federal Reserve Bank of Richmond Economic Brief, No. 22–36, September 2022, available at *https://www.richmondfed.org/publications/research/economic_brief/2022/eb_22-36* (accessed Nov. 6, 2022). The report is based on the Federal Reserve Bank of Richmond's *Survey of Employer Recruiting Behavior,* which was conducted jointly with the Richmond chapter of the Society for Human Resources Management and surveyed 155 in-house recruiters and HR professionals from a variety of industries and firm sizes between June 1 to June 17, 2022.

[148] Federal Reserve Board, Federal Open Market Committee, Summary of Economic Projections, September 21, 2022, available at *https://www.federalreserve.gov/monetarypolicy/fomcprojtabl20220921.htm* (access Nov. 6, 2022). Projections for the unemployment rate are for the average civilian unemployment rate in the fourth quarter of the year indicated. The Federal Reserve Board forecasts a 4.4% median unemployment rate for 2023, which represents the middle projection when the projections are arranged from lowest to highest, and 4.1% to 4.5% central tendency unemployment rate range for 2023, which excludes the three highest and three lowest projections in each calendar year.

directly upon learning of the job opportunity from a family, friend, or colleague with experience working for the employer.

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

New Recruitment Requirement for FY 2023: Posting of the Job Opportunity on the Employer's Website If the Employer Has a Website

Where the employer maintains a company website for its business operations, the employer must post an electronic advertisement of the job opportunity in a conspicuous location on this website. Although the vast majority of small businesses in the United States maintain a website, the Departments acknowledge that not all employers maintain a company website.[149] Although there is no parallel requirement for employers without a website, requiring employers with websites to post the job announcement on their website is reasonable because this population of employers uses their websites to inform the public about their existence and/or the services they may provide. Thus, these employers' advertisement of the job opportunity, via their websites, is consistent with these employers' use of the internet/electronic means to communicate with the public. Accordingly, this recruitment requirement will apply only to employers that maintain a website for business operations. For employers who must conduct this additional recruitment step, the electronic advertisement of the job opportunity on the company website must be posted in a conspicuous location. This means access to the electronic advertisement on the company website must be clearly visible on the website's homepage or easily accessible from the website's homepage using any job search tool(s) or direct links from the homepage to a subsequent web page where other available jobs or careers are normally posted by the employer.

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

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

Hiring U.S. Workers

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

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

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

Any U.S. worker who applies or is referred for the job opportunity and is not considered by the employer for the job opportunity, experiences difficulty accessing or understanding the material terms and conditions of the job opportunity, or believes they have been improperly rejected by the employer may file a complaint directly with the SWA serving the area of intended employment. Each SWA maintains a complaint system for public labor exchange services established under 20

[149] The U.S. Chamber of Commerce reports that 71% of small businesses have a website and, of those with websites, 79% of survey respondents claimed that their websites are mobile-friendly. According to the survey results, 92% of the 29% of small businesses without a website reported planning to have one up and running by the end of 2018. *See* U.S. Chamber of Commerce, Small Business Statistics, available at *https://www.chamberofcommerce.org/small-business-statistics/#marketing-statistics* (accessed Nov. 6, 2022).

CFR part 658, subpart E, and any complaint filed by, or on behalf of, a U.S. worker about a specific H–2B job order will be processed under this existing complaint system. Depending on the circumstances, the SWA may seek informal resolution by working with the complainant and the employer to resolve, for example, miscommunications with the employer to be considered for the job opportunity or other concerns or misunderstandings related to the terms and conditions of the job opportunity. In other circumstances, such as allegations involving discriminatory hiring practices, the SWA may need to formally enter the complaint and refer the matter to an appropriate enforcement agency for prompt action. As mentioned above, DOL's OFLC maintains a comprehensive directory of contact information for each SWA that can be used to obtain more information on how to file a complaint.

Although the hiring period may require some employers to hire U.S. workers after the start of the contract period, this is not unprecedented. For example, in the H–2A program, employers have been required to hire U.S. workers through 50 percent of the contract period since at least 2010, which ''enhance[s] protections for U.S. workers, to the maximum extent possible, while balancing the potential costs to employers,'' and is consistent with the Departments' responsibility to ensure that these job opportunities are available to U.S. workers. 74 FR 45917. The Department acknowledges that hiring workers after the start of the contract period imposes an additional cost on employers, but that cost can be lessened, in part, by the ability to discharge the H–2B worker upon hiring a U.S. worker (note, however, that an employer must pay for any discharged H–2B worker's return transportation, 20 CFR 655.20(j)(1)(ii) and 29 CFR 503.16(j)(1)(ii)). Additionally, this rule permits employers to immediately hire H–2B workers who are already present in the United States without waiting for approval of an H–2B petition, which will reduce the potential for harm to H–2B workers as a result of displacement by U.S. workers. *See* new 8 CFR 214.2(h)(29). Most importantly, a longer hiring period will ensure that available U.S. workers have a viable opportunity to apply for H–2B job opportunities. Accordingly, the Departments have determined that in affording the benefits of this temporary cap increase to businesses that are suffering irreparable harm or will suffer impending irreparable harm, it is necessary to ensure U.S. workers, who may be seeking employment as the economy continues to recover in 2022 and 2023, have sufficient time to apply for these jobs.

As in the temporary rules implementing the supplemental cap increases in prior years, employers must retain documentation demonstrating compliance with the recruitment requirements described above, including placement of a new job order with the SWA, contact with AJCs, contact with the bargaining representative or AFL–CIO when required, contact with former U.S. workers, and compliance with § 655.45(a) or (b). Employers must prepare and retain a recruitment report that describes these efforts and meets the requirements set forth in 20 CFR 655.48, including the requirement to update the recruitment report throughout the recruitment and hiring period set forth in paragraph (a)(5)(v) of new 20 CFR 655.65. Employers must maintain copies of the recruitment report, attestation, and supporting documentation, as described above, for a period of 3 years from the date that the TLC was approved, consistent with the document retention requirements under 20 CFR 655.56. These requirements are similar to those that apply to certain seafood employers that stagger the entry of H–2B workers under 20 CFR 655.15(f).

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

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

The H–2B Ombudsman Program, however, is not an alternative to the employment service complaint system administered by the Employment and Training Administration under regulations at 20 CFR 658, subpart E. Any information relevant to an employment service complaint will be forwarded to the appropriate SWA. The public may also submit employment service complaints directly to the appropriate SWA; the contact information for each SWA is available at the following web page: *https://www.dol.gov/agencies/eta/foreign-labor/contact.*

Complaints regarding an employer's failure to comply with the H–2B program requirements may also be submitted to DOL's WHD. WHD has the authority to investigate the employer's attestations, as the attestations are a required part of the H–2B petition process under this rule and the attestations rely on the employer's existing, approved TLC. Where a WHD investigation determines that there has been a willful misrepresentation of a material fact or a substantial failure to meet the required terms and conditions of the attestations, WHD may institute administrative proceedings to impose sanctions and remedies, including (but not limited to) assessment of civil money penalties; recovery of wages due to workers; make-whole relief for any U.S. worker who has been improperly rejected for employment, laid off, or displaced; make-whole relief for any person who has been discriminated against; and/or debarment for 1 to 5 years. *See* 29 CFR 503.19, 503.20. This regulatory authority is consistent with WHD's existing enforcement authority and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at new 20 CFR 655.67, the petitioner must retain documents and records evidencing compliance with this rule, and must provide the documents and records upon request by DHS or DOL.

When conducting an investigation, WHD will generally review the employer's compliance with this rule, the H–2B program obligations in

general, and any other Federal labor laws that WHD enforces (such as the Fair Labor Standards Act, which establishes minimum wage, overtime, recordkeeping and child labor obligations for most employers in the United States) and to which the employer is subject. WHD's investigations generally involve meeting with the employer, touring the worksite, conducting confidential interviews with employees, reviewing records (including those required by new 20 CFR 655.67 evidencing compliance with this rule), and, when appropriate, imposing sanctions and remedies (including back wages). For example, in the past five years (Fiscal Years 2018–2022), WHD collected more than $13.8 million in H–2B back wages owed to 8,654 workers, and assessed more than $10.6 million in H–2B civil money penalties.

Within the context of this rule, WHD's investigative tools are particularly adept for the review of alleged violations that may result in back wages and/or that require intensive fact-finding at the worksite. Additionally, WHD is well suited to investigate alleged violations that occur after the job order has closed and H–2B workers are already in the United States. For example, WHD's tools are well suited to investigate allegations that U.S. applicants were improperly rejected for the job opportunity (if supplemental recruitment was required as outlined in 20 CFR 655.65(a)(5)) after the job order has closed, as WHD may conduct employee interviews, question the employer as to why the applicant was not hired, review recruitment records, and, if a violation is substantiated, compute back wages for the improperly rejected U.S. applicant. Similarly, WHD is well suited to investigate an allegation that an employer is not complying with the obligations in § 655.65(a)(4) (meaning that the employer is not complying with applicable employment related laws or regulations, or is not notifying the workers that all persons in the United States have equal access to COVID–19 vaccines and vaccine distribution sites), as substantiating this allegation may involve interviews with affected H–2B workers or the employer and a tour of the worksite.

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

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

DHS has the authority to verify any information submitted to establish H–2B eligibility at any time before or after the petition has been adjudicated by USCIS. *See, e.g.,* INA sections 103 and 214 (8 U.S.C. 1103, 1184); *see also* 8 CFR part 103 and section 214.2(h). DHS' verification methods may include, but are not limited to, review of public records and information, contact via written correspondence or telephone, unannounced physical site inspections, and interviews. USCIS will use information obtained through verification to determine H–2B eligibility and assess compliance with the requirements of the H–2B program. Subject to the exceptions described in 8 CFR 103.2(b)(16), USCIS will provide petitioners with an opportunity to address adverse information that may result from a USCIS compliance review, verification, or site visit that occurs after a formal decision is made on a petition or after the agency has initiated an adverse action that may result in revocation or termination of an approval.

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

Under this rule, an employer may submit a petition to USCIS, including a valid TLC and Form ETA–9142B–CAA–7, in which the employer attests to compliance with requirements for access to the supplemental H–2B visas allocated through 8 CFR 214.2(h)(6)(xiii), including that its business is suffering irreparable harm or will suffer impending irreparable harm, and that it will conduct additional recruitment, if necessary to refresh the TLC's labor market test. DHS and DOL consider Form ETA–9142B–CAA–7 to be an appendix to the Application for Temporary Employment Certification and the attestations contained on the Form ETA–9142B–CAA–7 and documentation supporting the attestations to be evidence that is incorporated into and a part of the approved TLC. Therefore, DOL's audit authority includes the authority to audit the veracity of any attestations made on Form ETA–9142B–CAA–7 and documentation supporting the attestations. In order to make certain that the supplemental visa allocation is not subject to fraud or abuse, DHS will continue to share information regarding Forms ETA–9142B–CAA–7 with DOL, consistent with existing authorities. This information sharing between DHS and DOL, along with relevant information that may be obtained through the separate SWA and WHD

complaint systems, are expected to support DOL's identification of TLCs used to access the supplemental visa allocation for closer examination of TLCs through the audit process.

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

Failure to comply in the audit process may result in the revocation of the employer's certification or in debarment, under 20 CFR 655.72 and 655.73, respectively, or require the employer to undergo assisted recruitment in future filings of an Application for Temporary Employment Certification, under 20 CFR 655.71. Where an audit examination or review of information from DHS or other appropriate agencies determines that there has been fraud or willful misrepresentation of a material fact or a substantial failure to meet the required terms and conditions of the attestations or failure to comply with the audit examination process, OFLC may institute appropriate administrative proceedings to impose sanctions on the employer. Those sanctions may result in revocation of an approved TLC, the requirement that the employer undergo assisted recruitment in future filings of an Application for Temporary Employment Certification for a period of up to 2 years, and/or debarment from the H–2B program and any other foreign labor certification program administered by DOL for 1 to 5 years. *See* 29 CFR 655.71, 655.72, 655.73. Additionally, OFLC has the authority to provide any finding made or documents received during the course of conducting an audit examination to DHS, WHD, IER, or other enforcement agencies. OFLC's existing audit authority is independently authorized, and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at new 20 CFR 655.67, the petitioner must retain documents and records proving compliance with this rule, and must provide the documents and records upon request by DHS or DOL.

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

IV. Statutory and Regulatory Requirements

A. Administrative Procedure Act

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

1. Good Cause To Forgo Notice and Comment Rulemaking

The APA, 5 U.S.C. 553(b)(B), authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency, for good cause, finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Among other things, the good cause exception for forgoing notice and comment rulemaking ''excuses notice and comment in emergency situations, or where delay could result in serious harm.'' *Jifry* v. *FAA,* 370 F.3d 1174, 1179 (D.C. Cir. 2004). Courts have found ''good cause'' under the APA when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. *See, e.g., Nat'l Fed'n of Fed. Emps.* v. *Devine,* 671 F.2d 607, 611 (D.C. Cir. 1982) (holding that an agency may use the good cause exception to address ''a serious threat to the financial stability of [a government] benefit program''); *Am. Fed'n of Gov't Emps.* v. *Block,* 655 F.2d 1153, 1156 (D.C. Cir. 1981) (finding good cause when an agency bypassed notice and comment to avoid ''economic harm and disruption'' to a given industry, which would likely result in higher consumer prices).

Although the good-cause exception is ''narrowly construed and only reluctantly countenanced,'' *Tenn. Gas Pipeline Co.* v. *FERC,* 969 F.2d 1141, 1144 (D.C. Cir. 1992), the Departments have appropriately invoked the exception in this case due to the time exigencies resulting from the unique procedural history of the Department's authority for this action and the ongoing economic need for this rulemaking, as described further below. Overall, the Departments are bypassing notice and comment to prevent ''serious economic harm to the H–2B community,'' including U.S. employers, associated U.S. workers, and related professional associations, that could result from the failure to provide supplemental visas as authorized by Congress. *See Bayou Lawn & Landscape Servs.* v. *Johnson,* 173 F. Supp. 3d 1271, 1285 & n.12 (N.D. Fla. 2016). The Departments note that this action is temporary in nature, *see id.,*[150] and limits eligibility for H–2B supplemental visas to only those businesses most in need, and also protects H–2B and U.S. workers.

The Departments are bypassing advance notice and comment in order to prevent economic harm resulting from American businesses suffering irreparable harm due to a lack of a sufficient labor force, that would ensue if the Departments do not exercise the authority provided by the extension of supplemental cap authority in Section 204 of the Consolidated Appropriations Act, 2022 by section 101(6) of the FY 2023 Continuing Appropriations Act, 2023 (authorized on September 30, 2022) to FY 2023 before it expires on December 16, 2022.[151] The deadline for exercising the FY 2023 supplemental

[150] Because the Departments have issued this rule as a temporary final rule, the supplemental cap portion of this rule—with the sole exception of the document retention requirements—will be of no effect after September 30, 2023. The ability to initiate employment with a new employer pursuant to the portability provisions of this rule expires at the end of on January 24, 2024.

[151] *See* Section 204, Consolidated Appropriations Act, 2022, Division O, Public Law 117–103 (Mar. 15, 2022), extended by section 101(6) of the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Division A (''Continuing Appropriations Act, 2023''), Public Law 117–180 (Sep. 30, 2022). Pursuant to section 106 of the Continuing Appropriations Act, 2023, Division A, Public Law 117–180, the deadline for exercising the FY 2023 supplemental cap authority under this act is Dec. 16, 2022, the date on which the Continuing Appropriations Act expires.

cap authority under the Continuing Appropriations Act, 2023 is December 16, 2022, the date on which the Continuing Appropriations Act, 2023 expires.[152] The Departments must give effect to this authority prior to its expiration in order to urgently address increased labor demand[153] and insufficient labor supply, and other conditions stemming from the ongoing economic consequences of the ongoing COVID–19[154] pandemic, including high inflation. A characteristic of the pandemic, the ''Great Resignation,'' has resulted in an adverse impact on many employers in industries that frequently use the H–2B program,[155] and reports suggest this trend has continued in 2022. Furthermore, the pandemic has had an impact on inflation[156] and supply chains.[157] The war in Ukraine has further strained the U.S. economy; U.S. Treasury Secretary Janet Yellen warned on April 6, 2022 about the economic shock waves set off by the war in Ukraine, including disruptions to the global flow of food and energy which further aggravates inflation.[158]

USCIS received more than enough petitions to meet the H–2B visa statutory cap for the first half of FY 2023 on September 12, 2022,[159] more than two weeks earlier than when the semiannual cap for the first half of FY 2022 was reached.[160] Based on past years' experience, DHS anticipates that it will also receive sufficient petitions to meet the semiannual cap for the second half of the FY 2023; last year on February 25, 2022, USCIS received sufficient petitions to meet the H–2B visa statutory cap for the second half of FY 2022. Given the continued high demand of American businesses for H–2B workers, rapidly evolving economic conditions and historically high labor demand, and the limited time remaining until the expiration of the continuing resolution authorizing supplemental cap authority to help prevent further irreparable harm currently experienced by some U.S. employers or avoid impending economic harm for others,[161] a decision to undertake notice and comment rulemaking, which would delay final action on this matter by months, would greatly complicate and potentially preclude the Departments from successfully exercising the authority created by section 204, Public Law 117–103 as extended to FY 2023 by secs. 101(g) and 106, Public Law 117–180.

The temporary portability and change of employer provisions in 8 CFR 214.2 and 274a.12 are also supported by ongoing effects of the COVID–19 pandemic, including labor market

[152] In addition, it would not be possible to publish a notice of proposed rulemaking, collect comments, review those comments, and issue a final rule prior to the expiration of the authority that supports this rule.

[153] *See* Irina Ivanova, *America's labor shortage is actually an immigrant shortage,* CBS News, *https://www.cbsnews.com/news/immigration-jobs-workers-labor-shortage/* (Apr. 8, 2022). (''U.S. employers say it's a hard time to find and keep talent. Workers are decamping at near-record rates, while millions of open jobs go unfilled. One reason for this labor crunch that has largely flown beneath the radar: Immigration to the U.S. is plummeting, a shift with potentially enormous long-term implications for the job market.'')

[154] ''The U.S. has extended the Covid public health emergency through Jan. 11, a clear demonstration that the Biden administration still views Covid as a crisis despite President Joe Biden's recent claim that the pandemic is over.'' *See* Spencer Kimball, *U.S. extends Covid public health emergency even though Biden says pandemic is over,* CNBC Health & Science, *https://www.cnbc.com/2022/10/13/us-extends-covid-public-health-emergency-.html* (last visited Oct. 25, 2022).

[155] *See* Megan Leonhardt, *The Great Resignation is hitting these industries hardest,* Fortune, *https://fortune.com/2021/11/16/great-resignation-hitting-these-industries-hardest/* (Nov. 16, 2021) (''The industries hit hardest by quits in September are leisure and hospitality—including those who work in the arts and entertainment, as well as in restaurants and hotels—trade, transportation and utilities, professional services and retail.''). These observations made in the preceding source align with USCIS analysis of labor demand in industry sectors that are most represented in the H–2B program, as discussed in the E.O. 12866 analysis. *See also* Greg Iacurci, *The Great Resignation continues, as 44% of workers look for a new job,* CNBC, *https://www.cnbc.com/2022/03/22/great-resignation-continues-as-44percent-of-workers-seek-a-new-job.html* (Mar 22, 2022) (''Almost half of employees are looking for a new job or plan to soon, according to a survey, suggesting the pandemic-era phenomenon known as the Great Resignation is continuing into 2022.'' To that point, 44% of employees are ''job seekers,'' according to Willis Towers Watson's 2022 Global Benefits Attitudes Survey. Of them, 33% are active job hunters who looked for new work in the fourth quarter of 2021, and 11% planned to look in the first quarter of 2022.''); Bureau of Labor Statistics, Monthly Labor Review, *Great Resignation in Perspective,* July 2022, *https://www.bls.gov/opub/mlr/2022/article/the-great-resignation-in-perspective.htm* (last visited Oct. 25, 2022) (''Over the last year, the rate of job quitting in the United States has reached highs not seen since the start of the U.S. Bureau of Labor Statistics Job Openings and Labor Turnover Survey program in December 2000. This recent phenomenon has been called the ''Great Resignation.'').

[156] *See* Tom Barkin, *What's Driving Inflation* (''The pandemic (and the responses to it) unleashed a series of physical and human supply shocks that have pushed prices and wages up and lasted far longer than anyone anticipated.''), *https://www.richmondfed.org/press_room/speeches/thomas_i_barkin/2022/barkin_speech_20220930* (Sep. 30, 2022). On October 20, 2022, BLS reported that the CPI–U increased 0.4 percent in September on a seasonally adjusted basis after rising 0.1 percent in August. Over the previous 12 months, the all items index increased 8.2 percent as of September 2022 before seasonal adjustment. *See also* BLS, Economic News Release, Consumer Price Index Summary (Oct. 20, 2022), *https://www.bls.gov/news.release/archives/cpi_10132022.htm.*

[157] *See, e.g.,* Mitchell Hartman, *Omicron's impact on inflation and supply chains is uncertain,* Marketplace, *https://www.marketplace.org/2021/12/01/omicrons-impact-on-inflation-and-supply-chains-is-uncertain/* (Dec. 1, 2021) (''People have trouble getting to work through lockdowns and what have you, and labor gets scarcer—particularly for those jobs where being present at work matters. Supply goes down and has an upward pressure on pricing . . . .''); Alyssa Fowers & Rachel Siegel, *Five charts explaining why inflation is at a near 40-year high,* Wash. Post, *https://www.washingtonpost.com/business/2021/10/14/inflation-prices-supply-chain/* (Oct. 14, 2021, last updated Dec. 10, 2021) (''Prices for meat, poultry, fish and eggs have surged in particular above other grocery categories. The White House has pointed to broad consolidation in the meat industry, saying that large companies bear some of the responsibility for pushing prices higher . . . . Meat industry groups disagree, arguing that the same supply-side issues rampant in the rest of the economy apply to proteins because it costs more to transport and package materials, while tight labor market has held back meat production.''). *See also* Reuters, *Supply chain data eases, giving some hope for U.S. inflation relief* (''Supply-related issues have been a major problem for the economy and for monetary policymakers for some time now. Supply disruptions tied to the pandemic have now been joined by disruptions related to Russia's war on Ukraine . . . . Last week, Fed second-in-command Lael Brainard cautioned it could take a while for supply chains to help with inflation, and noted in a speech that ''global supply chains have eased significantly, but by some measures they are still more constrained than at nearly any time since the late 1990s.''), *https://www.reuters.com/markets/us/supply-chain-data-eases-giving-some-hope-us-inflation-relief-2022-10-17/* (last visited Oct. 25, 2022); U.S. Department of the Treasury, *Remarks by Secretary of the Treasury Janet L. Yellen at the Securities Industry and Financial Markets Association's Annual Meeting https://home.treasury.gov/news/press-releases/jy1045* (last visited Oct. 25, 2022) (''Our economic potential had been weighed down by sluggish productivity growth and declining labor force participation. Inequality had soared, with profound disparities by race and geography. And our economy had been over-exposed to the actions of malicious geopolitical actors . . ., vulnerabilities in our supply chain, and the growing impacts of climate change.'').

[158] *See* Anneken Tappe and Matt Egan, *Janet Yellen warns of 'enormous' economic repercussions from war in Ukraine,* CNN Business, *https://www.cnn.com/2022/04/06/economy/treasury-yellen-economic-impact-ukraine/index.html* (Apr. 6, 2022)

[159] *See* USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2023 https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023* (Sep. 14, 2022).

[160] November 16, 2020 was the last receipt date for the first half of FY 2020. *See* USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2021, https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021* (Nov. 18, 2020).

[161] *See* Jason Douglas et al., *Omicron Disrupts Government Plans to Lure Migrant Workers as Labor Shortages Bite,* Wall Street Journal, *https://www.wsj.com/articles/omicron-disrupts-government-plans-to-lure-migrant-workers-as-labor-shortages-bite-11639132203* (Dec. 10, 2021) (''I've lost customers because people don't have the patience to wait—it's horrible, horrible,'' she said. ''The sad part is, if I got my workers, my business would grow exponentially.' . . . Ms. Ogden has tried to find locals to fill the jobs. She even asked her congressman to put a sign in his office. She offered about $18 an hour, plus overtime. No one took a job. Congress raised the cap for H–2B visas this year, up to a total of 66,000 for fiscal 2022, but that still falls far short of demand.'').

demands. On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act in response to COVID–19 retroactive to January 27, 2020.[162] This determination that a public health emergency exists due to COVID–19 has subsequently been renewed several times: on April 21, 2020, on July 23, 2020, on October 2, 2020, January 7, 2021, on April 15, 2021, on July 19, 2021, on October 15, 2021, on January 14, 2022, April 12, 2022, and most recently, on October 13, 2022.[163] On March 13, 2020, then-President Trump declared a National Emergency concerning the COVID–19 outbreak, retroactive to March 1, 2020, to control the spread of the virus in the United States.[164]

Travel restrictions have changed over time as the pandemic has continued to evolve. On October 25, 2021, the President issued Proclamation 10294, *Advancing the Safe Resumption of Global Travel During the COVID–19 Pandemic,* which, together with other policies, advance the safety and security of the air traveling public and others, while also allowing the domestic and global economy to continue its recovery from the effects of the COVID–19 pandemic. The proclamation bars the entry of noncitizen adult nonimmigrants into the United States via air transportation unless they are fully vaccinated against COVID–19, with certain exceptions.[165] On January 22, 2022, similar requirements entered into force at land ports of entry and ferry terminals.[166] Varying availability of vaccines in some H–2B nonimmigrants' home countries could also complicate travel.

In addition to travel restrictions, as discussed elsewhere in this rule, current efforts to curb the pandemic in the United States and worldwide have only been partially successful. DHS anticipates that H–2B employers may need additional flexibilities, beyond supplemental visa numbers, to meet all of their labor needs, particularly if some U.S. and H–2B workers become unavailable due to illness or other restrictions related to the spread of COVID–19. Therefore, DHS is acting expeditiously to temporarily allow job portability for H–2B workers that will facilitate the continued employment of H–2B workers already present in the United States. This action will help employers fill these critically necessary nonagricultural job openings and protect U.S. businesses' economic investments in their operations.

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

The Departments recognize that the temporary nature of supplemental cap authority coupled with cyclical enactments and short timeframes for action, and the exigencies surrounding COVID–19 have not provided an opportunity for the public to weigh in on the implementation of this authority. While it is not possible to provide an opportunity for public comment prior to the implementation of this year's authority, and as explained above, the Departments have good cause to forgo notice and comment rulemaking, the Departments nevertheless recognize the importance of public input and believe they could receive valuable feedback that may lead to future improvements in the supplemental cap program. Therefore, DHS and DOL are accepting post-promulgation public comments for 60 days after the effective date of this rule as indicated in the **DATES** section.

2. Good Cause To Proceed With an Immediate Effective Date

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

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

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary and to the extent permitted by law, to proceed only if the benefits justify the costs and to select the regulatory approach that maximizes net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits; reducing costs; simplifying and harmonizing rules; and promoting flexibility through approaches that preserve freedom of choice (including through ''provision of information in a form that is clear and intelligible''). It also allows consideration of equity, fairness, distributive impacts, and human dignity, even if some or all of these are difficult or impossible to quantify.

The Office of Information and Regulatory Affairs has determined that this rule is an economically significant regulatory action. Accordingly, the Office of Management and Budget has reviewed this regulation.

1. Summary

With this temporary final rule (TFR), DHS is authorizing the release of an additional 64,716 total H–2B visas to be allocated throughout FY 2023. In accordance with the FY 2023 continuing resolution extending the authority provided in section 204 of the FY 2022 Omnibus, DHS is allocating the

[162] *See* HHS, *Determination of Public Health Emergency,* 85 FR 7316 (Feb. 7, 2020). *See also, https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx* (Jan. 31, 2020).

[163] *See* HHS, *Renewal of Determination That A Public Health Emergency Exists, https://aspr.hhs.gov/legal/PHE/Pages/covid19-13Oct2022.aspx* (Oct. 20, 2022).

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

[165] *See Advancing the Safe Resumption of Global Travel During the COVID–19 Pandemic,* 86 FR 59603 (Oct. 28, 2021) (Presidential Proclamation); *see also Amended Order Implementing Presidential Proclamation on Advancing the Safe Resumption of Global Travel During the COVID–19 Pandemic,* 86 FR 61224 (Nov. 5, 2021).

[166] *See Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico,* 87 FR 3425 (Jan. 24, 2022); *Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada,* 87 FR 3429 (Jan. 24, 2022).

supplemental visas in the following manner:

Table 1. Allocation of Supplemental Visas	
Supplement	Number of visas
FY23 1st Half RW Allocation	18,216
FY23 second Half RW Allocation	16,500
FY23 second Half RW Allocation #2 - (Late season Filers)	10,000
FY23 NCA/Haiti Allocation (available whole FY)	20,000
FY23 Total Supplemental Visas	64,716

As with previous H–2B visa supplements, these visas will be available to businesses that: (1) show that there are an insufficient number of U.S. workers to meet their needs throughout FY 2023; (2) attest that their businesses are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on their petition; and (3) petition for returning workers who were issued an H–2B visa or were otherwise granted H–2B status in FY 2020, 2021, or 2022, unless the H–2B worker is a national of one of the Northern Central American countries or Haiti. Additionally, up to 20,000 visas may be granted to workers from the Northern Central American countries and Haiti who are exempt from the returning worker requirement. This TFR aims to prevent irreparable harm to certain U.S. businesses by allowing them to hire additional H–2B workers within FY 2023.

The estimated total costs to petitioners range from $6,538,620 to $8,568,381. The estimated total cost to the Federal Government is $333,774. Therefore, DHS estimates that the total cost of this rule ranges from $6,872,394 to $8,902,155. Total transfers from filing fees made by petitioners to the Government are $9,126,020.[167] The benefits of this rule are diverse, though some of them are difficult to quantify. Some of these benefits include:

- Employers benefit from this rule significantly through increased access to H–2B workers;
- Customers and others benefit directly or indirectly from increased access;
- H–2B workers benefit from this rule significantly through obtaining jobs and earning wages, potential ability to port and earn additional wages, and increased information on COVID–19 and vaccination distribution. DHS recognizes that some of the effects of these provisions may occur beyond the borders of the United States; [168]
- Some American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if fewer H–2B workers were available;
- The existence of 20,000 visas set aside for workers from Guatemala, Honduras, El Salvador and Haiti gives lawful pathways for nationals from these countries to travel to and work in the U.S. and, therefore, provides multiple benefits in terms of U.S. policy with respect to the Northern Central American countries and Haiti; and
- The Federal Government benefits from increased evidence regarding attestations. Table 2 provides a summary of the provisions in this rule and some of their impacts.

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[167] DHS has determined, and USCIS will separately announce on its website, consistent with 8 CFR 106.4(g) and historical practice, that circumstances prevent the completion of processing of a significant number of H–2B supplemental cap petitions with start dates of need on or before March 31, 2023 that will be filed on or after the effective date of this rule within the 15-day premium processing timeframe. USCIS will therefore temporarily suspend premium processing for those petitions. This suspension will affect H–2B petitions filed under the NCA/Haiti allocation with start dates of work on or before March 31, 2023, as well as H–2B petitions filed under the returning worker allocation for the first half of FY 2023 (*i.e.* those with start dates on or before March 31, 2023). DHS will resume premium processing of these petitions on January 3, 2023 at which time it will begin to accept premium processing requests for these petitions on Form I–907. DHS cannot quantify to what extent, if any, some petitioners may modify their behavior in response to this temporary suspension of premium processing. Therefore, DHS believes that analyzing historical trends in premium processing requests is the best method for estimating the population that may request premium processing due to this rule, and DHS recognizes the estimates made for both costs and transfers in the analysis could be on the higher end due to the possibility that the temporary suspension in premium processing could modify filing behavior.

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

Table 2. Summary of the TFR's Provisions and Economic Impact

Current Provision	Changes Resulting from the Provisions of the TFR	Expected Costs of the Provisions of the TFR	Expected Benefits of the Provisions of the TFR
- The current statutory cap limits H-2B visa allocations to 66,000 workers a year.	- The amended provisions will allow for an additional 64,716 H-2B temporary workers. Up to 20,000 of the 64,716 additional visas will be reserved for workers who are nationals of Guatemala, Honduras, El Salvador, and Haiti and will be exempt from the returning worker requirement.	- The total estimated opportunity cost of time to file Form I-129 (Petition for a Nonimmigrant Worker) by human resource specialists is approximately $499,597. The total estimated opportunity cost of time to file Form I-129 and Form G-28 will range from approximately $1,062,796 if filed by in-house lawyers to approximately $1,832,442 if filed by outsourced lawyers. The total estimated opportunity cost of time associated with filing additional petitions ranges from $1,562,393 to $2,332,039 depending on the filer. - The total estimated opportunity cost of time associated with filing Form I-907 (Request for Premium Processing Service) if it is filed with Form I-129 is $62,469 if filed by human resource specialists. The total estimated costs	- Form I-129 petitioners would be able to hire temporary workers needed to prevent their businesses from suffering irreparable harm. - Businesses that are dependent on the success of other businesses that are dependent on H-2B workers would be protected from the repercussions of local business failures. - Some American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if additional H-2B workers were not available.

		associated with filing Form I-907 would range from approximately $111,574 if filed by an in-house lawyer to approximately $192,363 if filed by an outsourced lawyer. The total estimated opportunity cost of time associated with requesting premium processing ranges from approximately $174,043 to approximately $254,832. - The total estimated costs of this provision to petitioners range from $1,736,436 to $2,586,871, depending on the filer.	
n/a	-Petitioners will be required to fill out Form ETA-9142-B in order to utilize the 10,000 late season H-2B visas allocated under the rule	- The estimated cost for late season petitioners to file Form ETA-9142-B ranges from $107,665 to $157,666 depending on the filer.	-An approved Form ETA-9142-B is required before filing a Form I-129 to request H-2B workers.
n/a	- Petitioners will be required to fill out the newly created Form ETA-9142-B-CAA-7, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Div. O of the Consolidated Appropriations Act, 2021.	- The total estimated cost to petitioners to complete and file Form ETA-9142-B-CAA-7 is approximately $1,797,155.	- Form ETA-9142-B-CAA-7 will serve as initial evidence to DHS that the petitioner meets the irreparable harm standard and returning worker requirements.
n/a	- Petitioners would be required to conduct an	- The total estimated cost to petitioners to conduct an additional	- The additional round of recruitment will ensure that a U.S. worker who is willing and

	additional round of recruitment.	round of recruitment is approximately $239,401.	able to fill the position is not replaced by a nonimmigrant worker.
Temporary Portability	- An H-2B nonimmigrant who is physically present in the United States may port to another employer.	- The total estimated opportunity cost of time to file Form I-129 by human resource specialists is approximately $25,461. The total estimated opportunity cost of time to file Form I-129 and Form G-28 will range from approximately $54,296 if filed by in-house lawyers to approximately $93,615 if filed by outsourced lawyers. - The total estimated costs associated with filing Form I-907 if it is filed with Form I-129 is $3,202 if filed by human resource specialists. The total estimated costs associated with filing Form I-907 would range from approximately $5,669 if filed by an in-house lawyer to approximately $9,774 if filed by an outsourced lawyer. - The total estimated costs associated with the portability provision ranges from $88,628 to $132,052, depending on the filer. - DHS may incur some additional adjudication costs as more	- H-2B workers present in the United States will be able to port to another employer and potentially extend their stay and, therefore, earn additional wages. - An H-2B worker with an employer that is not complying with H-2B program requirements would have additional flexibility in porting to another employer's certified position. - This provision would ensure employers will be able to hire the H-2B workers they need.

		petitioners file Form I-129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form, which have been accounted for in costs to petitioners.	
n/a	- Employers of H-2B workers would be required to provide information about equal access to COVID-19 vaccines and vaccination distribution sites.	- The total estimated cost to petitioners to provide information regarding COVID-19 vaccines and vaccination distribution sites is approximately $1,294.	- Workers would be given information about equal access to vaccines and vaccination distribution.
n/a	- DHS and DOL intend to conduct several audits during the period of temporary need to verify compliance with H-2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule.	- Employers will have to comply with audits for an estimated total opportunity cost of time of $207,060. - It is expected both DHS and DOL will be able to shift resources to be able to conduct these audits without incurring additional costs. However, the Departments will incur opportunity costs of time. The audits are expected to take a total of approximately 4,200 hours and cost approximately $333,774.	- DOL and DHS audits will yield evidence of the efficacy of attestations in enforcing compliance with H-2B supplemental cap requirements. - Conducting a significant number of audits will discourage uncorroborated attestations.
Additional Scrutiny	- Some petitioners will provide additional evidence	- Some employers will need to print and ship additional evidence to USCIS. The estimated costs to comply with additional evidentiary	- Additional scrutiny of employers with past H-2B program violations are aimed at ensuring compliance with program requirements, reducing harms to both U.S. workers and H-2B workers.

		requirements is $21,486.	
Familiarization Cost	- Petitioners or their representatives will familiarize themselves with the rule	- Petitioners or their representatives will need to read and understand the rule at an estimated total opportunity cost of time that ranges from $2,339,495 to $3,425,396.	- Petitioners will have the necessary information to take advantage of and comply with the provisions of this rule.
Total Costs		Total cost of the rule to petitioners ranges from $6,538,620 to $8,568,381 depending on the filer. Total costs of the rule to government are $333,774. Total costs of the rule range from $6,872,394 to $8,902,155.	
Source: USCIS and DOL analysis.			

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2. Background and Purpose of the Temporary Rule

The H–2B visa classification program was designed to serve U.S. businesses that are unable to find enough U.S. workers to perform nonagricultural work of a temporary or seasonal nature. For a nonimmigrant worker to be admitted into the United States under this visa classification, the hiring employer is required to: (1) receive a temporary labor certification (TLC) from the Department of Labor (DOL); and (2) file Form I–129 with DHS. The temporary nature of the services or labor described on the approved TLC is subject to DHS review during adjudication of Form I–129.[169] The INA sets the annual number of H–2B visas for workers performing temporary nonagricultural work at 66,000 to be distributed semiannually beginning in October (33,000) and in April (33,000).[170] Any unused H–2B visas from the first half of the fiscal year are available for employers seeking to hire H–2B workers during the second half of the fiscal year. However, any unused H–2B visas from one fiscal year do not carry over into the next and would therefore not be made available.[171] Once the statutory H–2B visa cap limit has been reached, petitioners must wait until the next half of the fiscal year, or the beginning of the next fiscal year, for additional visas to become available.

On September 30, 2022, the President signed the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023 that contains a provision reauthorizing Sec. 204 of Div. O of the FY 2022 Omnibus, permitting the Secretary of Homeland Security, under certain circumstances, to increase the number of H–2B visas available to U.S. employers, notwithstanding the established statutory numerical limitation. After consulting with the Secretary of Labor, the Secretary of the Homeland Security has determined it is appropriate to exercise his discretion and raise the H–2B cap by up to a total of 64,716 visas for FY 2023. The total supplemental allocation will be divided into four separate allocations: one for the first half of FY 2023, two for the second half of FY 2023 (a first one for employment from April 1 through May 14, 2023, and a second one for those with filing dates after May 15, 2023), and a full fiscal year allocation for workers from NCA countries and Haiti. As with previous supplemental allocations, USCIS will make these supplemental visas available only to businesses that qualify and meet the requirements for the supplemental vias. These businesses must attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H–2B workers requested on their petition.

In contrast to previously issued H–2B TFRs which codified the availability of supplemental H–2B visas only after the relevant statutory fiscal half-year caps had been reached, the Secretaries have determined that this TFR will cover the entirety of FY 2023. While the Departments cannot predict with certainty what labor market conditions will be during the second half of FY 2023, they believe that the structure of this TFR is reasonable because (1) the

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

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

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

availability of the second half FY supplemental visas is contingent on the exhaustion of the second half FY statutory cap, (2) strong historical demand for H–2B workers, and (3) mainstream estimates of labor market conditions for FY 2023 indicate a continuation of labor market tightness from a historical perspective.[172]

Table 3. DOL Certified Worker Demand[173]

Fiscal Year	Number of Certifications	Number of DOL Certified Workers Requested	DOL Certified Workers with requested start dates 4/1 or later
2017	5,889	113,923	68,807
2018	6,675	130,536	86,568
2019	7,044	143,310	92,415
2020	6,816	137,884	88,466
2021	7,772	159,081	100,522
5-yr Average[174]	6,839	136,947	87,356

Withrespect to historical demand for H–2B workers, Table 3 makes two important points supporting the Departments' decision to structure this rule in a manner that covers the entire fiscal year. First, Table 3 shows that H–2B demand, as represented by the number of workers requested on certified TLCs, has outpaced the statutorily capped allotment of H–2B visas. This demonstrates that, in aggregate, there is sufficient demand for the entire supplementary allocation that the Departments are making available. To that end, the 5-year average of workers requested on certified TLCs, 136,947, would still completely exhaust the total supplemental allocation made available by the TFR. Second, Table 3 demonstrates that within a given fiscal year, demand for H–2B workers is particularly strong in the second half of the fiscal year. On average over the last 5 fiscal year, H–2B employers have requested 87,356 employees with start dates on April 1 or later, which would completely exhaust the 26,500[175] total supplemental H–2B visas explicitly set aside for workers with employment start dates in the first portion of the second half of FY 2023. Given these conditions, the Departments believe that the decision to authorize a second half supplement is reasonable.

In terms of the actual distribution of the visas being made available by the Rule, the Departments have determined that up to 44,716 of the 64,716 these supplemental visas will be limited to returning H–2B returning workers for nationals of any country. These individuals must be workers who were issued H–2B visas or were otherwise granted H–2B status in fiscal years 2020, 2021, or 2022. The 44,716 visas for returning workers will be divided into three separate allocations that will be available to petitioners over the fiscal year. The first allocation is comprised of 18,216 visas for returning workers with requested start dates between October 1, 2022, and March 31, 2023. These visas will be available to petitioners immediately upon the publication of the rule. The second allocation is comprised of 16,500 visas for returning workers with requested start dates between April 1, 2023, and May 14, 2023. These visas will be available to petitioners 15 calendar days after the second half statutory cap of 33,000 visas is reached. The third allocation is comprised of 10,000 visas for returning workers with requested start dates between May 15, 2023, and September 30, 2023. These visas will be available to petitioners 45 calendar days after the second half statutory cap of 33,000 visas is reached.

The inclusion of an allocation of visas specifically for those petitioners with employment needs starting on or after May 15 is in response to trends in TLC data since FY 2016, illustrated in Table 4 and Table 5. More specifically, the increase in the relative prevalence of April 1 start dates since 2016 gives rise to concerns that petitioners with employment needs later in the fiscal year may not have the opportunity to utilize the H–2B program because the supply of supplemental visas is already exhausted by the time a petitioner with a later start date can file a TLC and receive eligibility to request workers on Form I–129. Under DOL regulations, employers must apply for a TLC 75 to 90 days before the start date of work.[176] Employers must have a DOL-approved TLC before filing their Form I–129 request for H–2B workers with USCIS. Because the availability of H–2B visas is limited by statute and regulation, USCIS generally announces to the public when it has received a sufficient number I–129 petitions, and by extension H–2B beneficiaries, to exhaust the respective H–2B visa allocation.[177] USCIS rejects H–2B I–129 petitions that are received after USCIS has determined that a given allocation has been fully utilized. Functionally, this means that a subset of petitioners that would utilize H–2B workers given the chance may not be able to do so because the available visas have already been allocated before they can petition USCIS for the necessary workers. Using OFLC TLC data, Table 4 illustrates that since 2016, when employers of returning workers had greater flexibility in determining TLC-requested start dates, requested H–2B

[172] September 2022 Federal Open Market Committee (FOMC) projections for unemployment rate in 2023 ranged from 3.7 to 5.0% with central tendency more tightly clustered between 4.1 and 4.5%. *See https://www.federalreserve.gov/monetarypolicy/fomcprojtabl20220921.htm* (last accessed Oct. 19, 2022).

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

[174] Averages are rounded to the nearest whole number.

[175] 16,500 visas for returning workers and 10,000 visas for filers with employment start dates May 15, 2023 or later.

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

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

employment start dates have become increasingly concentrated in April.[178]

Table 4. DOL Certified Worker Demand for April Start Dates			
Fiscal Year	Certified DOL Workers Requested	DOL Certified Workers with requested start dates in April	Percentage of DOL Certified Workers with requested start dates in April
2016	93,324	42,469	45.51%
2017	113,923	62,357	54.74%
2018	130,536	80,934	62.00%
2019	143,310	86,525	60.38%
2020	137,884	82,757	60.02%
2021	159,081	94,656	59.50%

Table 5. DOL Certified Worker Demand post-April Start Dates			
Fiscal Year	Certified DOL Workers Requested	DOL Certified Workers with requested start dates after April	Percentage of DOL Certified Workers with requested start dates after April
2016	93,324	16,736	17.93%
2017	113,923	6,450	5.66%
2018	130,536	5,634	4.32%
2019	143,310	5,890	4.11%
2020	137,884	5,709	4.14%
2021	159,081	5,866	3.69%

This has given rise to the concern that this proliferation of April start dates has crowded out employers with labor needs later in the season (shown in Table 5). These data suggest that there may be structural barriers that preclude employers with later start dates from being able to utilize needed workers through the H–2B program. To illustrate, in FY 2016, a temporary statutory provision exempted certain H–2B visas from the cap that had been counted against the cap in any of the three prior fiscal years. Data from FY 2016 show a much higher incidence of employers that request relatively later start dates, suggesting that employers with later season needs would utilize the H–2B program but for the unavailability of visas. By making an allocation of visas available only to this subset of petitioners whose late season labor needs may have put them at a disadvantage in accessing H–2B workers in recent years, the Departments hope to both address this potentially inequitable situation and to take concrete steps towards collecting information through this rule to determine whether such a structural barrier exists. To that end, USCIS intends to analyze the results of this TFR as soon as feasible with the goal of determining whether those petitioners that utilize the late season filing allocation are materially different from those petitioners that have utilized fiscal year second half supplemental allocations for employment beginning on or after April 1, both via this TFR and via previously issued supplemental H–2B visa allocations.

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

3. Population

This rule will affect those employers that file Form I–129 on behalf of nonimmigrant workers they seek to hire under the H–2B visa program. More specifically, this rule will affect those employers that can establish that their business is suffering irreparable harm or will suffer impending irreparable harm

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

without the ability to employ all the H–2B workers requested on their petition and without the exercise of authority that is the subject of this rule. Due to historical trends and strong demand for the H–2B program (see Table 3), the Departments believe that it is reasonable to assume that the population of eligible petitioners for these additional 64,716 visas will generally be the same population as those employers that would already complete the steps to receive an approved TLC irrespective of this rule. One exception is the population of late season employers, described below.

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

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

As discussed above, the population that will file a Form I–129 is necessarily limited to those business that have already established that their business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H–2B workers requested on their petition and without the exercise of authority that is the subject of this rule. Because the number of supplementary visas available is finite, USCIS has generally informed the public when the number of submitted Form I–129 petitions and, by extension, the number of respective beneficiaries is enough to exhaust the supply of supplemental visas.[179]

Table 6. I-129 Petitions per Supplemental H-2B Visa Allocation

Supplement	Supplement Amount	Total I-129 Petitions Received	Total I-129 Beneficiaries	Beneficiaries per I-129 petition
2017 Supplement	15,000	770	13,045	16.94
2018 Supplement	15,000	983	15,868	16.14
2019 Supplement	30,000	2,700	33,239	12.31
2021 Supplement[180]	22,000	2,180	31,274	14.35
2022 Supplement[181]	55,000	4,045	61,868	15.29
Average				**15.01**

Table 6 shows the total supplemental H–2B visa allocations issued by the Departments in each fiscal year since 2017,[182] including the total number of petitions and the total number of beneficiaries submitted under a supplement in each fiscal year. Using the historical average of 15.01 beneficiaries per petition for supplemental visas derived in Table 6, USCIS anticipates that 4,312 Forms I–129 will be submitted as a result of this temporary final rule.[183]

Using the estimates in Table 6, the Departments further estimate that the allocation of 10,000 visas for late season filers made by this TFR, addressing the disadvantage these employers face in accessing scarce H–2B visas, will result in 667 [184] additional DOL–ETA–9142–B requests assuming each late season visa requestor submits a TLC and Form I–129 for the historic average of 15.01 beneficiaries. The number of additional DOL–ETA–9142–B requests could be lower if some petitioners that would have filed for April 1 start dates in the absence of this TFR change their behavior to request late season workers as a result of this allocation. Alternatively, this number could be higher if late season filers are at a larger disadvantage in accessing H–2B workers than recent data suggests. The Departments commit to monitoring the utilization of these late season FY23 visas to determine if this carve-out promotes access, as anticipated, to employers with needs for workers later in the second half of the fiscal year but that have faced obstacles to accessing H–2B workers in the past.

USCIS recognizes that some employers will have to submit two I–129 Forms if they choose to request H–2B workers under both the returning worker and Northern Central American Countries/Haiti caps. At this time, USCIS cannot predict how many employers will choose to take advantage of more than one allocation, and therefore recognizes that the number of petitions may be underestimated.

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

If a lawyer or accredited representative submits Form I–129 on behalf of the petitioner, Form G–28, Notice of Entry of Appearance as

[179] *See, e.g., https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-second-half-of-fy-2022.*

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

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

[182] FY2020 was not included due to the suspension of additional H–2B visas to be released in 2020. DHS also noted that the Department of State had suspended routine visa services.

[183] Calculation for expected petitions. If each I–129 requests 15.01 workers, we'd expect to see 4,312 petitioners exhausting the 64,716 supplement allocated this year: 64,716/15.01 = 4,312 (rounded)

[184] Calculation for expected late season TLCs: 10,000 visas/15.01 beneficiaries per petition = 667 TLCs (rounded up).

Attorney or Accredited Representative, must accompany the Form I–129 submission.[185] Using data from FY 2018 to FY 2022, we estimate that a lawyer or accredited representative will file 45.84 percent of Form I–129 petitions. Table 7 shows the percentage of Form I–129 H–2B petitions that were accompanied by a Form G–28. Therefore, we estimate that in-house or outsourced lawyers will file 1,977 Forms I–129 and Forms G–28, and that human resources (HR) specialists will file 2,335 Forms I–129.[186]

Table 7. 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

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

Employers may use Form I–907, Request for Premium Processing Service, to request faster processing of their Form I–129 petitions for H–2B visas.[187] Table 8 shows the percentage of Form I–129 H–2B petitions that were filed with a Form I–907. Using data from FY 2018 to FY 2022, USCIS estimates that approximately 93.57 percent of Form I–129 H–2B petitioners will file a Form I–907 requesting premium processing. Based on this historical data, USCIS estimates that 4,035 Forms I–907 will be filed with the Forms I–129 as a result of this rule.[188] Of these 4,035 premium processing requests, we estimate that in-house or outsourced lawyers will file 1,850 Forms I–907 and HR specialists or an equivalent occupation will file 2,185.[189]

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

[186] Calculation: 4,312 estimated additional petitions * 45.84 percent of petitions filed by a lawyer = 1,977 (rounded) petitions filed by a lawyer.

Calculation: 4,312 estimated additional petitions—1,977 petitions filed by a lawyer = 2,335 petitions filed by an HR specialist.

[187] As explained above, DHS has elected to pause the receipt of premium processing requests until January 3, 2023. Due to the timing of the pause only a subset of the overall population of petitioners would be affected. DHS cannot quantify to what extent, if any, affected petitioners may modify their behavior in response to such pauses of premium processing. Therefore, DHS believes that analyzing historical trends in premium processing requests is the best method for estimating the population that may request premium processing due to this rule, and DHS recognizes that the estimates for costs and transfers made in this analysis could be on the higher end due to modified behavior as a result of the pause in premium processing.

[188] Calculation: 4,312 estimated additional petitions * 93.57 percent premium processing filing rate = 4,035 (rounded) additional Form I–907.

[189] Calculation: 4,035 additional Form I–907 * 45.84 percent of petitioners represented by a lawyer = 1,850 (rounded) additional Form I–907 filed by a lawyer.

Calculation: 4,035 additional Form I–907—1,850 additional Form I–907 filed by a lawyer = 2,185 additional Form I–907 filed by an HR specialist.

Table 8. Form I-129 H-2B Petition Receipts that Were Accompanied by a Form I-907, FY 2017-2021.

Fiscal Year	Number of Form I-129 H-2B Petitions Accompanied by Form I-907	Total Number of Form I-129 H-2B Petitions Received	Percent of Form I-129 H-2B Petitions Accompanied by Form I-907
2018	5,986	6,148	97.36%
2019	7,227	7,461	96.86%
2020	4,341	5,422	80.06%
2021	8,650	9,160	94.43%
2022	11,767	12,388	94.99%
2018 - 2022 Total	37,971	40,579	93.57%

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

d. Population That Files Form ETA–9142–B–CAA–7, Attestation for Employers Seeking to Employ H–2B Nonimmigrant Workers Under Section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117–103, and Public Law 117–180

Petitioners seeking to take advantage of this FY 2023 H–2B supplemental visa cap will need to file a Form ETA–9142–B–CAA–7 attesting that their business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H–2B workers requested on the petition, comply with third-party notification, and maintain required records, among other requirements. DOL estimates that each of the 4,312 petitions will need to be accompanied by Form ETA–9142–B–CAA–7 and petitioners filing these petitions and attestations will incur burdens complying with the evidentiary requirements.

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

As Table 3 demonstrated, historical data strongly indicate that there will be sufficient demand such that only those petitioners that utilize the late season allocation of supplemental visas will need to file an additional Form ETA–9142–B. Assuming that the historical average of 15.01 beneficiaries per I–129 petition holds, 667 [190] petitioners will need to file Form ETA–9142–B as a direct result of the provision reserving 10,000 visas for beneficiaries of these employers. Given estimates from Table 7 of the percentage of Form I–129 H–2B petitions accompanied by a Form G–28, we estimate that in-house or outsourced lawyers will file 306 of these Forms ETA–9142–B, and that human resources (HR) specialists will file 361 Forms ETA–9142–B.[191]

f. Population That Must Undergo Additional Recruitment Activities

An employer that files Form ETA–9142B–CAA–7 and the I–129 petition 30 or more days after the certified start date of work must conduct additional recruitment of U.S. workers. This consists of placing a new job order with the State Workforce Agency (SWA), contacting the relevant American Job Center (AJC), contacting former U.S. workers, contacting the bargaining representative or posting the job order in the places and manner described in 20 CFR 655.45(b) if there is no bargaining representative, contacting current U.S. workers, posting the job to the company's website if it maintains one and, if applicable, contacting the AFL–CIO.

The Departments assume that, due to the timing of the publication of the rule, only petitioners that file for H–2B workers under the first half supplemental allocation of 18,216 workers will incur burdens associated with this additional recruitment. By utilizing the average number of beneficiaries per Form I–129 petition established in Table 6, the Departments estimate that the population of petitioners that would need to fulfil the additional recruitment requirements would be 1,214.[192]

g. Population Affected by the Portability Provision

The population affected by this provision are nonimmigrants in H–2B status who are present in the United States and the employers with valid TLCs seeking to hire H–2B workers. We use the population of 66,000 H–2B workers authorized by statute and the 64,716 additional H–2B workers authorized by this rule as a proxy for the H–2B population that could be currently present in the United States.[193] USCIS uses the number of Forms I–129 filed for extension of stay due to change of

[190] Calculation for expected late season TLCs: 10,000 late season visas/15.01 beneficiaries per petition = 667 TLCs (rounded up).

[191] Calculation: 667 estimated additional requests * 45.84 percent of petitions filed by a lawyer (see Table 5) = 306 (rounded) ETA–9142–B requests filed by a lawyer.

Calculation: 667 estimated additional requests—306 requests filed by a lawyer = 361 requests filed by an HR specialist.

[192] Calculation: 18,216 workers in the 1st half returning working supplemental allocation/15.01 workers per petitioner = 1,214 (rounded) petitioners required to undertake additional recruitment.

[193] H–2B workers may have varying lengths in time approved on their H–2B visas. This number may overestimate H–2B workers who have already completed employment and departed and may underestimate H–2B workers not reflected in the current cap and long-term H–2B workers. In FY 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 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* (accessed April 4, 2022). USCIS assumes some of these workers, along with current workers with a valid H–2B visa under the cap, could be eligible to port under this new provision. USCIS does not know the exact number of H–2B workers who would be eligible to port at this time but uses the cap and supplemental cap allocations as a possible proxy for this population.

employer relative to the Forms I–129 filed for new employment from FY 2016 to FY 2020, the five years prior to the implementation of the first portability provision in a H–2B supplemental cap TFR, to estimate the baseline rate. We compare the average rate from FY 2016–FY 2020 to the average rate from FY 2021–FY 2022. Table 9 presents the number of Forms I–129 filed for extensions of stay due to change of employer and Forms I–129 filed for new employment for Fiscal year 2016 FY through FY 2020. The average rate of extension of stay due to change of employer compared to new employment is approximately 12.6 percent.

Table 9. Numbers of Form I-129 H-2B Petitions Filed for Extension of Stay due to Change of Employer and Form I-129 H-2B Petitions Filed for New Employment, FY 2016 – FY 2020

Fiscal Year	Form I-129 H-2B petitions filed for extension of stay due to change of employer	Form I-129 H-2B petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings
2016	427	5,750	7.4%
2017	556	5,298	10.5%
2018	744	5,136	14.5%
2019	812	6,251	13.0%
2020	804	3,997	20.1%
FY 2016 -2020 Total	3,343	26,433	12.6%
USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 10/2022, TRK 10638			

In FY 2021, the first year a H–2B supplemental cap included a portability provision, there were 1,113 Forms I–129 filed for extension of stay due to change of employer compared to 7,207 Forms I–129 filed for new employment.[194] In FY 2022, there were 1,791 Forms I–129 filed for extension of stay due to change of employer compared to 9,233 Forms I–129 filed for new employment.[195] Over the period when a portability provision was in place for H–2B workers, the rate of Form I–129 for extension of stay due to change of employer relative to new employment is 17.7 percent.[196] This is above the 12.6 percent rate expected without a portability provision. 17.7 percent is our estimate of the rate expected in periods with a portability provision in the supplemental visa allocation. Using the 4,312 as our estimate for the number of Forms I–129 filed for H–2B new employment in FY 2023, we estimate that 543 Forms I–129 for extension of stay due to change of employer would be filed in absence of this provision.[197] With this portability provision, we estimate that 763 Forms I–129 for extension of stay due to change of employer would be filed.[198] This difference results in 220 additional Forms I–129 as a result of this provision.[199] As previously estimated, we expect that about 45.84 percent of Form I–129 petitions will be filed by an in-house or outsourced lawyer. Therefore, we expect that a lawyer will file 101 of these petitions and an HR specialist or equivalent occupation will file the remaining 119.[200] Previously in this analysis, we estimated 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 portability provision, we expect that an additional 206 Forms I–907 will be filed.[201] We expect a lawyer to file 94 of those Forms I–907 and an HR specialist to file the remaining 112.[202]

[194] USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 10/2022, TRK 10638.

[195] USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 10/2022, TRK 10638.

[196] 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 extension 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 (rounded).

[197] Calculation: 4,312 Form I–129 H–2B petitions filed for new employment * 12.6 percent = 543 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, no portability provision.

[198] Calculation: 4,312 Form I–129 H–2B petitions filed for new employment * 17.7 percent = 763 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, with a portability provision.

[199] Calculation: 763 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, with a portability provision—543 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, no portability provision = 220 Form I–129 H–2B petition increase as a result of portability provision.

[200] Calculation, Lawyers: 220 additional Form I–129 due to portability provision * 45.83 percent of Form I–129 for H–2B positions filed by an attorney or accredited representative = 101 (rounded) estimated Form I–129 filed by a lawyer.

Calculation, HR specialist: 220 additional Form I–129 due to portability provision—101 estimated Form I–129 filed by a lawyer = 119 estimated Form I–129 filed by an HR specialist.

[201] Calculation: 220 Form I–129 H–2B petitions * 93.57 percent premium processing filing rate = 206 (rounded) Forms I–907.

[202] Calculation, Lawyers: 206 Forms I–907 * 45.84 percent filed by an attorney or accredited representative = 94 (rounded) Forms I–907 filed by a lawyer.

Calculation, HR specialists: 206 Forms I–907—94 Forms I–907 filed by a lawyer = 112 Forms I–907 filed by an HR specialist.

h. Population Affected by the Audits

Under this time-limited FY 2023 H–2B supplemental cap rule, DHS intends to conduct 250 audits of employers hiring H–2B workers, and DOL intends to conduct 100 audits of employers hiring H–2B workers. The determination of which employers will be audited will be done at the discretion of the Departments, though the agencies will coordinate so that no employer is audited by both DOL and DHS. Therefore, the Federal Government expects to conduct a total of 350 audits on employers that petition for H–2B workers under this TFR.[203]

i. Population Affected by Additional Scrutiny

DHS expects that petitioners that have been cited by WHD for H–2B program violations will undergo additional scrutiny from USCIS. To estimate the number of firms expected to undergo increased scrutiny, we utilize DOL's Wage and Hour Compliance Action Data.[204] The data available here is for concluded cases. Table 10 presents the number of employers that were cited for H–2B violations that have a worker protection violation end date in FYs 2017–2021. The worker protection violation end date is established based on the ''findings end date,'' which represents the date that the last worker protection violation occurred in the concluded case. During FY 2017–2021, on average 76 (rounded) employers that were cited for H–2B violations had a worker protection violation end date each year. USCIS intends to request evidence from employers cited for H–2B violations with a worker protection violation end date in the last two years. Therefore, for purposes of this analysis, we expect 152 petitioners will undergo additional scrutiny from USCIS.[205]

Table 10. Employers with H-2B violations with worker protection violation end date in FY 2017-2021

Fiscal Year	Employers cited for H-2B violations with worker protection violation end date in Fiscal Year
2017	64
2018	90
2019	112
2020	74
2021	39
Five-year Average (rounded)	76
Source: USCIS analysis of DOL Wage and Hour Compliance Action Data	

j. Population Expected To Familiarize Themselves With This Rule

DHS expects employers that have filed for TLCs to familiarize themselves with this rule. Table 3 shows that the average number of certifications over the last five FYs is 6,839. We use the TLC population, rather than the estimated 4,312 expected to file a Form I–129 petition, because employers that have applied for TLCs would need to familiarize themselves with the rule in order to determine whether or not to subsequently file a Form I–129 petition.

We expect a HR specialist, in-house lawyer, or outsourced lawyer will perform familiarization with the rule at the same rate as petitioners that file a Form G–28. As discussed above, an estimated 45.84 percent of petitioners are submitted by lawyers. Therefore, we estimate that 3,135 lawyers and 3,704 HR specialists will incur familiarization costs.[206]

4. Cost-Benefit Analysis

The provisions of this rule require the submission of a Form I–129 H–2B petition. The costs for this form include the opportunity cost of time to complete and submit the form.[207] The estimated time to complete and file Form I–129 for H–2B classification is 4.34 hours.[208] A U.S. employer, a U.S. agent, or a foreign employer filing through the U.S. agent must file the petition. DHS estimates that an in-house or outsourced lawyer will file 45.84 percent of Form I–129 H–2B petitions, and an HR specialist or equivalent occupation will file the remainder (54.16 percent). DHS presents estimated costs for HR specialists filing Form I–129 petitions and an estimated range of costs for in-house lawyers or outsourced lawyers filing Form I–129 petitions.

To estimate the total opportunity cost of time to HR specialists who complete and file Form I–129, DHS uses the mean hourly wage rate of HR specialists of $34.00 as the base wage rate.[209] If petitioners hire an in-house or outsourced lawyer to file Form I–129 on their behalf, DHS uses the mean hourly wage rate $71.71 as the base wage rate.[210] Using the most recent BLS data, DHS calculated a benefits-to-wage

[203] These 350 audits are separate and distinct from WHD's investigations pursuant to its existing enforcement authority.

[204] Available at *https://enforcedata.dol.gov/views/data_catalogs.php* (accessed October 5, 2022).

[205] It is possible not every employer that has been cited for an H–2B violation in the last two years will petition for H–2B employees under this supplemental cap authority. DHS considers an upper limit of 152 to be a reasonable estimate of the number of petitioners that will undergo additional scrutiny.

[206] Calculation for lawyers: 6,839 estimated applicants * 45.84 percent represents by a lawyer = 3,135 (rounded) represented by a lawyer.

Calculation for HR specialists: 6,839 approved, pending, and projected applicants—3,135 represented by a lawyer = 3,704 represented by an HR specialist.

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

[208] The public reporting burden for this form is 2.34 hours for Form I–129 and an additional 2.00 hours for H Classification Supplement, totaling 4.34 hours. *See* Form I–129 instructions at *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf* (accessed Oct. 17, 2022).

[209] U.S. Department of Labor, Bureau of Labor Statistics, ''May 2021 National Occupational Employment and Wage Statistics'' Human Resources Specialist (13–1071), Mean Hourly Wage, available at *https://www.bls.gov/oes/2021/may/oes131071.htm* (accessed Oct. 17, 2022).

[210] U.S. Department of Labor, Bureau of Labor Statistics. ''May 2021 National Occupational Employment and Wage Estimates'' Lawyers (23–1011), Mean Hourly Wage, available at *https://www.bls.gov/oes/2021/may/oes231011.htm* (accessed Oct. 17, 2022).

multiplier of 1.45 to estimate the full wages to include benefits such as paid leave, insurance, and retirement.[211] DHS multiplied the average hourly U.S. wage rate for HR specialists and for in-house lawyers by the benefits-to-wage multiplier of 1.45 to estimate total compensation to employees. The total compensation for an HR specialist is $49.30 per hour, and the total compensation for an in-house lawyer is $103.98 per hour.[212] In addition, DHS recognizes that an entity may not have an in-house lawyer and may seek outside counsel to complete and file Form I–129 on behalf of the petitioner. Therefore, DHS presents a second wage rate for lawyers labeled as outsourced lawyers. DHS recognizes that the wages for outsourced lawyers may be much higher than in-house lawyers and therefore uses a higher compensation-to-wage multiplier of 2.5 for outsourced lawyers.[213] DHS estimates the total compensation for an outsourced lawyer is $179.28 per hour.[214] If a lawyer submits Form I–129 on behalf of the petitioner, Form G–28 must accompany the Form I–129 petition.[215] DHS estimates the time burden to complete and submit Form G–28 for a lawyer is 50 minutes (0.83 hour, rounded).[216] For this analysis, DHS adds the time to complete Form G–28 to the opportunity cost of time to lawyers for filing Form I–129 on behalf of a petitioner. This results in a time burden of 5.17 hours for in-house lawyers and outsourced lawyers to complete Form G–28 and Form I–129.[217] Therefore, the total opportunity cost of time per petition for an HR specialist to complete and file Form I–129 is approximately $213.96, for an in-house lawyer to complete and file Forms I–129 and G–28 is about $537.58, and for an outsourced lawyer to complete and file is approximately $926.88.[218]

a. Transfers

i. Transfers From Petitioners to the Government

The provisions of this rule require the submission of a Form I–129 H–2B petition. The transfers for this form include the filing costs to submit the form. The current filing fee for Form I–129 is $460 and employers filing H–2B petitions must submit an additional fee of $150.[219] These filing fees are not a cost to society or an expenditure of new resources but a transfer from the petitioner to USCIS in exchange for agency services. DHS anticipates that petitioners will file 4,312 Forms I–129 due to the rule's supplemental visa allocation and an additional 220 Forms I–129 due to the rule's portability provision. The total value of transfers from petitioners to the Government for Form I–129 filings due to the rule is $2,764,520.[220]

Additionally, employers may use Form I–907 to request premium processing of Form I–129 petitions for H–2B visas. The filing fee for Form I–907 for H–2B petitions is $1,500. Based upon historical trends, USCIS expects that 93.57 percent of petitioners will file a Form I–907 in addition to their Form I–129. Applying that rate to the expected number of Forms I–129 would result in 4,241 Forms I–907 filed due to the rule.[221] Transfers from petitioners to the Government related to the filing of Forms I–907 as a result of the rule are $6,361,500.[222] Total transfers from petitioners to the Government are $9,126,020.[223]

b. Cost to Petitioners

As mentioned in *Section 3,* the estimated population impacted by this rule is 4,312 eligible petitioners that are projected to apply for the additional 64,716 H–2B visas, with 20,000 of those additional visas reserved for employers that will petition for workers who are nationals of the Northern Central American countries and Haiti, who are exempt from the returning worker requirement.

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

As discussed above, DHS estimates that HR specialists will file an additional 2,335 petitions using Form I–129 and lawyers will file an additional 1,977 petitions using Form I–129 and Form G–28. DHS estimates the total cost to file Form I–129 petitions if filed by HR specialists is $499,597 (rounded).[224] DHS estimates the total cost to file Form I–129 petitions and Form G–28 if filed by lawyers will range from $1,062,796 (rounded) if only in-house lawyers file these forms, to $1,832,442 (rounded) if only outsourced lawyers file them.[225] Therefore, the estimated total cost to file Form I–129 and Form G–28 range from $1,562,393 and $2,332,039.[226]

[211] Calculation: $41.03 mean Total Employee Compensation per hour for civilian workers/$28.31 mean Wages and Salaries per hour for civilian workers = 1.45 benefits-to-wage multiplier. *See* Economic News Release, Bureau of Labor Statistics, U.S. Department of Labor, Employer Costs for Employee Compensation—December 2021 Table 1. Employer Costs for Employee Compensation by ownership, Civilian workers, available at *https://www.bls.gov/news.release/archives/ecec_09202022.pdf* (accessed Oct. 17, 2022).

[212] Calculation, HR specialist: $34.00 mean hourly wage * 1.45 benefits-to-wage multiplier = $49.30 hourly total compensation (hourly opportunity cost of time).

Calculation, In-house Lawyer: $71.71 mean hourly wage * 1.45 benefits-to-wage multiplier = $103.98 hourly total compensation (hourly opportunity cost of time).

[213] The DHS ICE ''Safe-Harbor Procedures for Employers Who Receive a No-Match Letter'' acknowledges that ''the cost of hiring services provided by an outside vendor or contractor is two to three times more expensive than the wages paid by the employer for that service produced by an in-house employee,'' based on information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis (SEIA) remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule: *Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis,* 73 FR 63843 (Oct. 28, 2008), available at *https://www.regulations.gov/document/ICEB-2006-0004-0921* (accessed Oct. 25, 2022). *See also Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 4722 (Jan. 28, 2022), available at *https://www.regulations.gov/document/DHS-2022-0010-0001* (accessed Oct. 26, 2022).

[214] Calculation, Outsourced Lawyer: $71.71 mean hourly wage * 2.5 benefits-to-wage multiplier = $179.28 hourly total compensation (hourly opportunity cost of time).

[215] USCIS, Filing Your Form G–28, *https://www.uscis.gov/forms/filing-your-form-g-28* (accessed October 17, 2022).

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

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

[217] Calculation: 0.83 hour to file Form G–28 + 4.34 hours to file Form I–129 = 5.17 hours to file both forms.

[218] Calculation, HR specialist files Form I–129: $49.30 hourly opportunity cost of time * 4.34 hours = $213.96 opportunity cost of time per petition.

Calculation, In-house Lawyer files Form I–129 and Form G–28: $103.98 hourly opportunity cost of time * 5.17 hours = $537.58 opportunity cost of time per petition.

Calculation, Outsourced Lawyer files Form I–129 and Form G–28: $179.28 hourly opportunity cost of time * 5.17 hours = $926.88 opportunity cost of time per petition.

[219] *See* Form I–129 instructions at *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf* (accessed Oct. 17, 2022). *See also* 8 U.S.C. 1184(c)(13).

[220] Calculation: (4,312 petitions + 220 petitions) * $610 per petition = $2,764,520.

[221] Calculation (4,312 petitions + 220 petitions) * 93.57 Form I–907 rate = 4,241 Forms I–907.

[222] Calculation: $1,500 per petition * 4,241 Forms I–907 = $6,361,500.

[223] Calculation: $2,764,520 + $6,361,500 = $9,126,020.

[224] Calculation, HR specialist: $213.96 cost per petition * 2,335 Form I–129 = $499,597 (rounded) total cost.

[225] Calculation, In-house Lawyer: $537.58 cost per petition * 1,977 Form I–129 and Form G–28 = $1,062,796 (rounded) total cost.

Calculation, Outsourced Lawyer: $926.88 cost per petition * 1,977 Form I–129 and Form G–28 = $1,832,442 (rounded) total cost.

[226] Calculation: $499,597 total cost of Form I–129 filed by HR specialists + $1,062,796 total cost of

iii. Costs To File Form I–907

Employers may use Form I–907 to request premium processing of Form I–129 petitions for H–2B visas. The filing fee for Form I–907 for H–2B petitions is $1,500, and the time burden for completing the form is 35 minutes (0.58 hour).[227] [228] Using the wage rates established previously, the opportunity cost of time to file Form I–907 is approximately $28.59 for an HR specialist, $60.31 for an in-house lawyer, and $103.98 for an outsourced lawyer.[229]

As discussed above, DHS estimates that HR specialists will file an additional 2,185 Form I–907 and lawyers will file an additional 1,850 Form I–907.[230] DHS estimates the total cost of Form I–907 filed by HR specialists is about $62,469 (rounded).[231] DHS estimates the total cost to file Form I–907 filed by lawyers range from about $111,574 (rounded) for only in-house lawyers, to $192,363 (rounded) for only outsourced lawyers.[232] The estimated total cost to file Form I–907 range from $174,043 and $254,832.[233]

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

In addition to the costs for employers projected to request TLCs irrespective of this rule, the population of 667 late season employers that would not otherwise request H–2B workers will file Form ETA–9142–B as a precondition to utilizing the late season allocation of H–2B visas made available by the rule. There is no filing fee for Form ETA–9142–B, and the time burden for completing the form, including Appendix A, Appendix B, Appendix C, Appendix D, and record keeping, is 2 hours and 10 minutes (2.17 hours).[234] DHS estimates the total cost of Form ETA–9142–B filed by HR specialists is about $38,620 (rounded).[235] DHS estimates the total cost to file Form ETA–9142–B by lawyers range from about $69,045 (rounded) for only in-house lawyers, to $119,046 (rounded) for only outsourced lawyers.[236] The estimated total cost to file Form ETA–9142–B range from $107,665 and $157,666.

v. Cost To File Form ETA–9142–B–CAA–7

Form ETA–9142–B–CAA–7 is an attestation form that includes recruiting requirements, the irreparable harm standard, and document retention obligations. DOL estimates the time burden for completing and signing the form is 0.25 hours, 0.25 hours for retaining records, and 0.50 hours to comply with the returning workers' attestation, for a total time burden of 1 hour. Using the $49.30 hourly total compensation for an HR specialist, the opportunity cost of time for an HR specialist to complete the attestation form, notify third parties, and retain records relating to the returning worker requirements is approximately $49.30.[237] Employers are also required to send OFLC and AFL–CIO the ETA case number when filing a petition with DHS. DOL estimates the time burden for this task is 10 minutes (0.17 hours) for an HR specialist. The opportunity cost of time for an HR specialist to send OFLC and AFL the ETA case number is approximately $8.38.[238] The total opportunity cost of time for filing Form ETA–9142–B–CAA–7 and emailing the ETA case number to both OFLC and the AFL–CIO is $57.68.[239]

Additionally, the form requires that petitioners assess, prepare a detailed written statement, and document supporting evidence for meeting the irreparable harm standard, and retain those documents and records, which we assume will require the resources of a financial analyst (or another equivalent occupation). Using the same methodology previously described for wages, the mean hourly wage for a financial analyst is $49.53,[240] and the estimated hourly total compensation for a financial analyst is $71.82.[241] DOL estimates the time burden for these tasks is at least 4 hours, and 1 hour for gathering and retaining documents and records, for a total time burden of 5 hours. Therefore, the total opportunity cost of time for a financial analyst to assess, document, and retain supporting evidence is approximately $359.10.[242]

As discussed previously, DHS believes that the 4,312 Form I–129 petitions required to exhaust the number of supplemental visas made available in this rule represents the number of potential employers that will request to employ H–2B workers under this rule. This number of petitions is a reasonable proxy for the number of employers that may need to review and sign the attestation. Using this estimate

Form I–129 and Form G–28 filed by in-house lawyers = $1,562,393 estimated total costs to file Form I–129 and G–28.

Calculation: $499,597 total cost of Form I–129 filed by HR specialists + $1,832,442 total cost of Form I–129 and G–28 filed by outsourced lawyers = $2,332,039 estimated total costs to file Form I–129 and G–28.

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

[228] See Form I–907 instructions at *https://www.uscis.gov/i-907* (accessed October 17, 2022).

Calculation: 35 minutes/60 minutes per hour = 0.58 (rounded) hour.

[229] Calculation, HR specialist Form I–907: $49.30 hourly opportunity cost of time * 0.58 hour = $28.59 opportunity cost of time per request.

Calculation, In-house Lawyer Form I–907: $103.98 hourly opportunity cost of time * 0.58 hour = $60.31 opportunity cost of time per request.

Calculation, Outsourced Lawyer Form I–907: $179.28 hourly opportunity cost of time * 0.58 hour = $103.98 opportunity cost of time per request.

[230] As explained above, DHS has elected to pause the receipt of premium processing requests until January 3, 2023. Due to the timing of the pause only a subset of the overall population of petitioners would be affected. DHS cannot quantify to what extent, if any, affected petitioners may modify their behavior in response to such pauses of premium processing. Therefore, DHS believes that analyzing historical trends in premium processing requests is the best method for estimating the population that may request premium processing due to this rule, and DHS recognizes that the estimates for costs and transfers made in this analysis could be on the higher end due to modified behavior as a result of the pause in premium processing.

[231] Calculation, HR specialist: $28.59 opportunity cost of time per request * 2,185 Form I–907 = $62,469 (rounded) total cost of Form I–907 filed by HR specialists.

[232] Calculation, In-house Lawyer Form I–907: $60.31 hourly opportunity cost of time * 1,850 applications = $111,574.

Calculation, Outsourced Lawyer Form I–907: $103.98 hourly opportunity cost of time * 1,850 applications = $192,363.

[233] Calculation: $62,469 total cost of Form I–907 filed by HR specialists + $111,574 total cost of Form I–907 filed by in-house lawyers = $174,043 estimated total costs to file Form I–907.

Calculation: $62,469 total cost of Form I–129 filed by HR specialists + $192,363 total cost of Form I–907 filed by outsourced lawyers = $254,832 estimated total costs to file Form I–907.

[234] The 130 minute burden estimate is as follows: 9142–B—55 minutes, Appendix A—15 minutes, Appendix B—15 minutes, Appendix C—20 minutes, Appendix D—10 minutes, Record Keeping—15 minutes. *See* Form ETA–9142–B at *https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/ETA_Form_9142B.pdf* (last accessed Oct. 24, 2022).

[235] Calculation, HR specialist: $49.30 per hour * 2.17 hours * 361 Form ETA–9142–B = $38,620 (rounded) total cost of Form ETA–9142–B filed by HR specialists.

[236] Calculation, In-house Lawyer Form ETA–9142–B: $103.98 per hour * 2.17 hours * 306 applications = $69,045 (rounded). Calculation, Outsourced Lawyer Form ETA–9142–B: $179.28 per hour * 2.17 hours * 306 applications = $119,046 (rounded).

[237] Calculation: $49.30 hourly opportunity cost of time * 1-hour time burden for the new attestation form and notifying third parties and retaining records related to the returning worker requirements = $49.30.

[238] Calculation: $49.30 hourly opportunity cost of time * 0.17 hours to send OFLC and AFL–CIO the ETA case number = $8.38 (rounded).

[239] Calculation: $49.30 + $8.38 = $57.68.

[240] *See* U.S. Department of Labor, Bureau of Labor Statistics, ''May 2021 National Occupational Employment and Wage Statistics'' Financial and Investment Analysts (13–2051), *https://www.bls.gov/oes/2021/may/oes132051.htm* (accessed Oct. 17, 2022).

[241] Calculation: $49.53 mean hourly wage for a financial analyst * 1.45 benefits-to-wage multiplier = $71.82 (rounded).

[242] Calculation: $71.82 estimated total compensation for a financial analyst * 5 hours to meet the requirements of the irreparable harm standard = $359.10.

for the total number of certifications, we estimate the opportunity cost of time for completing the attestation and sending the ETA case number to OFLC and AFL–CIO for HR specialists is approximately $248,716 (rounded) and for financial analysts is about $1,548,439 (rounded).[243]

The estimated total cost to file Form ETA–9142–B–CAA–7 and comply with the attestation is approximately 1,797,155.[244]

vi. Cost To Conduct Recruitment

An employer that files Form ETA–9142B–CAA–7 and the I–129 petition 30 or more days after the certified start date of work must conduct additional recruitment of U.S. workers. This consists of (1) placing a new job order with the State Workforce Agency (SWA), (2) contacting the relevant American Job Center (AJC), (3) contacting laid-off workers, (4) contacting current employees for referrals, (5) placing the available job opportunity on the employer's website if the employer maintains a website for its business, and (6) contacting the AFL–CIO if applicable and providing a copy of the job order to the bargaining representative for its employees in the occupation and area of intended employment.

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

Employers are required to make reasonable efforts to contact, by mail or other effective means, their former U.S. workers, including those workers who were furloughed and laid off, beginning January 1, 2020. Employers must disclose the terms of the job order to these workers as required by the rule. Employers are also required to contact current employees regarding available job opportunities for referrals.

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

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

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

DOL estimates the average expected time burden for activities related to conducting recruitment is 4 hours.[245] Assuming this work will be done by an HR specialist or an equivalent occupation, the estimated cost to each petitioner is approximately $197.20.[246] Using 1,214 as the estimated number of petitioners required to undergo additional recruitment activities, the estimated total cost of this provision is approximately $239,401 (rounded).[247]

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

vii. Cost of the COVID Protection Provision

Employers must notify employees, in a language understood by the worker as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID–19 vaccines and vaccine distribution sites. We assume that employers will provide a printed notification to inform their employees, such as the free publicly available posters published by DOL's WHD. We also assume that printing and posting the notification can be done during the normal course of business and expect that an employer would need to post two copies of a one-page notification. One of these copies would be in English and a second copy would be in a foreign language. The printing cost associated with posting the notifications (assuming that the notification is written) is $0.15 per posting.[248] The estimated total cost to petitioners to print copies is approximately $1,294 (rounded).[249] Employers may incur higher print costs if they have to print notifications in more than two languages.

viii. Cost of the Portability Provision

Petitioners seeking to hire H–2B nonimmigrants who are currently present in the United States with a valid H–2B visa would need to file a Form I–129, which includes paying the associated fee as discussed above. Also previously discussed, we estimate that approximately 220 additional Form I–129 H–2B petitions will be filed as a result of this provision.

As discussed previously, if a petitioner is represented by a lawyer, the lawyer must file Form G–28. In addition, if a petitioner desires premium processing, the petitioner must file Form I–907 and pay the associated fee. We expect an HR specialist, in-house lawyer, or an outsourced lawyer will perform these actions. Moreover, as previously estimated, we expect that an in-house or outsourced lawyer will file about 45.84 percent of these Form I–129 petitions. Therefore, we expect that a lawyer will file 101 of these petitions and an HR specialist or equivalent occupation will file the remaining 119. As previously discussed, the opportunity cost of time to file a Form

[243] Calculations, HR specialists: $57.68 opportunity cost of time to comply with attestation requirements and to send the ETA case number to OFLC and AFL–CIO * 4,312 estimated additional petitions = $248,716 (rounded) total cost to comply with attestation requirements.

Calculation, Financial Analysts: $359.10 opportunity cost of time to comply with attestation requirements * 4,312 estimated additional petitions = $1,548,439 (rounded) to comply with attestation requirements

[244] Calculation: $248,716 total cost for HR specialist to comply with attestation requirement and to send the ETA case number to OFLC and AFL–CIO + $1,548,439 total cost for financial analysts to comply with attestation requirements = $1,797,155 total cost to comply with attestation requirements.

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

[246] Calculation: $49.30 hourly opportunity cost of time for an HR specialist * 4 hours to conduct additional recruitment = $197.20 per petitioner cost to conduct additional recruitment.

[247] Calculation: 1,214 estimated number of petitioners subject to additional recruitment requirements * $197.20 per petitioner cost to conduct additional recruitment = $239,401 (rounded) total cost to conduct additional recruitment.

[248] *See https://www.montgomerycountymd.gov/Library/services/computerhelp.html* (accessed October 17, 2022). Cost to make black and white copies.

[249] Calculation: $0.15 per posting * 4,312 estimated number of petitioners * 2 copies = $1,294 (rounded) cost of postings.

I–129 H–2B petition is $213.96 for an HR specialist; and the opportunity cost of time to file a Form I–129 H–2B petition with accompanying Form G–28 is $537.58 for an in-house lawyer and $926.88 for an outsourced lawyer. Therefore, we estimate the cost of the additional Forms I–129 from the portability provision for HR specialists is $25,461.[250] The estimated cost of the additional Forms I–129 accompanied by Forms G–28 from the portability provision for lawyers is $54,296 if filed by in-house lawyers and $93,615 if filed by outsourced lawyers.[251]

Previously in this analysis, we estimated 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 206 Forms I–907 will be filed.[252] We expect a lawyer will file 94 of those Forms I–907 and an HR specialist or equivalent occupation will file the remaining 112.[253] As previously discussed, the estimated opportunity cost of time to file a Form I–907 is $28.59 for an HR specialist; and the estimated opportunity cost of time to file a Form I–907 is approximately $60.31 for an in-house lawyer and $103.98 for an outsourced lawyer. The estimated total cost of the additional Forms I–907 if HR specialists file is $3,202.[254] The estimated total cost of the additional Forms I–907 is $5,669 if filed by in-house lawyers and $9,774 if filed by outsourced lawyers.[255]

The estimated total cost of this provision ranges from $88,628 to $132,052 depending on what share of the forms are filed by in-house or outsourced lawyers.[256]

ix. Cost of Audits to Petitioners

As discussed above, DHS intends to conduct 250 audits of employers hiring H–2B workers, and DOL intends to conduct 100 audits of employers hiring H–2B workers, for a total of 350 employers. Employers will need to provide requested information to comply with the audit. We estimate that the expected time burden to comply with audits conducted by DHS and DOL's Office of Foreign Labor Certification is 12 hours.[257] We expect that an HR specialist or equivalent occupation will provide these documents. Given an hourly opportunity cost of time of $49.30, the estimated cost of complying with audits is $591.60 per audited employer.[258] Therefore, the total estimated cost to employers to comply with audits is $207,060.[259]

x. Cost of Additional Scrutiny

The Departments expect that petitioners undergoing additional scrutiny will need to submit additional evidence to USCIS. In addition to the previously described burden to assess, document and retain evidence, submission of this evidence is expected to require printing and mailing hundreds of pages of documents. To estimate the cost of additional scrutiny, we assume 152 petitioners will need to print 500 pages of documents and mail this to USCIS. We expect these documents to be able to fit in a Priority Mail Medium Flat Rate box, which costs $17.05.[260] We estimate the costs of printing at $0.15 per page and the cost of printing 500 at $75.00.[261] The estimated cost for an employer to print and ship evidence to USCIS is $92.05.[262] With an estimated 152 petitioners expected to print and ship evidence, the total estimated costs for printing and shipping evidence is $13,992.[263]

We also expect petitioners to incur a time burden associated with printing and shipping evidence to USCIS. We estimate it will take an HR specialist or equivalent employee 1 hour to print and ship evidence. Using the $49.30 hourly opportunity cost of time for HR specialist, we estimate the opportunity cost of time for each petitioner is $49.30.[264] With an estimated 152 petitioners expected to print and ship evidence, the total estimated opportunity cost of time to print and ship evidence is $7,494.[265]

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

The total estimated cost of additional scrutiny is $21,486.[266]

xi. Familiarization Costs

We expect that petitioners or their representatives will need to read and understand this rule if they seek to take advantage of the supplemental cap. As a result, we expect this rule will impose one-time familiarization costs associated with reading and understanding this rule. As shown previously, we estimate that approximately 6,839 petitioners may take advantage of the provisions of this rule, and that a lawyer will represent 3,135 of these petitioners and an HR specialist or equivalent occupation will represent 3,704.

To estimate the costs of rule familiarization, we estimate the time it will take to read and understand the rule by assuming a reading speed of 238 words per minute.[267] This rule has approximately 66,000 words. Using a reading speed of 238 words per minute, DHS estimates it will take

[250] Calculation, HR specialist: $213.96 estimated cost to file a Form I–129 H–2B petition * 119 petitions = $25,461 (rounded).

[251] Calculation, In-house Lawyer: $537.58 estimated cost to file a Form I–129 H–2B petition and accompanying Form G–28 * 101 petitions = $54,296 (rounded).

Calculation, Outsourced Lawyer: $926.88 estimated cost to file a Form I–129 H–2B petition and accompanying Form G–28 * 101 petitions = $93,615 (rounded).

[252] Calculation: 220 estimated additional Form I–129 H–2B petitions * 93.57 percent accompanied by Form I–907 = 206 (rounded) additional Form I–907.

[253] Calculation, Lawyers: 206 additional Form I–907 * 45.84 percent = 94 (rounded) Form I–907 filed by a lawyer.

Calculation, HR specialists: 206 Form I–907—94 Form I–907 filed by a lawyer = 112 Form I–907 filed by an HR specialist.

[254] Calculation, HR specialist: $28.59 to file a Form I–907 * 112 forms = $3,202 (rounded).

[255] Calculation, In-house lawyer: $60.31 to file a Form I–907 * 94 forms = $5,669 (rounded).

Calculation for an outsourced lawyer: $103.98 to file a Form I–907 * 94 forms = $9,774 (rounded).

[256] Calculation for HR specialists and in-house lawyers: $25,461 for HR specialists to file Form I–129 H–2B petitions + $54,296 for in-house lawyers to file Form I–129 and the accompanying Form G–28 + $3,202 for HR specialists to file Form I–907 + $5,669 for in-house lawyers to file Form I–907 = $88,628.

Calculation for HR specialists and outsourced lawyers: $25,461 for HR specialists to file Form I–129 H–2B petitions + $93,615 for outsourced lawyers to file Form I–129 and the accompanying Form G–28 + $3,202 for HR specialists to file Form I–907 + $9,774 for outsourced lawyers to file Form I–907 = $132,052.

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

[258] Calculation: $49.30 hourly opportunity cost of time for an HR specialist * 12 hours to comply with an audit = $591.60 per audited employer.

[259] Calculation: 350 audited employers * $591.60 opportunity cost of time to comply with an audit = $207,060.

[260] USPS, Priority Mail, *https://www.usps.com/ship/priority-mail.htm* (accessed October 17, 2022).

[261] Calculation: 500 pages * $0.15 per page = $75.00 in printing costs.

[262] Calculation: $75.00 in printing costs + $17.05 in shipping costs = $92.05 to print and ship evidence.

[263] Calculation: 152 petitioners * $92.05 to print and ship evidence = $13,992 total printing and shipping costs.

[264] Calculation: $49.30 hourly opportunity cost of time for HR specialist * 1 hour to print and ship evidence = $49.30 opportunity cost of time per petitioner.

[265] Calculation: 152 petitioners * $49.30 opportunity cost of time per petitioner = $7,494 total estimated opportunity cost of time to print and ship evidence.

[266] Calculation: $13,992 total printing and shipping costs + $7,494 total opportunity cost of time = $21,486 total estimated cost of additional scrutiny.

[267] Brysbaert, Marc (2019, April 12). 'How many words do we read per minute? A review and meta-analysis of reading rate.' *https://doi.org/10.31234/osf.io/xynwg* (accessed March 30, 2022). We use the average speed for silent reading of English nonfiction by adults.

approximately 4.6 hours to read and understand this rule.[268]

The estimated hourly total compensation for a HR specialist, in-house lawyer, and outsourced lawyer are $49.30, $103.98, and $179.28, respectively. The estimated opportunity cost of time for each of these filers to read and understand the rule are $142.97, $301.54, and $519.91, respectively.[269] The estimated total opportunity cost of time for 3,704 HR specialists to familiarize themselves with this rule is approximately $839,993.[270] The estimated total opportunity cost of time for 3,135 lawyers to familiarize themselves with this rule is approximately $1,499,502 if they are all in-house lawyers and $2,585,403 if they are all outsourced lawyers.[271] Accordingly, the estimated total opportunity costs of time for petitioners' representatives to familiarize themselves with this rule ranges from $2,339,495 to $3,425,396.[272]

xii. Estimated Total Costs to Petitioners

In sum, the monetized costs of this rule come from time spent filing and complying with Form I–129, Form G–28, Form I–907, and Form ETA–9142–B–CAA–7, as well as contacting and refreshing recruitment efforts, posting notifications, time spent filing to obtain a porting worker, and complying with audits. The estimated total cost to file Form I–129 and an accompanying Form G–28 ranges from $1,562,393 to $2,332,039, depending on the filer. The estimated total cost of filing Form I–907 ranges from $174,043 to $254,832, depending on the filer. The estimated cost for late season employers to file Form ETA–9142–B ranges from $107,665 to $157,666 depending on the filer. The estimated total cost of filing and complying with Form ETA–9142–B–CAA–7 is $1,797,155. The estimated total cost of conducting additional recruitment is $850,326. The estimated total cost of the COVID–19 protection provision is approximately $1,294. The estimated cost of the portability provision ranges from $88,628 to $132,052, depending on the filer. The estimated total cost for employers to comply with audits is $207,060. The estimated total costs for petitioners or their representatives to familiarize themselves with this rule ranges from $2,339,495 to $3,425,396, depending on the filer. The estimated total cost of additional scrutiny is $21,486. The total estimated cost to petitioners ranges from $6,538,620 to $8,568,381, depending on the filer.[273]

c. Cost to the Federal Government

USCIS will incur costs related to the adjudication of petitions as a result of this TFR. DHS expects USCIS to recover these costs by the fees associated with the forms, which have been accounted for as a transfer from petitioners to USCIS and serve as a proxy for the costs to the agency. The total filing fees associated with Form I–129 H–2B petitions are $2,764,520,[274] and the total filing fees associated with premium processing are $6,361,500.[275] Total transfers from petitioners to the Government are $9,126,020.[276]

The INA provides USCIS with the authority to collect fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including administrative costs, and services provided without charge to certain applicants and petitioners.[277] DHS notes USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. USCIS establishes fees at an amount that is necessary to recover these assigned costs, such as clerical, officers, and managerial salaries and benefits, plus an amount to recover unassigned overhead (for example, facility rent, IT equipment and systems among other expenses) and immigration benefits provided without a fee charged. Consequently, since USCIS immigration fees are primarily based on resource expenditures related to the benefit in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. DHS anticipates some additional costs in adjudicating the additional petitions submitted because of the increase in cap limitation for H–2B visas.

Both DOL and DHS intend to conduct a significant number of audits during the period of temporary need to verify compliance with H–2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule.[278] While fees fund most USCIS activities and appropriations fund DOL, we expect both agencies will be able to shift resources to conduct these audits without incurring additional costs. As previously mentioned, the agencies will conduct a total of 350 audits, and we expect each audit to take 12 hours. This results in a total time burden of 4,200 hours.[279] USCIS anticipates that a Federal employee at a GS–13 Step 5 salary will typically conduct these audits for each agency. The base hourly pay for a GS–13 Step 5 in the Washington, DC locality area is $58.01.[280] To estimate the total hourly compensation for these positions, we multiply the hourly wage ($58.01) by the Federal benefits to wage multiplier of 1.37.[281] This results in an hourly opportunity cost of time of $79.47 for GS–13 Step 5 Federal employees in the

[268] Calculation, Step 1: roughly 66,000 words/238 words per minute = 277 (rounded) minutes.

Calculation, Step 2: 277 minutes/60 minutes per hour = 4.6 (rounded) hours.

[269] Calculation, HR Specialists: $49.30 estimated hourly total compensation for an HR specialist * 4.6 hours to read and become familiar with the rule = $226.78 opportunity cost of time for an HR specialist to read and understand the rule.

Calculation, In-house lawyer: $103.98 estimated hourly total compensation for an in-house lawyer * 4.6 hours to read and become familiar with the rule = $478.31 (rounded) opportunity cost of time for an in-house lawyer to read and understand the rule.

Calculation, Outsourced lawyer: $179.2 estimated hourly total compensation for an outsourced lawyer * 4.6 hours to read and become familiar with the rule = $824.69 (rounded) opportunity cost of time for an outsourced lawyer to read and understand the rule.

[270] Calculation, HR specialists: $226.78 opportunity cost of time * 3,704 = $839,993 (rounded).

[271] Calculation for in-house lawyers: $478.31 opportunity cost of * 3,135 = $1,499,502 (rounded).

Calculation for outsourced lawyers: $824.69 opportunity cost of time * 3,135 = $2,585,403 (rounded).

[272] Calculation: $839,993 + $1,499,502 = $2,339,495.

Calculation: $839,993 + $2,585,403 = $3,425,396.

[273] Calculation of lower range: $1,562,393 + $174,043 + $107,665 + $1,797,155 + $239,401 + $1,294 + $88,628 + $207,060 + $2,339,495 + $21,486 = $6,538,620.

Calculation of upper range: $2,332,039 + $254,832 + $157,666 + $1,797,155 + $239,401 + $1,294 + $132,052 + $207,060 + $3,425,396 + $21,486 = $8,568,381.

[274] Calculation: (4,312 + 220 Form I–129 petitions) * $610 per petition = $2,764,520

[275] Calculation: (4,035 + 206 Forms I–907) * $1,500 per form = $6,361,500.

[276] Calculation: $2,764,520 + $6,361,500 = $9,126,020.

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

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

[279] Calculation: 12 hours to conduct an audit * 350 audits = 4,200 total hours to conduct audits.

[280] *See* U.S. Office of Personnel Management, Pay and Leave, Salaries and Wages, For the Locality Pay area of Washington-Baltimore-Arlington, DC-MD-A-WV-PA, 2022, Hourly Basic Rate, *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2022/DCB_h.pdf* (last accessed October 17, 2022).

[281] Calculation, Step 1: $2,070,773 Full-time Permanent Salaries + $762,476 Civilian Personnel Benefits = $2,833,249 Compensation.

Calculation, Step 2: $2,833,249 Compensation/$2,070,773 Full-time Permanent Salaries = 1.37 (rounded) Federal employee benefits to wage ratio. *See https://www.uscis.gov/sites/default/files/document/reports/USCIS_FY_2021_Budget_Overview.pdf* (accessed October 17, 2022).

Washington, DC locality pay area.[282] The total opportunity costs of time for Federal workers to conduct audits is estimated to be $333,774.[283]

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

d. Benefits to Petitioners

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

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

e. Benefits to Workers

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

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

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

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

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

C. Regulatory Flexibility Act

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

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule that includes any Federal mandate that may result in $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.[284] This rule is exempt from the written statement requirement because DHS did not publish a notice of proposed rulemaking for this rule.

In addition, this rule does not exceed the $100 million in 1995 expenditure in any 1 year when adjusted for inflation ($178 million in 2021 dollars based on the Consumer Price Index for All Urban Consumers (CPI–U)),[285] and this

[282] Calculation: $58.01 hourly wage for a GS 13–5 in the Washington, DC locality area * 1.37 Federal employee benefits to wage ratio = $79.47 hourly opportunity cost of time for a GS 13–5 federal employee in the Washington, DC locality area.

[283] Calculation: 4,200 hours to conduct audits * $79.47 hourly opportunity cost of time = $333,774 total opportunity costs of time for Federal employees to conduct audits.

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

[285] *See* U.S. Department of Labor, BLS, ''Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month,'' available at *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202209.pdf* (last

Continued

rulemaking does not contain such a federal mandate as the term is defined under UMRA.[286] The requirements of Title II of the Act, therefore, do not apply, and the Departments have not prepared a statement under the Act.

E. Executive Order 13132 (Federalism)

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

F. Executive Order 12988 (Civil Justice Reform)

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

G. National Environmental Policy Act

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

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

This rule temporarily amends the regulations implementing the H–2B nonimmigrant visa program to increase the numerical limitation on H–2B nonimmigrant visas for FY 2023, based on the Secretary of Homeland Security's determination, in consultation with the Secretary of Labor, consistent with the FY 2022 Omnibus and Public Law 117–180. It also allows H–2B beneficiaries who are in the United States to change employers upon the filing of a new H–2B petition and begin to work for the new employer for a period generally not to exceed 60 days before the H–2B petition is approved by USCIS.

DHS has determined that this temporary final rule clearly fits within categorical exclusion A3(d) because it interprets or amends a regulation without changing its environmental effect. The amendments to 8 CFR part 214 would authorize up to an additional 64,716 visas for noncitizens who may receive H–2B nonimmigrant visas, of which 44,716 are for returning workers (persons issued H–2B visas or were otherwise granted H–2B status in Fiscal Years 2020, 2021, or 2022). The proposed amendments would also facilitate H–2B nonimmigrants to move to new employment faster than they could if they had to wait for a petition to be approved. The amendment's operative provisions approving H–2B petitions under the supplemental allocation would effectively terminate after September 30, 2023 for the cap increase, and at the end of January 24, 2024 for the portability provision. DHS believes amending applicable regulations to authorize up to an additional 64,716 H–2B nonimmigrant visas will not result in any meaningful, calculable change in environmental effect with respect to the current H–2B limit or in the context of a current U.S. population exceeding 331,893,745 (maximum temporary increase of 0.0195 percent).[287]

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

H. Congressional Review Act

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

I. Paperwork Reduction Act

Attestation for Employers Seeking To Employ H–2B Nonimmigrants Workers Under Section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117–103, and Public Law 117–180, Form ETA–9142–B–CAA–7

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. DOL has submitted the Information Collection Request (ICR) contained in this rule to

visited Nov. 4, 2022). Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2021); (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 2021 – Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(270.970 – 152.383)/152.383] * 100 = (118.587/152.383) * 100 = 0.77821673 * 100 = 77.82 percent = 78 percent (rounded). Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.78 = $178 million in 2021 dollars.

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

[287] *See* U.S. Census Bureau Quick Facts, available at *https://www.census.gov/quickfacts/US* (accessed October, 26 2022).

Calculation: 64,716 additional visas/331,893,745 million people in the United States = 0.0195 (rounded) percent temporary increase in the population.

OMB and obtained approval of a new form, Form ETA–9142B–CAA–7, using emergency clearance procedures outlined at 5 CFR 1320.13. The Departments note that while DOL submitted the ICR, both DHS and DOL will use the information provided by employers in response to this information collection.

Petitioners will use the new Form ETA–9142B–CAA–7 to make attestations regarding, for example, irreparable harm and the returning worker requirement (unless exempt because the H–2B worker is a national of one of the Northern Central American countries or Haiti who is counted against the 20,000 returning worker exemption cap) described above. Petitioners will need to file the attestation with DHS until it announces that the supplemental H–2B cap has been reached. In addition, the petitioner will need to retain all documentation demonstrating compliance with this implementing rule, and must provide it to DHS or DOL in the event of an audit or investigation.

In addition to obtaining immediate emergency approval pursuant to 5 CFR 1320.13, DOL is seeking comments on this information collection pursuant to 44 U.S.C. 3506(c)(2)(A). Comments on the information collection must be received by February 13, 2023. This process of engaging the public and other Federal agencies helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. *See* 44 U.S.C. 3501 *et seq.* In addition, notwithstanding any other provisions of law, no person must generally be subject to a penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

In accordance with the PRA, DOL is affording the public with notice and an opportunity to comment on the new information collection, which is necessary to implement the requirements of this rule. The information collection activities covered under a newly granted OMB Control Number 1205–NEW are required under Section 204 of Division O of the FY 2022 Omnibus, which provides that ''the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied in [FY] 2022 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor,'' may increase the total number of noncitizens who may receive an H–2B visa in FY 2022 by not more than the highest number of H–2B nonimmigrants who participated in the H–2B returning worker program in any fiscal year in which returning workers were exempt from the H–2B numerical limitation. As previously discussed in the preamble of this rule, the Secretary of Homeland Security, in consultation with the Secretary of Labor, has decided to increase the numerical limitation on H–2B nonimmigrant visas to authorize the issuance of up to, but not more than, an additional 64,716 visas for FY 2023 for certain H–2B workers, for U.S. businesses that attest that they are suffering irreparable harm or will suffer impending irreparable harm. As with the previous supplemental rules, the Secretary has determined that the additional visas will only be available for returning workers, that is workers who were issued H–2B visas or otherwise granted H–2B status in FY 2020, 2021, or 2022, unless the worker is one of the 20,000 nationals of one of the Northern Central American countries and Haiti who are exempt from the returning worker requirement.

Commenters are encouraged to discuss the following:

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

The aforementioned information collection requirements are summarized as follows:

Agency: DOL–ETA.

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

Title of the Collection: Attestation for Employers Seeking to Employ H–2B Nonimmigrants Workers Under *Section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117–103, and Public Law 117–180.*

Agency Form Number: Form ETA–9142–B–CAA–7.

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

Total Estimated Number of Respondents: 4,312.

Average Responses per Year per Respondent: 1.

Total Estimated Number of Responses: 4,312.

Average Time per Response: 10.17 hours per application.

Total Estimated Annual Time Burden: 43,853 hours.

Total Estimated Other Costs Burden: $2,647,484

Request for Premium Processing Service, Form I–907

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. Form I–907, Request for Premium Processing Service, has been approved by OMB and assigned OMB control number 1615–0048. DHS is making no changes to the Form I–907 in connection with this temporary rule implementing the time-limited authority pursuant to Section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117–103 as extended by Public Law 117–180 (which expires on December 16, 2022). However, USCIS estimates that this temporary rule may result in approximately 4,035 additional filings of Form I–907 in fiscal year 2022.[288]

[288] As explained above, DHS has elected to pause the receipt of premium processing requests until January 3, 2023. Due to the timing of the pause only a subset of the overall population of petitioners would be affected. DHS cannot quantify to what extent, if any, affected petitioners may modify their behavior in response to such pauses of premium processing. Therefore, DHS believes that analyzing historical trends in premium processing requests is the best method for estimating the population that may request premium processing due to this rule, and DHS recognizes that the estimates made in this analysis could be on the higher end due to modified

Continued

The current OMB-approved estimate of the number of annual respondents filing a Form I–907 is 815,773. USCIS has determined that the OMB-approved estimate is sufficient to fully encompass the additional respondents who will be filing Form I–907 in connection with this temporary rule, which represents a small fraction of the overall Form I–907 population. Therefore, DHS is not changing the collection instrument or increasing its burden estimates in connection with this temporary rule and is not publishing a notice under the PRA or making revisions to the currently approved burden for OMB control number 1615–0048.

List of Subjects

8 CFR Part 214

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

8 CFR Part 274a

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, Reporting and recordkeeping requirements, Students.

20 CFR Part 655

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

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

DEPARTMENT OF HOMELAND SECURITY

PART 214—NONIMMIGRANT CLASSES

■ 1. Effective December 15, 2022 through December 15, 2025, the authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1357, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

■ 2. Effective December 15, 2022 through December 15, 2025, amend § 214.2 by:

■ a. Amending Table 3 to paragraph (h) by adding row (29); and

■ b. Adding paragraphs (h)(6)(xiii) and (h)(29).

The additions read as follows:

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

* * * * *

(h) * * *

TABLE 3 TO PARAGRAPH (h)—PARAGRAPH CONTENTS

* * * * * * *
(29) Change of employers and portability for H–2B workers (January 25, 2023 through January 24, 2024).

* * * * *

(6) * * *

(xiii) *Special requirements for additional cap allocations under Public Laws 117–103 and 117–180*—(A) *Public Law 117–103 and section 101(6) of Division A of Public Law 117–180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023*—(*1*) *Supplemental allocation for returning workers.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2023 only, the Secretary has authorized up to an additional 64,716 visas for aliens who may receive H–2B nonimmigrant visas pursuant to section 204 of Division O of Public Law 117–103, the Consolidated Appropriations Act, 2022, and section 101(6) of Division A of Public Law 117–180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023. An alien may be eligible to receive an H–2B nonimmigrant visa under this paragraph (h)(6)(xiii)(A)(*1*) if she or he is a returning worker. The term ''returning worker'' under this paragraph (h)(6)(xiii)(A)(*1*) means a person who was issued an H–2B visa or was otherwise granted H–2B status in fiscal year 2020, 2021, or 2022. Notwithstanding § 248.2 of this chapter, an alien may not change status to H–2B nonimmigrant under this paragraph (h)(6)(xiii)(A)(*1*). The additional H–2B visas authorized under this paragraph will be made available to returning workers as follows:

(*i*) Up to an additional 18,216 visas for aliens who may receive H–2B nonimmigrant visas based on petitions requesting FY 2023 employment start dates on or before March 31, 2023.

(*ii*) Up to an additional 16,500 visas for aliens who may receive H–2B nonimmigrant visas based on petitions requesting FY 2023 employment start dates from April 1, 2023 to May 14, 2023.

(*iii*) Up to an additional 10,000 visas available for aliens with employment start dates from May 15, 2023 to September 30, 2023.

(*2*) *Supplemental allocation for nationals of Guatemala, El Salvador, Honduras (Northern Central American countries), or Haiti.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2023 only, and in addition to the allocation described in paragraph (h)(6)(xiii)(A)(*1*) of this section, the Secretary has authorized up to an additional 20,000 visas for aliens who are nationals of Guatemala, El Salvador, Honduras (Northern Central American countries), or Haiti, who may receive H–2B nonimmigrant visas pursuant 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, based on petitions with FY 2023 employment start dates. Such workers are not subject to the returning worker requirement in paragraph (h)(6)(xiii)(A)(*1*). Petitioners must request such workers in an H–2B petition that is separate from H–2B petitions that request returning workers under paragraph (h)(6)(xiii)(A)(*1*) and

behavior as a result of the pause in premium processing.

must declare that they are requesting these workers in the attestation required under 20 CFR 655.67(a)(1). A petition requesting returning workers under paragraph (h)(6)(xiii)(A)(*1*), which is accompanied by an attestation indicating that the petitioner is requesting nationals of Northern Central American countries or Haiti, will be rejected, denied or, in the case of a non-frivolous petition, will be approved solely for the number of beneficiaries that are from the Northern Central American countries or Haiti. Notwithstanding § 248.2 of this chapter, an alien may not change status to H–2B nonimmigrant under this paragraph (h)(6)(xiii)(A)(*2*).

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

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

(*2*) Submit to USCIS, at the time the employer files its petition, a U.S. Department of Labor attestation, in compliance with this section and 20 CFR 655.65, evidencing that:

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

(*ii*) All workers requested and/or instructed to apply for a visa have been issued an H–2B visa or otherwise granted H–2B status in fiscal year 2020, 2021, or 2022, unless the H–2B worker is a national of Guatemala, El Salvador, Honduras, or Haiti who is counted towards the 20,000 cap described in paragraph (h)(6)(xiii)(A)(*2*) of this section;

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

(*iv*) The employer will comply with obligations and additional recruitment requirements outlined in 20 CFR 655.65(a)(3) through (5);

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

(*vi*) The employer will agree to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by DHS, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with immigration laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2023 supplemental allocations outlined in paragraph (h)(6)(xiii)(B) of this section, as a condition for the approval of the petition.

(*vii*) The employer will fully cooperate with any audit, investigation, compliance review, evaluation, verification or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2023 supplemental allocations outlined in 20 CFR 655.65(a) and 655.67(a), as a condition for the approval of the H–2B petition. The employer must attest to this on Form ETA–9142–B–CAA–7 and must further attest on Form ETA–9142–B–CAA–7 that it will not impede, interfere, or refuse to cooperate with an employee of the Secretary of the U.S. Department of Labor who is exercising or attempting to exercise DOL's audit or investigative authority pursuant to 20 CFR part 655, subpart A, and 29 CFR 503.25.

(C) *Processing—(1) Petitions filed pursuant to paragraph (h)(6)(xiii)(A)(1)(i) requesting FY 2023 employment start dates on or before March 31, 2023.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xiii)(A)(*1*)(*a*) of this section requesting employment start dates on or before March 31, 2023 that are received after the applicable numerical limitation has been reached or after September 15, 2023.

(*2*) *Petitions filed pursuant to paragraph (h)(6)(xiii)(A)(1)(ii) requesting FY 2023 employment start dates from April 1, 2023 to May 14, 2023.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xii)(A)(*1*)(*ii*) of this section requesting employment start dates from April 1, 2023 to May 14, 2023 that are received earlier than 15 days after the INA section 214(g) cap for the second half FY 2023 has been met or after the applicable numerical limitation has been reached or after September 15, 2023.

(*3*) *Petitions filed pursuant to paragraph (h)(6)(xiii)(A)(1)(iii) of this section requesting FY 2023 employment start dates from May 15, 2023 and September 30, 2023.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xiii)(A)(*1*)(*iii*) of this section requesting employment start dates from May 15, 2023 to September 30, 2023, that are received earlier than 45 days after the INA section 214(g) cap for the second half FY 2023 has been met, or after the applicable numerical limitation has been reached or after September 15, 2023.

(*4*) *Petitions filed pursuant to paragraph (h)(6)(xiii)(A)(2) of this section requesting nationals of Guatemala, El Salvador, Honduras (Northern Central American countries), or Haiti with FY 2023 employment start dates.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xiii)(A)(*2*) of this section that have a date of need on or after April 1, 2023 and are received earlier than 15 days after the INA section 214(g) cap for the second half of FY 2023 is met, or after the applicable numerical limitation has been reached or after September 15, 2023.

(*5*) USCIS will not approve a petition filed pursuant to paragraph (h)(6)(xiii) of this section on or after October 1, 2023.

(D) *Numerical limitations under paragraphs (h)(6)(xiii)(A)(1) and (2) of this section.* When calculating the numerical limitations under paragraphs (h)(6)(xiii)(A)(*1*) and (*2*) of this section as authorized under Public Law 117–103, as extended by Public Law 117–180, USCIS will make numbers for each allocation available to petitions in the order in which the petitions subject to the respective limitation are received. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions received (including the

number of workers requested when necessary) and will notify the public of the dates that USCIS has received the necessary number of petitions (the ''final receipt dates'') under paragraph (h)(6)(xiii)(A)(*1*) or (*2*) of this section. The day the public is notified will not control the final receipt dates. When necessary to ensure the fair and orderly allocation of numbers subject to the numerical limitations in paragraphs (h)(6)(xiii)(A)(*1*) and (*2*) of this section, USCIS may randomly select from among the petitions received on the final receipt dates the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt dates that may be applicable under paragraph (h)(6)(xiii)(A)(*1*) or (*2*) of this section will be rejected. If the final receipt date is any of the first 5 business days on which petitions subject to the applicable numerical limits described in paragraph (h)(6)(xiii)(A)(*1*) or (*2*) of this section may be received (in other words, if either of the numerical limits described in paragraph (h)(6)(xiii)(A)(*1*) or (*2*) of this section is reached on any one of the first 5 business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those 5 business days.

(E) *Sunset.* This paragraph (h)(6)(xiii) expires on October 1, 2023.

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

* * * * *

(29) *Change of employers and portability for H–2B workers.* (i) This paragraph (h)(29) relates to H–2B workers seeking to change employers during the time period specified in paragraph (h)(29)(iv) of this section. Notwithstanding paragraph (h)(2)(i)(D) of this section:

(A) An alien in valid H–2B nonimmigrant status whose new petitioner files a non-frivolous H–2B petition requesting an extension of the alien's stay on or after January 25, 2023, is authorized to begin employment with the new petitioner after the petition described in this paragraph (h)(29) is received by USCIS and before the new H–2B petition is approved, but no earlier than the start date indicated in the new H–2B petition; or

(B) An alien whose new petitioner filed a non-frivolous H–2B petition requesting an extension of the alien's stay before January 25, 2023 that remains pending on January 25, 2023, is authorized to begin employment with the new petitioner before the new H–2B petition is approved, but no earlier than the start date of employment indicated on the new H–2B petition.

(ii)(A) With respect to a new petition described in paragraph (h)(29)(i)(A) of this section, and subject to the requirements of 8 CFR 274a.12(b)(33), the new period of employment described in paragraph (h)(29)(i) of this section may last for up to 60 days beginning on the Received Date on Form I–797 (Notice of Action) or, if the start date of employment occurs after the I–797 Received Date, for a period of up to 60 days beginning on the start date of employment indicated in the H–2B petition.

(B) With respect to a new petition described in paragraph (h)(29)(i)(B) of this section, the new period of employment described in paragraph (h)(29)(i) of this section may last for up to 60 days beginning on the later of either January 25, 2023 or the start date of employment indicated in the H–2B petition.

(C) With respect to either type of new petition, if USCIS adjudicates the new petition before the expiration of this 60-day period and denies the petition, or if the new petition is withdrawn by the petitioner before the expiration of the 60-day period, the employment authorization associated with the filing of that petition under 8 CFR 274a.12(b)(33) will automatically terminate 15 days after the date of the denial decision or 15 days after the date on which the new petition is withdrawn. Nothing in this paragraph (h)(29) is intended to alter the availability of employment authorization related to professional H–2B athletes who are traded between organizations pursuant to paragraph (h)(6)(vii) of this section and 8 CFR 274a.12(b)(9).

(iii) In addition to meeting all other requirements in paragraph (h)(6) of this section for the H–2B classification, to commence employment under this paragraph (h)(29):

(A) The alien must either have been in valid H–2B nonimmigrant status on or after January 25, 2023 and be the beneficiary of a non-frivolous H–2B petition requesting an extension of the alien's stay that is received on or after January 25, 2023, but no later than January 24, 2024; or be the beneficiary of a non-frivolous H–2B petition requesting an extension of the alien's stay that is pending as of January 25, 2023.

(B) The petitioner must comply with all Federal, State, and local employment-related laws and regulations, including, where applicable, health and safety laws, laws related to COVID–19 worker protections, any right to time off or paid time off for COVID–19 vaccination, or to reimbursement for travel to and from the nearest available vaccination site; and

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

(iv) Authorization to initiate employment changes pursuant to this paragraph (h)(29) begins at 12 a.m. on January 25, 2023, and ends at the end of January 24, 2024.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

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

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

■ 4. Effective December 15, 2022 through December 15, 2025, amend § 274a.12 by adding paragraph (b)(33) to read as follows:

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

* * * * *

(b) * * *

(33) (i) Pursuant to 8 CFR 214.2(h)(29) and notwithstanding 8 CFR 214.2(h)(2)(i)(D), an alien is authorized to be employed no earlier than the start date of employment indicated in the H–2B petition and no earlier than January 25, 2023, by a new employer that has filed an H–2B petition naming the alien as a beneficiary and requesting an extension of stay for the alien, for a period not to exceed 60 days beginning on:

(A) The later of the ''Received Date'' on Form I–797 (Notice of Action) acknowledging receipt of the petition, or the start date of employment indicated on the new H–2B petition, for petitions filed on or after January 25, 2023; or

(B) The later of January 25, 2023 or the start date of employment indicated on the new H–2B petition, for petitions that are pending as of January 25, 2023.

(ii) If USCIS adjudicates the new petition prior to the expiration of the 60-day period in paragraph (b)(33)(i) of this section and denies the new petition for extension of stay, or if the petitioner withdraws the new petition before the expiration of the 60-day period, the employment authorization under this paragraph (b)(33) will automatically terminate upon 15 days after the date of the denial decision or the date on which the new petition is withdrawn. Nothing in this section is intended to alter the availability of employment authorization related to professional H–2B athletes who are traded between organizations pursuant to paragraph (b)(9) of this section and 8 CFR 214.2(h)(6)(vii).

(iii) Authorization to initiate employment changes pursuant to 8 CFR 214.2(h)(29) and paragraph (b)(33)(i) of this section begins at 12 a.m. on January 25, 2023, and ends at the end of January 24, 2024.

* * * * *

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Chapter V

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

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

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

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

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

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

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

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

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

■ 6. Effective December 15, 2022 through September 30, 2023, add § 655.65 to read as follows:

§ 655.65 Special application filing and eligibility provisions for Fiscal Year 2023 under the December 15, 2022 supplemental cap increase.

(a) An employer filing a petition with USCIS under 8 CFR 214.2(h)(6)(xiii) to request H–2B workers with FY 2023 employment start dates on or before September 30, 2023, must meet the following requirements:

(1) The employer must attest on the Form ETA–9142–B–CAA–7 that its business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H–2B workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(xiii). Additionally, the employer's attestation must identify the types of evidence the employer is relying on and will retain to meet the irreparable harm standard, attest that the employer has created a detailed written statement describing how it is suffering irreparable harm or will suffer impending irreparable harm and describing how such evidence demonstrates irreparable harm, and attest that the employer will provide all documentary evidence of the applicable irreparable harm and the written statement describing how such evidence demonstrates irreparable harm to DHS or DOL upon request.

(2) The employer must attest on Form ETA–9142–B–CAA–7 that each of the workers requested and/or instructed to apply for a visa, whether named or unnamed, on a petition filed pursuant to 8 CFR 214.2(h)(6)(xiii), have been issued an H–2B visa or otherwise granted H–2B status during one of the last three (3) fiscal years (fiscal year 2020, 2021, or 2022), unless the H–2B worker is a national of Guatemala, El Salvador, Honduras, or Haiti and is counted towards the 20,000 cap described in 8 CFR 214.2(h)(6)(xiii)(A)(*2*).

(3) The employer must attest on Form ETA–9142–B–CAA–7 that the employer will comply with all the assurances, obligations, and conditions of employment set forth on its approved *Application for Temporary Employment Certification.*

(4) The employer must attest on Form ETA–9142–B–CAA–7 that it will comply with all Federal, State, and local employment-related laws and regulations, including, where applicable, health and safety laws and laws related to COVID–19 worker protections; any right to time off or paid time off for COVID–19 vaccination, or to reimbursement for travel to and from the nearest available vaccination site; and that the employer will notify any H–2B workers, approved under the supplemental cap in 8 CFR 214.2(h)(6)(xiii)(A)(*1*) and (*2*), in a language understood by the worker as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID–19 vaccines and vaccine distribution sites.

(5) An employer that submits Form ETA–9142B–CAA–7 and the I–129 petition 30 or more days after the certified start date of work, as shown on its approved Form ETA–9142B, *Final Determination: H–2B Temporary Labor Certification Approval,* must conduct additional recruitment of U.S. workers as follows:

(i) Not later than the next business day after submitting the I–129 petition for H–2B worker(s), the employer must place a new job order for the job opportunity with the State Workforce Agency (SWA), serving the area of intended employment. The employer must follow all applicable SWA instructions for posting job orders, concurrently inform the SWA and NPC that the job order is being placed in connection with a previously certified *Application for Temporary Employment Certification* for H–2B workers by providing the unique temporary labor certification (TLC) identification number, and receive applications in all forms allowed by the SWA, including online applications (sometimes known as ''self-referrals''). The job order must contain the job assurances and contents set forth in § 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 15 calendar days;

(ii) During the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of this section for intrastate clearance, the employer must contact, by email or

other available electronic means, the nearest comprehensive American Job Center (AJC) serving the area of intended employment where work will commence, request staff assistance advertising and recruiting qualified U.S. workers for the job opportunity, and provide the unique identification number associated with the job order placed with the SWA or, if unavailable, a copy of the job order. If a comprehensive AJC is not available, the employer must contact the nearest affiliate AJC serving the area of intended employment where work will commence to satisfy the requirements of this paragraph (a)(5)(ii);

(iii) Where the occupation or industry is traditionally or customarily unionized, during the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of this section for intrastate clearance, the employer must contact (by mail, email or other effective means) the nearest American Federation of Labor and Congress of Industrial Organizations office covering the area of intended employment and provide written notice of the job opportunity, by providing a copy of the job order placed pursuant to (a)(5)(i) of this section, and request assistance in recruiting qualified U.S. workers for the job;

(iv) During the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of this section for intrastate clearance, the employer must contact (by mail or other effective means) its former U.S. workers, including those who have been furloughed or laid off, during the period beginning January 1, 2021, until the date the I–129 petition required under 8 CFR 214.2(h)(6)(xiii) is submitted, who were employed by the employer in the occupation at the place of employment (except those who were dismissed for cause or who abandoned the worksite), disclose the terms of the job order placed pursuant to (a)(5)(i) of this section, and solicit their return to the job. The contact and disclosures required by this paragraph (a)(5)(iv) must be provided in a language understood by the worker, as necessary or reasonable, and in writing;

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

(vi) During the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of this section for intrastate clearance, the employer must contact (by mail or other effective written means) all U.S. workers currently employed at the place of employment, disclose the terms of the job order placed pursuant to (a)(5)(i) of this section, and request assistance in recruiting qualified U.S. workers for the job. The contact, disclosure, and request for assistance required by this paragraph (a)(5)(iv) must be provided in a language understood by the worker, as necessary or reasonable, and in writing;

(vii) Where the employer maintains a website for its business operations, during the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of this section for intrastate clearance, the employer must post the job opportunity in a conspicuous location on the website. The job opportunity posted on the website must disclose the terms of the job order placed pursuant to (a)(5)(i) of this section, and remain posted for at least 15 calendar days;

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

(6) The employer must attest on Form ETA–9142–B–CAA–7 that it will fully cooperate with any audit, investigation, compliance review, evaluation, verification, or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2023 supplemental allocations outlined in this paragraph (a) and § 655.67(a), as a condition for the approval of the H–2B petition. Pursuant to this subpart and 29 CFR 503.25, the employer will not impede, interfere, or refuse to cooperate with an employee of the Secretary who is exercising or attempting to exercise DOL's audit or investigative authority.

(b) This section expires on October 1, 2023.

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

■ 7. Effective December 15, 2022 through September 30, 2026, add § 655.67 to read as follows:

§ 655.67 Special document retention provisions for Fiscal Years 2023 through 2026 under the Consolidated Appropriations Act, 2022, as extended by Public Law 117–180.

(a) An employer that files a petition with USCIS to employ H–2B workers in fiscal year 2023 under authority of the temporary increase in the numerical limitation under section 204 of Division O, Public Law 117–103 must maintain for a period of three (3) years from the date of certification, consistent with 20 CFR 655.56 and 29 CFR 503.17, the following: (1) A copy of the attestation filed pursuant to the regulations in 8 CFR 214.2 governing that temporary increase;

(2) Evidence establishing, at the time of filing the I–129 petition, that the employer's business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H–2B workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(xiii), including a detailed written statement describing the irreparable harm and how such evidence shows irreparable harm;

(3) Documentary evidence establishing that each of the workers the employer requested and/or instructed to apply for a visa, whether named or unnamed on a petition filed pursuant to 8 CFR 214.2(h)(6)(xiii), have been issued an H–2B visa or otherwise granted H–2B status during one of the last three (3) fiscal years (fiscal year 2020, 2021, or 2022), unless the H–2B worker(s) is a national of El Salvador, Guatemala, Honduras, or Haiti and is counted towards the20,000 cap described in 8 CFR 214.2(h)(6)(xiii)(A)(*2*). Alternatively, if applicable, employers must maintain documentary evidence that the workers the employer requested and/or instructed to apply for visas are eligible nationals of El Salvador, Guatemala, Honduras, or Haiti as defined in 8 CFR 214.2(h)(6)(xiii)(A)(*2*); and

(4) If applicable, proof of recruitment efforts set forth in § 655.65(a)(5)(i) through (viii) and a recruitment report

that meets the requirements set forth in § 655.48(a)(1) through (4) and (7), and maintained throughout the recruitment period set forth in § 655.65(a)(5)(ix).

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

(c) This section expires on October 1, 2026.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

Martin J. Walsh,

Secretary, U.S. Department of Labor.

[FR Doc. 2022–27236 Filed 12–12–22; 5:15 pm]

BILLING CODE 9111–97–P; 4510–FP–P