DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 274a

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RIN 1615–AC76

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

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security (DHS).

ACTION: Final rule.

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

DATES: This final rule is effective January 17, 2025.

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Table of Abbreviations

AAO—Administrative Appeals Office
APA—Administrative Procedure Act
BLS—Bureau of Labor Statistics
CBP—U.S. Customs and Border Protection
CEQ—Council on Environmental Quality
CFR—Code of Federal Regulations
CPI–U—Consumer Price Index for All Urban Consumers
DHS—Department of Homeland Security
DOJ—Department of Justice
DOL—Department of Labor
DOS—Department of State
DOT—Department of Transportation
ELIS—Electronic Immigration System
ETA—Employment and Training Administration
FAM—Foreign Affairs Manual
FDNS—Fraud Detection and National Security Directorate
FR—Federal Register
FRFA—Final Regulatory Flexibility Analysis
FTE—Full-time equivalent
FY—Fiscal year
GAO—Government Accountability Office
GDOL—Guam Department of Labor
HR—Human Resources
HSA—Homeland Security Act of 2002
H–2A—Temporary Agricultural Workers Nonimmigrant Classification
H–2B—Temporary Nonagricultural Workers Nonimmigrant Classification
ICE—U.S. Immigration and Customs Enforcement
IEFA—Immigration Examinations Fee Account
INA—Immigration and Nationality Act
INS—Immigration and Naturalization Service
IRFA—Initial Regulatory Flexibility Analysis
MOU—Memorandum of understanding
NAICS—North American Industry Classification System
NEPA—National Environmental Policy Act
NOID—Notice of intent to deny
NPRM—Notice of proposed rulemaking
OFLC—Office of Foreign Labor Certification
OMB—Office of Management and Budget
OSHA—Occupational Safety and Health Administration
PRA—Paperwork Reduction Act

RFA—Regulatory Flexibility Act of 1980
RFE—Request for evidence
RIA—Regulatory Impact Analysis
SBA—Small Business Administration
TFR—Temporary final rule
TLC—Temporary labor certification
UMRA—Unfunded Mandates Reform Act of 1995
USCIS—U.S. Citizenship and Immigration Services
USDA—U.S. Department of Agriculture
WHD—Wage and Hour Division

I. Executive Summary

A. Purpose of the Regulatory Action

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

B. Legal Authority

The Immigration and Nationality Act (INA or the Act) sec. 101(a)(15)(H)(ii)(a) and (b), 8 U.S.C. 1101(a)(15)(H)(ii)(a) and (b), establishes the H–2A and H–2B nonimmigrant visa classifications for noncitizens [1] who are coming to the United States temporarily to perform agricultural labor or services or to perform nonagricultural services or labor, respectively.

The Secretary's authority for this rule can be found in various provisions of the immigration laws, including but not limited to INA sections 103(a), 8 U.S.C. 1103(a), and 214, 8 U.S.C. 1184.[2] INA sec. 103(a), as amended, 8 U.S.C. 1103(a), provides the Secretary general authority to administer and enforce the immigration laws and to issue regulations necessary to carry out that authority. Section 402 of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 202, charges the Secretary with ''[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States'' and ''[e]stablishing national immigration enforcement policies and priorities.'' *See also* HSA sec. 428, 6 U.S.C. 236. The HSA also provides that a primary mission of DHS is to ''ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.'' HSA sec. 101(b)(1)(F), 6 U.S.C. 111(b)(1)(F).

With respect to nonimmigrants in particular, the INA provides that ''[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe.'' [3] INA sec. 214(a)(1), 8 U.S.C. 1184(a)(1); *see* INA secs. 274A(a)(1) and (h)(3), 8 U.S.C. 1324a(a)(1) and (h)(3) (prohibiting employment of noncitizens who are not authorized for employment). In addition, the HSA transferred to USCIS the authority to adjudicate petitions for H–2 nonimmigrant status, establish policies for performing that function, and set national immigration services policies and priorities. *See* HSA secs. 451(a)(3), (b); 6 U.S.C. 271(a)(3), (b). Furthermore, under INA sec. 214(b), 8 U.S.C. 1184(b), every noncitizen, with the exception of noncitizens seeking L, V, or H–1B nonimmigrant status, is presumed to be an immigrant unless the noncitizen establishes the noncitizen's entitlement to a nonimmigrant status. INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1), establishes the nonimmigrant petition process as a prerequisite for obtaining (H), (L), (O), or (P)(i) nonimmigrant status (except for those in the H–1B1 classification). This statutory provision provides the Secretary of Homeland Security with exclusive authority to approve or deny H–2 nonimmigrant visa petitions after consultation with the appropriate agencies of the Government. It also authorizes the Secretary to prescribe the form of and identify information necessary to adjudicate the petition. With respect to the H–2A classification, this section defines the term ''appropriate agencies of [the] Government'' to include the Departments of Labor (DOL) and Agriculture (USDA), and cross-references INA sec. 218, 8 U.S.C. 1188.

Section 214(c)(14) of the INA, 8 U.S.C. 1184(c)(14), provides the Secretary of Homeland Security with the authority to impose, ''in addition to any other remedy authorized by law,'' such administrative remedies (including civil monetary penalties) as the Secretary ''determines to be appropriate'' and to deny petitions for a period of at least 1 but not more than 5 years, if, after notice and an opportunity for a hearing, the Secretary finds that an employer substantially failed to meet any of the conditions of the H–2B petition or engaged in willful misrepresentation of a material fact in the H–2B petition. *See* INA sec. 214(c)(14)(A)(i) and (ii), 8 U.S.C. 1184(c)(14)(A)(i) and (ii). It also authorizes the Secretary to delegate to the Secretary of Labor the authority under INA sec. 214(c)(14)(A)(i) to determine violations and impose administrative remedies, including civil monetary penalties, and any other remedy authorized by law. *See* INA sec. 214(c)(14)(B), 8 U.S.C. 1184(c)(14)(B).[4] The Secretary of Homeland Security may designate officers or employees to take and consider evidence concerning any matter that is material or relevant to the enforcement of the INA. *See* INA secs. 235(d)(3), 287(a)(1), (b); 8 U.S.C. 1225(d)(3), 1357(a)(1), (b).

Section 291 of the INA, 8 U.S.C. 1361, establishes that the petitioner or applicant for a visa or other immigration document bears the burden of proof with respect to eligibility and inadmissibility, including that a noncitizen is entitled to the immigration status being sought.

C. Summary of the Major Provisions of the Regulatory Action

This final rule includes the following major changes:

- Program Integrity and Worker Protections

To improve the integrity of the H–2 programs, DHS is making significant revisions to the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H–2A and H–2B workers, including new bases for denial for some H–2 petitions.[5] Further, as a significant new program integrity measure and a deterrent to petitioners that have been found to have committed labor law violations or abused the H–2 programs, DHS is instituting certain mandatory and discretionary grounds for denial of an H–2A or H–2B petition. In addition, to protect workers who report their

[1] For purposes of this discussion, DHS uses the term ''noncitizen'' as synonymous with the term ''alien'' as it is used in the INA and regulations. *See* INA sec. 101(a)(3), 8 U.S.C. 1101(a)(3).

[2] The broad authority under INA sections 103(a), 8 U.S.C. 1103(a)(3), and 214, 8 U.S.C. 1184, applies with respect to all of the provisions of this final rule, regardless of whether this authority is explicitly referenced in responses to specific public comments on any of the provisions of this final rule.

[3] Although several provisions of the INA discussed in this final rule refer exclusively to the ''Attorney General,'' such provisions are now to be read as referring to the Secretary of Homeland Security by operation of the HSA. *See* 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1), (g), 1551 note; *Nielsen* v. *Preap,* 586 U.S. 392, 397 n.2 (2019).

[4] In 2009, the Secretary delegated to the Secretary of Labor certain authorities under INA sec. 214(c)(14)(A)(i). *See* ''Delegation of Authority to the Department of Labor under Section 214(c)(14)(A) of the Immigration and Nationality Act'' (Jan. 16, 2009).

[5] DHS is making a change from the NPRM in how it refers to these new bases for denial, referring to the new 1- and 3-year periods following a petition denial or revocation for a prohibited fee as denial periods rather than as bars on approval.

employers for program violations, DHS is providing H–2A and H–2B workers with ''whistleblower protection'' comparable to the protection that is currently offered to H–1B workers. Additionally, DHS is clarifying requirements for petitioners and employers to consent to, and fully comply with, USCIS compliance reviews and inspections. DHS is also clarifying USCIS' authority to deny or revoke a petition if USCIS is unable to verify information related to the petition, including but not limited to where such inability is due to lack of cooperation from a petitioner or an employer during a site visit or other compliance review.

- Worker Flexibilities

This final rule makes changes meant to provide greater flexibility to H–2A and H–2B workers. These changes include adjustments to the existing admission periods before and after the validity dates of an approved petition (grace periods) so that H–2 workers would be considered maintaining valid H–2 status for a period of up to 10 days prior to the petition's validity period and up to 30 days following the expiration of the petition. In addition, the final rule provides for an extension of the existing 30-day grace period to a period of up to 60 days following revocation of an approved petition during which an H–2 worker may seek new qualifying employment or prepare for departure from the United States without violating their nonimmigrant H–2 status or accruing unlawful presence. Further, to account for other situations in which a worker may unexpectedly need to stop working or wish to seek new employment, DHS is providing a new grace period for up to 60 days during which an H–2 worker can cease working for their petitioner while maintaining H–2 status.

Additionally, in a change meant to work in conjunction with the new grace period provisions, DHS is permanently providing portability—the ability to begin new employment with the same or new employer upon the proper filing of an extension of stay petition rather than only upon its approval—to H–2A and H–2B workers. Furthermore, in the case of petition revocations, DHS is clarifying that H–2A employers have the same responsibility that H–2B employers have for reasonable costs of return transportation for the beneficiary. DHS also is clarifying that H–2 workers will not be considered to have failed to maintain their H–2 status and will not have H–2 petitions filed on their behalf denied solely on the basis of taking certain steps mentioned in this rule toward becoming lawful permanent residents of the United States. Finally, DHS is removing the phrase ''abscondment,'' ''abscond,'' and its other variations to emphasize that the mere fact of leaving employment, standing alone, does not constitute a basis for assuming wrongdoing by the worker.

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

DHS is making two changes to improve the efficiency of the H–2 programs and to reduce barriers to use of those two programs. First, DHS is removing the requirement that USCIS may generally only approve petitions for H–2 nonimmigrant status for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated as eligible to participate in the H–2 programs. Second, DHS is simplifying the regulatory provisions regarding the effect of a departure from the United States on the 3-year maximum period of stay by providing a uniform standard for resetting the 3-year clock following such a departure.

D. Costs and Benefits

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

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

Table 1 provides a detailed summary of the provisions in this rule and their impacts. The impact of the costs and benefits described herein are quantified (and monetized) wherever possible given all available information. Where there are insufficient data to quantify a given impact, we provide a qualitative description of the impact.

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Table 1: Summary of Provisions and Impacts

Provision	Purpose of Provision	Expected Impact of the Provision
8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F)	DHS is adding stronger language requiring petitioners or employers to both consent to and fully comply with any USCIS audit, investigation, or other program integrity activity and clarify USCIS' authority to deny/revoke a petition if unable to verify information related to the petition, including due to lack of cooperation from the petitioner or employer during a site visit or other compliance review.	Costs: • Cooperation during a site visit or compliance review may result in opportunity costs of time for petitioners to provide information to USCIS during these compliance reviews and inspections. On average, USCIS site visits last 1.7 hours, which is a reasonable estimate for the marginal time that a petitioner may need to spend in order to comply with a site visit. • Employers that do not cooperate will face denial or revocation of their petition(s), which could result in costs to those businesses. Benefits: • USCIS will have clearer authority to deny or revoke a petition if unable to verify information related to the petition. The effectiveness of existing USCIS program integrity activities will be improved through increased cooperation from employers. More effective program integrity activities may benefit domestic workers, compliant petitioners, and H-2 workers.
8 CFR 214.2(h)(20)	DHS is providing H-2A and H-2B workers with "whistleblower protection" comparable to the protection currently offered to H-1B workers.	Costs: Employers may face increased RFEs, denials, or other actions on their H-2 petitions, or other program integrity mechanisms available under this rule or existing authorities, as a result of H-2 workers' cooperation in program integrity activity due to whistleblower protections. Such actions may result in potential costs such as lost productivity and profits to employers whose noncompliance with the program is revealed by whistleblowers. Benefits: • Such protections may afford workers the ability to expose issues that harm workers or are not in line with the intent of the H-2 programs while also offering protection to such workers (therefore potentially improving overall working conditions for both U.S. and noncitizen workers), but the extent to which this would occur is unknown.
8 CFR 214.2(h)(5)(xi)(A), 8 CFR 214.2(h)(5)(xi)(C), 8 CFR 214.2(h)(6)(i)(B), 8 CFR 214.2(h)(6)(i)(C), and 8 CFR 214.2(h)(6)(i)(D)	DHS is significantly revising the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H-2A and H-2B workers, including new bases for denial for some H-2 petitions.	Costs: • Enhanced consequences for petitioners who charge prohibited fees could lead to increased financial losses and extended ineligibility from participating in H-2 programs. Benefits: • Possibly increase compliance with provisions regarding prohibited fees and thus reduce the

		occurrence and burden of prohibited fees on H-2 beneficiaries. • More effective application of provisions regarding prohibited fees benefits domestic workers, compliant petitioners, and H-2 beneficiaries.
8 CFR 214.2(h)(10)(iv)[6]	DHS is instituting certain mandatory and discretionary grounds for denial of an H-2A or H-2B petition.	Costs: • USCIS adjudicators may require additional time associated with reviewing information regarding debarment and other past violation determinations more closely, issuing RFEs or NOIDs, and conducting the discretionary analysis for relevant petitions. • The expansion of violation determinations that could be considered during adjudication, as well as the way debarments and other violation determinations would be tracked, would require some computer system updates resulting in costs to USCIS. • Expanding the grounds for denial could lead to increased financial losses and extended ineligibility from participating in H-2 programs for affected petitioners. Benefits: • Expected to increase compliance with H-2 program requirements, thereby increasing protection of H-2 workers directly and indirectly benefiting domestic workers and compliant petitioners.
8 CFR 214.2(h)(2)(ii) and (iii), 8 CFR 214.2(h)(5)(i)(F), and 8 CFR 214.2(h)(6)(i)(E)	Eliminate the lists of countries eligible to participate in the H-2 programs.	Costs*: • None expected. Benefits: • Employers and the Federal Government will benefit from the simplification of Form I-129 adjudications by eliminating the "national interest" portion of the adjudication that USCIS is currently required to conduct for beneficiaries from countries that are not on the lists. • Remove petitioner burden to provide evidence for beneficiaries from countries not on the lists. • Petitioners may have increased access to workers potentially available to the H-2 programs. • Free up agency resources currently devoted to developing and publishing the eligible country lists in the *Federal Register* every year.
8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(6)(vii)(A)	Change grace periods such that they will be the same for both H-2A and H-2B Programs. Create a 60-day grace period following any H-2A or H-2B	Costs**: • H-2A employers may face additional costs such as for housing, but employers likely would weigh those costs against the benefit of providing employees with additional time to prepare for the start of work.

8 CFR 214.2(h)(11)(iv) and 8 CFR 214.2(h)(13)(i)(C)	revocation or cessation of employment during which the worker will not be considered to have failed to maintain nonimmigrant status and will not accrue any unlawful presence solely on the basis of the revocation or cessation.	Benefits: • Provides employees (and their employers) with extra time to prepare for the start of work. • Provides clarity for adjudicators and makes timeframes consistent for beneficiaries and petitioners. • Provides workers additional time to seek other employment or depart from the United States if their employer faces a revocation or if they cease employment.
8 CFR 214.2(h)(11)(iv)	Clarify responsibility of H-2A employers for reasonable costs of return transportation for beneficiaries following a petition revocation.	Costs: • None expected since H-2A petitioning employers are already generally liable for the return transportation costs of H-2A workers. Benefits: • Beneficiaries will benefit in the event that clarified employer responsibility decreases the incidence of workers having to pay their own return travel costs in the event of a petition revocation.
8 CFR 214.2(h)(16)(i)	Clarify that H-2 workers may take certain steps toward becoming a lawful permanent resident of the United States while still maintaining lawful nonimmigrant status.	Costs: • None expected. Benefits: • DHS expects this to enable some H-2 workers who have otherwise been dissuaded to take certain steps toward becoming a lawful permanent resident with the ability to do so without concern over becoming ineligible for H-2 status based solely on taking these steps.
8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(6)(vii), and 8 CFR 214.2(h)(13)(i)(B)	Eliminate the "interrupted stay" calculation and instead reduce the period of absence to reset an individual's 3-year period of stay.	Costs: • Workers in active H-2 status considering making trips abroad for periods of fewer than 60 days but more than 45 days, may be disincentivized to make such trips. Benefits: • Simplifies and reduces the burden to calculate beneficiary absences for petitioners, beneficiaries, and adjudicators. • May reduce the number of RFEs related to 3-year periods of stay. Transfers: • As a result of a small number of H-2 workers at the 3-year maximum stay responding to the shorter absence requirement by working 30 additional days, DHS estimates upper bound annual transfer payment of $2,918,958 in additional earnings from consumers to H-2 workers and $337,122 in tax transfers from these workers and their employers to tax programs (Medicare and Social Security).
8 CFR 214.2(h)(2)(i)(D), 8 CFR 214.2(h)(2)(i)(I), and 8 CFR 274a.12(b)(21)	Make portability permanent for H-2B workers and remove the requirement that H-2A workers can only port to an E-Verify employer.	Costs: • The total estimated annual opportunity cost of time to file Form I-129 by human resource (HR) specialists is approximately $42,186. The total estimated annual opportunity cost of time to file

		Form I-129 and Form G-28 will range from approximately $93,628 if filed by in-house lawyers to approximately $161,434 if filed by outsourced lawyers. • The total estimated annual costs associated with filing Form I-907 if it is filed with Form I-129 is $4,728 if filed by HR specialists. The total estimated annual costs associated with filing Form I-907 will range from approximately $9,006 if filed by an in-house lawyer to approximately $15,527 if filed by an outsourced lawyer. • The total estimated annual costs associated with the portability provision ranges from $144,636 to $216,633, depending on the filer. • DHS may incur some additional adjudication costs as more petitioners will likely file Form I-129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form. Benefits: • Enabling H-2 workers present in the United States to port to a new petitioning employer affords these workers agency of choice at an earlier moment in time consistent with other portability regulations and more similar to other workers in the labor force. • Replacing the E-Verify requirement for employers wishing to hire porting H-2A workers with strengthened site visit authority and other provisions that maintain program integrity will aid porting beneficiaries in finding petitioners without first needing to confirm if that employer is in good standing in E-Verify. Although this change impacts an unknown portion of new petitions for porting H-2A beneficiaries, no reductions in E-Verify enrollment are anticipated. • An H-2 worker with an employer that is not complying with H-2 program requirements will have additional flexibility in porting to another employer's certified position. Transfers: • Annual undiscounted transfers of $884,180 from filing fees for Form I-129 combined with Form I-907 from petitioners to USCIS.
8 CFR 214.2(h)(2)(i)(I)(*3*)	DHS is clarifying that a beneficiary of an H-2 portability petition is considered to have been in a period of authorized stay during the pendency of the petition and that the petitioner must still abide by all H-2 program requirements.	Costs: • None expected. Benefits: • Provides H-2 workers with requisite protections and benefits as codified in the rule in the event that a porting provision is withdrawn or denied.
Cumulative Impacts of Proposed Regulatory Changes		

DHS is making changes to the Form I-129, to effectuate the proposed regulatory changes.	Costs: • The time burden to complete and file Form I-129, H Classification Supplement, will increase by 0.23 hours as a result of the proposed changes. The estimated opportunity cost of time for each petition by type of filer will be $11.72 for an HR specialist, $26.26 for an in-house lawyer, and $45.28 for an outsourced lawyer. The estimated total annual opportunity costs of time for petitioners or their representatives to file H-2 petitions under this final rule ranges from $571,700 to $755,946.
Petitioners and/or their representatives will familiarize themselves with the rule.	Costs: • Petitioners and/or their representatives will need to read and understand the final rule at an estimated opportunity cost of time that ranges from $9,741,753 to $12,881,310, incurred during the first year of the analysis.

Source: USCIS analysis.

Notes:
* DHS notes that there were comments advising of possibly adverse costs from the removal of the eligible countries list, notably that the list provides an important incentive for other countries to cooperate with the United States, such as by accepting repatriation of their nationals who are subject to a final order of removal. DHS disagrees with those comments, as discussed in the preamble.

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

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II. Background

A. Description of the H–2 Nonimmigrant Classifications

1. H–2A Temporary Agricultural Workers

The INA establishes the H–2A nonimmigrant classification for temporary agricultural workers, described as a noncitizen ''having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services.'' INA sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a). USCIS cannot approve petitions for H–2A workers unless the Secretary of Labor has certified that there are not sufficient able, willing, qualified, and available U.S. workers who are capable of performing such services or labor, and H–2A employment will not adversely affect the wages and working conditions of workers in the United States. *See* INA sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); INA sec. 218(a)(1), 8 U.S.C. 1188(a)(1); 8 CFR 214.2(h)(5)(ii).[7]

As noted in INA sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a), not only must the noncitizen be coming ''temporarily'' to the United States, but the agricultural labor or services that the noncitizen is performing must also be ''of a temporary or seasonal nature.'' Current DHS regulations further define an employer's temporary need as employment that is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year. *See* 8 CFR 214.2(h)(5)(iv)(A). An employer's seasonal need is defined as employment that is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle and requires labor levels above those necessary for ongoing operations. *Id.* There is no annual limit or ''cap'' on the number of noncitizens who may be issued H–2A visas or otherwise provided H–2A status (such as through a change from another nonimmigrant status, *see* INA sec. 248, 8 U.S.C. 1258).

2. H–2B Temporary Nonagricultural Workers

Similarly, the INA establishes the H–2B nonimmigrant classification for temporary nonagricultural workers, described as a noncitizen ''having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary [nonagricultural] service or labor if unemployed persons capable of performing such service or labor cannot

[6] DHS initially proposed this provision as new 8 CFR 214.2(h)(10)(iii). *See Modernizing H–2 Program Requirements, Oversight, and Worker Protections,* 88 FR 65040 (Sept. 20, 2023). Because a separate DHS final rule, *Improving the H–1B Registration Selection Process and Program Integrity,* 89 FR 7456 (Feb. 2, 2024) has since added a subparagraph within 8 CFR 214.2(h)(10), the provision of this final rule will now be new 8 CFR 214.2(h)(10)(iv).

[7] DHS regulations provide that an H–2A petition must be accompanied by a Temporary Labor Certification (TLC) from DOL, which serves as DHS's consultation with DOL with respect to these requirements. *See* 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(5)(i)(A).

be found in this country.'' INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). H–2B workers may not displace qualified, available U.S. workers who are capable of performing such services or labor, and H–2B employment may not adversely affect the wages and working conditions of workers in the United States. *See* INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); *see also* 8 CFR 214.2(h)(6)(i).[8] Current DHS regulations define an employer's temporary need as employment that is of a temporary nature where the employer's need to fill the position with a temporary worker generally will last no longer than 1 year, unless the employer's need is a one-time event, in which case the need could last up to 3 years. *See* 8 CFR 214.2(h)(1)(ii)(D), (h)(6)(ii), and (h)(6)(vi)(D).

Unlike the H–2A classification, there is a statutory annual limit or ''cap'' on the number of noncitizens who may be issued H–2B visas or otherwise provided H–2B status. Specifically, the INA sets the annual number of noncitizens who may be issued H–2B visas or otherwise provided H–2B status at 66,000,[9] to be distributed semi-annually beginning in October and April. *See* INA sec. 214(g)(1)(B) and (g)(10), 8 U.S.C. 1184(g)(1)(B) and (g)(10). With certain exceptions,[10] up to 33,000 noncitizens may be issued H–2B visas or provided H–2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation, including any unused nonimmigrant H–2B visas from the first half of a fiscal year, will be available for employers seeking to hire H–2B workers during the second half of the fiscal year.[11] If insufficient petitions are approved to use all available H–2B numbers in a given fiscal year, the unused numbers cannot be carried over for petition approvals for employment start dates beginning on or after the start of the next fiscal year.

III. Changes in the Final Rule

Following careful consideration of public comments received, this final rule adopts the regulatory text proposed in the notice of proposed rulemaking (NPRM), *Modernizing H–2 Program Requirements, Oversight, and Worker Protections,* 88 FR 65040, published in the **Federal Register** on September 20, 2023, with some changes. DHS retains the rationale for the proposed rule and the reasoning provided in that rule, except as described in the preamble of this final rule. Section IV of this preamble includes a detailed summary and analysis of the comments and presents DHS's responses to those comments.

A. Changes to Provisions Related to Payment of Fees, Penalties, or Other Compensation by H–2 Beneficiaries

1. Clarification of Acceptable Reimbursement Fees

In the NPRM, DHS explained that it is not the intention of DHS to pass to petitioners, employers, agents, attorneys, facilitators, recruiters, or similar employment services, the costs of services or items that are truly personal and voluntary in nature for the worker. Under the proposed rule, payments made primarily for the benefit of the worker, such as a passport fee, would not be prohibited fees or payments related to the H–2 employment and would, therefore, permissibly be considered the responsibility of the worker. To simplify the language related to acceptable reimbursement fees and to clarify that the exception only applies to costs that are truly for the worker's benefit, proposed 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) would have replaced the existing regulatory language on this topic with text stating that the provision would not prevent relevant parties ''from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.'' As mentioned in the NPRM, this language was derived from, and is consistent with, DOL regulations on prohibited fees for H–2B and H–2A workers at 20 CFR 655.20(o), 29 CFR 503.16(o), and 20 CFR 655.135(j).

In response to public comments requesting additional clarity on this topic, DHS is finalizing the proposed language about costs that are the responsibility and primarily for the benefit of the worker and further revising 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) to add: ''This provision does not prohibit employers from allowing workers to initially incur fees or expenses that the employers are required to subsequently reimburse, where such arrangement is specifically permitted by, and performed in compliance with, statute or regulations.''[12] Adding this language clarifies that, under certain conditions, the employer can reimburse the worker after the worker initially pays costs that are the employer's responsibility (such as certain transportation costs), and that this would not be considered a collection of a prohibited fee. This change to specify when an employer may make reimbursements to the beneficiary for a cost that is ultimately the employer's responsibility complements the regulatory text as proposed and finalized in 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) regarding reimbursements from the beneficiary. That language specifies that the prohibited fee provisions do not prohibit petitioners and third parties from receiving reimbursement from the beneficiary for costs that are the responsibility of and primarily for the benefit of the worker, such as government-required passport fees.

[8] DHS regulations provide that an H–2B petition must be accompanied by an approved TLC from DOL or from the Guam Department of Labor (GDOL) for H–2B workers who will be employed on Guam, which serves as DHS's consultation with DOL or GDOL with respect to these requirements. 8 CFR 214.2(h)(6)(iii)(A), (C)–(E), (h)(6)(iv)(A), (h)(6)(v).

[9] Since 2017, Congress has authorized up to an additional 64,716 visas when the Secretary of Homeland Security, after consultation with the Secretary of Labor, determines that the needs of American businesses cannot be satisfied in a given fiscal year with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor. For example, on September 25, 2024, Congress passed the FY 2025 authority, Public Law 118–83, which the President signed the next day. This law extends authorization under the same terms and conditions provided in section 105 of Division G, Title I of the FY 2024 Omnibus permitting the Secretary of Homeland Security to increase the number of H–2B visas available to U.S. employers in FY 2025, and expires on December 20, 2024.

[10] Generally, workers in the United States in H–2B status who extend their stay, change employers, or change the terms and conditions of employment will not be subject to the cap. *See* 8 CFR 214.2(h)(8)(ii). Similarly, H–2B workers who have previously been counted against the cap in the same fiscal year that the proposed employment begins will not be subject to the cap if the employer names them on the petition and indicates that they have already been counted. *See* 8 CFR 214.2(h)(8)(ii)(A) and 8 CFR 214.2(h)(2)(iii). The spouse and children of H–2B workers, classified as H–4 nonimmigrants, also do not count against the cap. *See* INA 214(g)(2) and 8 CFR 214.2(h)(8)(ii). Additionally, until December 31, 2029, petitions for the following types of workers are exempt from the H–2B cap: fish roe processors, fish roe technicians, or supervisors of fish roe processing; and workers performing labor or services in the Commonwealth of the Northern Mariana Islands or Guam. *See* Public Law 108–287, sec. 14006, 118 Stat. 951, 1014 (Aug. 5, 2004); Northern Mariana Islands U.S. Workforce Act of 2018, Public Law 115–218, sec. 3, 132 Stat. 1547, 1547 (July 24, 2018). Once the H–2B cap is reached, USCIS may only accept petitions for H–2B workers who are exempt or not subject to the H–2B cap.

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

[12] *See, e.g.,* 20 CFR 655.20(j)(2) (''The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the H–2B worker . . .'').

2. Prohibiting Breach of Contract Fees and Penalties

DHS is adding text to the proposed provisions at 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) to clarify that a prohibited fee may not be collected from a beneficiary ''or any person acting on the beneficiary's behalf.'' This revision responds to public comment in that it strengthens the proposed language in the NPRM prohibiting the charging of breach of contract fees by barring non-monetary penalties or penalties imposed on a worker or anyone acting on behalf of the worker.

3. Similar Employment Services

Based on feedback from commenters requesting greater clarity with respect to the phrase ''similar employment services,'' DHS is amending its proposed provisions at 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) to clarify that ''similar employment service refers to any person or entity that recruits or solicits prospective beneficiaries of the [H–2] petition.'' This clarification addresses commenters' feedback as to what ''similar employment services'' means.

4. Extraordinary Circumstances Standard

In response to public comments, DHS is making several changes to 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*) to clarify the standards under which a petitioner will be held accountable for its own prohibited fee-related violations or those of its employees. These changes include removing the proposed ''rare and unforeseeable'' language, as this phrase was always meant to specifically explain ''extraordinary circumstances'' and not create another standard separate and apart from ''extraordinary circumstance.'' DHS is also removing the proposed ''To qualify for this exception'' language because this phrase was intended only to refer to the ''extraordinary circumstances'' exception, not to create another exception. In addition, new 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*) requires the petitioner to demonstrate that it ''made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its employees throughout the recruitment, hiring, and employment process'' instead of ''significant efforts to prevent prohibited fees prior to the collection of or agreement to collect such fees.'' These changes clarify what was meant by ''significant''; moreover, they clarify the petitioner's obligation to not only prevent prohibited fees before the collection of or agreement to collect such fees occurs, but also to prevent and learn of any collection or agreement to collect such fees on an ongoing basis given that such fees could be collected or agreed upon at various points in time during the recruitment, hiring, or employment process. DHS is also deleting duplicative language about the petitioner's obligation to fully reimburse all affected beneficiaries.

5. Due Diligence Standard

In response to public comments, DHS is making several changes at 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*) to clarify the standards under which a petitioner may be held accountable for the prohibited fee-related violations of its agents, attorneys, facilitators, recruiters, or similar employment services. Specifically, DHS is foregoing the proposed ''did not know and could not, through due diligence, have learned'' language and instead requiring the petitioner to demonstrate ''ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by such third parties throughout the recruitment, hiring, and employment process.'' This is not intended to be a substantive change, but instead is intended to clarify what DHS meant by ''due diligence'' and to better align the regulatory language at 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*) which also requires the same ''ongoing, good faith, reasonable efforts.'' Further, new 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*) require the petitioner to take immediate remedial action as soon as it becomes aware of the payment of or agreement to pay the prohibited fee, which was missing from these provisions as proposed in the NPRM. The only difference in the evidentiary requirements at new 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*), compared to new 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*), is that prohibited fee-related violations by the petitioner or its employees, unlike those by third parties, will require an additional showing that extraordinary circumstances beyond the petitioner's control resulted in its failure to prevent collection or entry into agreement for the collection of prohibited fees in order to avoid denial or revocation of an H–2 petition on notice.

6. Application of the Prohibited Fee Provisions, and 1- and 3-Year Denial Periods

As discussed in response to public comments, DHS is clarifying in this final rule how it will apply the revised provisions governing the collection of or agreement to collect prohibited fees. Namely, the denial or revocation of H–2 petitions under the provisions of this final rule will apply only to petitions filed on or after the effective date of this rule. New 8 CFR 214.2(h)(5)(xi)(A)(*1*)–(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*1*)-(*2*). Similarly, DHS is clarifying that the 1-year and 3-year additional denial periods of H–2 petitions based on the denial or revocation of petitions for collection or agreement to collect prohibited fees will apply in cases where the denial or revocation of the H–2 petition was made on a petition filed on or after the effective date of this final rule. New 8 CFR 214.2(h)(5)(xi)(B)-(C) and 8 CFR 214.2(h)(6)(i)(C)-(D). Petitions filed before the effective date of this final rule will be subject to the provisions in place before this final rule. DHS has made edits to the relevant regulatory provisions to ensure consistent application and transparency for the public.

7. Clarifying When a Designee May Be Reimbursed

DHS is adding language at new 8 CFR 214.2(h)(5)(xi)(A)(*2*) and (C)(*1*), and new 8 CFR 214.2(h)(6)(i)(B)(*2*) and (D)(*1*), to clarify that a beneficiary's designee may be reimbursed only if the affected beneficiary(ies) cannot be located or is (are) deceased. These are clarifying, non-substantive changes. While proposed 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*) contained the clarifying clause ''only if such beneficiaries cannot be located or are deceased,'' DHS never intended for this to apply only when the prohibited fee was collected by the petitioner pursuant to proposed 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*). To better ensure parity in the regulations, DHS is adding the same or similar clause to the other prohibited fee provisions addressing a prohibited fee collection or agreement by an agent, attorney, employer, facilitator, recruiter, or similar employment service, or any joint employer at new 8 CFR 214.2(h)(5)(xi)(A)(*2*) and (C)(*1*), and new 8 CFR 214.2(h)(6)(i)(B)(*2*) and (D)(*1*).

B. Application of Mandatory Grounds for Denial

DHS is clarifying in this final rule and discussing in more detail in response to

public comments how it will apply the new mandatory grounds for denial.

With respect to denials based on final administrative determinations made by the Secretary of Labor or the Governor of Guam to debar the petitioner, USCIS will deny a petition pursuant to new 8 CFR 214.2(h)(10)(iv)(A)(*1*) if it is filed during the debarment period or if the debarment occurs during the pendency of the petition, as proposed in the NPRM. 88 FR 65040, 65057–58 (Sept. 20, 2023). This final rule adds language clarifying that this provision will only apply if the petition is filed on or after the effective date of the rule and the final administrative determination to debar the petitioner is issued on or after the effective date of the rule.

Similarly, as proposed in the NPRM, USCIS will deny petitions pursuant to new 8 CFR 214.2(h)(10)(iv)(A)(*2*) if a finding of fraud or willful misrepresentation of a material fact was included in the initial denial or revocation of a prior petition if such decision was issued during the pendency of the petition or within 3 years prior to filing the petition. 88 FR 65040, 65058 (Sept. 20, 2023). This final rule rephrases the provision for clarity and adds language specifying that this provision will only apply if the final denial or revocation decision is made on a prior petition filed on or after the effective date of the rule.

When it comes to mandatory denials based on violations of INA sec. 274(a) under new 8 CFR 214.2(h)(10)(iv)(A)(*3*), USCIS will deny petitions if there is a final determination of violation(s) under section 274(a) of the Act during the pendency of the petition or within 3 years prior to filing the petition, as proposed in the NPRM. 88 FR 65040, 65058 (Sept. 20, 2023). This final rule adds language clarifying that this provision will only apply if the final determination of violation(s) under section 274(a) of the Act is made on or after the effective date of the rule and if the petition is filed on or after the effective date of the rule.

C. Application of Discretionary Grounds for Denial

DHS will apply the discretionary grounds for denial under new 8 CFR 214.2(h)(10)(iv)(B), as proposed in the NPRM. 88 FR 65040, 65058–60 (Sept. 20, 2023). This final rule adds language clarifying that this provision will apply to petitions filed on or after the effective date of this final rule, regardless of whether the action(s) or the violation(s) underlying the determination of violation(s) of the discretionary grounds for denial occurred before, on, or after the effective date of this final rule.

D. Discretionary Grounds for Denial

In response to comments, DHS is adding new 8 CFR 214.2(h)(10)(iv)(F) to state that, if USCIS has determined in the course of a previous adjudication that a petitioner (or the preceding entity, if the petitioner is a successor in interest) has established its intention and ability to comply with H–2A or H–2B program requirements notwithstanding relevant violation determinations under paragraph (h)(10)(iv)(B), USCIS will not seek to deny a subsequent petition under paragraph (h)(10)(iv)(B) of this section based on the same previous violation(s) unless USCIS becomes aware of a new material fact (such as a repeat of the previous violation(s)) or if USCIS finds that its previous determination was based on a material error of law.

At 8 CFR 214.2(h)(10)(iv)(B), DHS is making non-substantive changes to replace ''or'' with ''and/or'' to clarify that USCIS may deny a petition if the petitioner (or successor in interest) has not established its ''intention and/or ability to comply with H–2A or H–2B program requirements.'' Consistent with the NPRM, the petitioner must demonstrate that it has both the intent and ability to comply with H–2 program requirements, and USCIS can deny a petition under this ground if the petitioner has not established either its intent to comply with H–2A or H–2B program requirements, or its ability to comply with H–2A or H–2B program requirements, or both.

E. Conforming Changes To Align With the USCIS Fee Schedule Final Rule

As DHS proposed to eliminate the eligible countries lists from 8 CFR 214.2(h)(5)(i)(F) and 214.2(h)(6)(C), DHS also proposed to remove a reference to the eligible countries list from 8 CFR 214.2(h)(2)(ii) which, at the time of the NPRM, allowed an unlimited number of H–1C, H–2A, H–2B, and H–3 beneficiaries to be requested on a single nonimmigrant petition. After the publication of the NPRM, DHS published the Fee Schedule Final Rule (''Fee Rule'') on January 31, 2024, and that rule went into effect on April 1, 2024. 89 FR 6194. Most relevantly, the Fee Rule replaced the language in 8 CFR 214.2(h)(2)(ii) allowing the grouping of an unlimited number of H–1C, H–2A, H–2B, and H–3 beneficiaries on a single nonimmigrant petition and imposed a limit of 25 named beneficiaries. Therefore, in addition to amending the language in final 8 CFR 214.2(h)(2)(ii) to remove the reference to the eligible country list, this provision has been amended to reflect the change made by the Fee Rule.

F. Severability

In the severability clause contained in this final rule, DHS has identified the second level paragraphs (for example, (h)(6)) in which the severable amended provisions contained in this final rule can be found. These references along with the date of the final rule are intended to better identify the severable provisions and differentiate them from the existing provisions in 8 CFR 214.2 that are not being impacted by this final rule.

IV. Response to Public Comments on the Proposed Rule

A. Summary of Comments on the Proposed Rule

DHS received a total of 1,944 public comment submissions in Docket USCIS–2023–0012 in response to the NPRM. Of the submissions, 223 were unique submissions, 1,714 were form letter copies, 3 were duplicate submissions, 1 was out of scope, 2 were foreign language submissions, and 1 was a partial foreign-language submission. The majority of comment submissions originated from individual or anonymous commenters, including attorneys and individual employers or farmers. Other commenters included companies, trade and business associations, advocacy groups, professional associations, unions, research organizations, Federal elected officials, State or local government agencies, farming or agricultural entities, a religious organization, and a foreign government. While the great majority of comment submissions (1,844) were supportive of the rule, some commenters (7) expressed general opposition to the rule, and many commenters (87) offered mixed feedback, such as by providing both support for and opposition to various provisions of the proposed rule throughout their comment, or by generally providing support or opposition but with suggested revisions.

B. General Feedback on the Proposed Rule

1. General Support for the Rule

a. Positive Impacts on Nonimmigrants/Workers/Noncitizens,Their Communities, and Support Systems

Comment: Approximately 1,850 submissions, including a large form letter campaign, discussed the proposed rule's positive impacts on H–2 beneficiaries, their communities, and support systems.

A few individual commenters endorsed USCIS' efforts to advance protections and flexibilities for H–2 workers on the basis that such measures would be responsive to the needs of nonimmigrants and their support systems. Numerous commenters, including individual commenters, unions, joint submissions, advocacy groups, and a group of Federal elected officials, stated that the proposed rule would address long-standing issues of abuse, exploitation, and trafficking among H–2 workers by allowing workers to leave an abusive employer in search of outside opportunities, enhancing enforcement against retaliation, and protecting visa status for those seeking lawful permanent residence. Several individual commenters added that the proposed rule's efforts to provide flexibility and protections for H–2 workers would enhance workers' well-being and rights, as well as reporting practices. Similarly, a few individual commenters stated that the changes to nonimmigrant worker protections would represent a positive step towards equality and addressing health equity disparities by ensuring proper compensation, appropriate physical conditions, legal protections, and equal rights and opportunities relative to U.S. citizens.

Several individual commenters, including an advocacy group, and a couple of joint submissions provided examples of abusive and exploitative behavior—such as what was seen in ''Operation Blooming Onion,'' [13] employer retaliation against workers for protesting hazardous conditions, and other anecdotes from H–2 workers that they said showed the need for increased protections, including those proposed in the NPRM. A couple of individual commenters wrote that with the increase in extreme heat resulting from climate change, H–2 workers need further protection.

Numerous individual commenters and a form letter campaign stated that DHS has a responsibility to protect workers' rights, as H–2 workers help to provide food for the U.S. public, serve as the ''backbone'' of the U.S. agricultural industry, help U.S. society function, and as a result, strengthen U.S. national security. The form letter campaign added that the proposed rule would ''not only protect the rights and dignity of farm workers but also contribute to the welfare and security of [the] nation's agricultural workforce.'' Several individual commenters and a trade association commented that implementing measures to protect H–2 workers while ensuring their fair treatment would align with U.S. and agriculture industry values. An individual commenter added that farm workers are vital members of communities they work and live in, and that strengthened protections would benefit local, regional, and national communities.

A couple of individual commenters and a couple of joint submissions including one from a union and numerous advocacy organizations stated that domestic farm workers' labor conditions are undermined by the exploitation of H–2 workers, highlighting the necessity of the proposed rule. An individual commenter stated that the proposed rule demonstrates DHS's commitment to listening to those working in the agriculture industry, including unions and organizations that represent migrant and non-English speaking agriculture workers. A joint submission from a union and numerous advocacy organizations contained comments from H–2 workers voicing support for the proposed rule changes on the basis that it would improve their job security and working conditions, and allow them to better provide for their families.

Response: DHS appreciates public commenters' general support for this rulemaking and for the Department's ongoing efforts to advance protections and flexibilities for H–2 workers. As discussed earlier, DHS is cognizant of the importance of temporary nonimmigrant workers for agricultural and nonagricultural employers and of the positive impacts these workers contribute to local and regional economies in the United States. DHS agrees with the general support of the majority of commenters that the changes adopted in this rule will help to reduce the H–2A and H–2B programs' vulnerabilities and better ensure the rights and dignity of H–2 workers.

b. Positive Impacts on Employers/Petitioners/Farmers, Employment Service Providers, Workforce, Industry, and Economy

Comment: Approximately 10 submissions discussed the proposed rule's positive impacts on petitioners, employment service providers, the U.S. workforce, U.S. industries related to the H–2 program, and the U.S. economy.

An individual commenter expressed support for the proposed rule's efforts to streamline the petition process for employers, reasoning that these measures would reduce administrative and financial burdens for employers while increasing program efficiency and accessibility.

Several commenters provided feedback on the potential positive impacts the proposed rule would have on the U.S. agricultural workforce and labor conditions for U.S. workers. Some individual commenters stated that H–2 workers are essential for the well-being of the U.S. economy and agriculture industry as they alleviate domestic workforce shortages, and stated that as a result, the protections put forth in the proposed rule are needed. Other individual commenters also voiced support for the proposed rule on the basis that their farming operations would benefit from their employees being able to stay for temporary H–2A employment.

Response: DHS appreciates these commenters' support and their recognition of the positive impacts the proposed rule would have to the agricultural industry and the efforts to improve the Department's administration of the H–2 programs. In addition to the rule's focus on providing workers with better labor protections and increased flexibility, streamlining the process for requesting temporary nonimmigrant workers through reducing administrative and financial burdens is a positive change for both employers and their employees.

c. Positive Impacts on the Government, Program Operability, and Integrity

Comment: Approximately 10 unique submissions, including a form letter campaign, discussed the proposed rule's impacts on the government, program operability, and integrity.

Several commenters, including multiple advocacy groups, a joint submission from a union, a form letter campaign, and a group of Federal elected officials, endorsed the proposed rule's measures to improve program oversight and enforcement, reasoning that these provisions would deter misconduct by employers and recruiters while ensuring the integrity and quality of H–2 programs. Other commenters, including an advocacy group, a union, the form letter campaign, and joint submissions, also expressed support for the proposed rule on the grounds that it would create needed accountability and transparency in the H–2 programs. A business association provided additional feedback that the proposed changes would streamline requirements

[13] *See, e.g.,* DOJ, U.S. Attorney's Office, Southern District of Georgia, ''Three men sentenced to federal prison on charges related to human trafficking: Each admitted to role in forced farm labor in Operation Blooming Onion'' (Mar. 31, 2022) (involving forced labor, keeping workers in substandard conditions, kidnapping, and rape, among other abuses), *https://www.justice.gov/usao-sdga/pr/*three-men-sentenced-federal-prison-charges-related-human-trafficking.

between H–2A and H–2B programs, helping USCIS make the those program more effective and efficient overall.

Multiple commenters, including a joint submission, advocacy groups, a union, the form letter campaign, and a group of Federal elected officials, stated that the proposed rule complemented DOL H–2 program initiatives in making needed program integrity improvements and enhancing DOL and DHS combined capabilities to protect workers from exploitation.

Response: The Department appreciates the commenters' support for the changes finalized in this rule and agrees that the new provisions herein will have a positive impact on the effort to increase programmatic efficiency, integrity, and accountability. As demonstrated by the changes first proposed in the NPRM, and by those adopted as final in this rule, DHS is committed to efforts that will better protect workers from exploitation and deter misconduct by employers and recruiters.

2. General Overview of Comments Opposing the Rule

a. Lack of Need for the Rule

Comment: An individual commenter expressed opposition to the rule on the basis that there is no need for the proposed changes. In addition to citing ''obstructive'' costs that will ''fall on general taxpayer[s],'' the commenter reasoned that DOL already provides a system of protection for temporary workers.

Response: DHS declines to revise the proposed rule in response to this comment. The commenter does not identify any specific costs to general taxpayers or offer data to support the claims of such costs being ''obstructive.'' The commenter does not contest any of the Government Accountability Office (GAO) studies or media reports of abuse of H–2 workers occurring under current regulations that this rule is designed to curtail. Further, while DOL provides protection for temporary workers consistent with its authority and available resources, the changes in this rule are intended to complement DOL regulations to provide a more comprehensive framework for worker protections.

b. Negative Impacts on Employers/Petitioners/Farmers, Employment Service Providers, Workforce, Industry, and Economy

Comment: Approximately 10 submissions discussed the proposed rule's potential negative impacts on petitioners, employment service providers, the U.S. workforce, U.S. industries relevant to the H–2 programs, and the U.S. economy.

An individual commenter stated their concern that the proposed rule could impact the availability and diversity of H–2 workers by deterring employers from participating or causing them to pass costs to workers. In support of this position, the commenter cited examples of proposals that are not included in either the proposed rule or this final rule, such as increasing filing fees, limiting the number of H–2B visas available each fiscal year, and excluding certain occupations from the H–2B program. In a separate comment, a research organization acknowledged the new flexibilities the NPRM provided for workers but stated that it does not make use of all the legal authorities available and does not include any effort to streamline the process for employers. The commenter expressed concern that the increased costs would cause employers to leave the program and would lead to more undocumented immigration and unauthorized employment.

Some commenters expressed concern that the proposed rule would unfairly target employers who are largely compliant with labor laws and regulations, with multiple associations and an individual commenter stating that the Department's approach signals a belief that most employers are acting in violation of labor laws and that the proposed rule would debar good faith employers for minor infractions. In addition, one of the trade associations stated that 80 to 90 percent of H–2 workers return to previous employers and many refer friends and family as indication that a majority of petitioners are compliant with labor laws and treat workers fairly.

In addition, other commenters expressed concern over the general costs that the proposed rule would have on employers. A trade association cited statistics on increases in domestic worker wages that have necessitated employers' reliance on the H–2 program, and stated that without a dependable workforce and a predictable and stable wage rate, farmers are making difficult decisions about the crops they grow and may be forced out of business. An individual commenter expressed a general, vague concern that the proposed rule ''would have a negative impact on my farm and the local, healthy food we produce,'' without further explaining the nature of the claimed negative impacts. Another individual commenter expressed concern that with the ''lengthy'' list of regulations both DHS and DOL have released in recent years, the new proposed rule would complicate farmers' ability to hire the workers they need in an already complex system. The commenter concluded that broadening DHS's authority to come onto farmers' property with ''unfettered access'' to employees for interviews without a farmer or agent present ''worr[ies] American farmers,'' and urged USCIS to ''find solutions rather than create more problems.'' Another individual commenter repeated these concerns and added that the ''stringent'' nature of the disciplinary process would exceed State requirements for employers discharging U.S. workers, exacerbating disparities in employment law. Referencing the Department's statement on the purpose of the proposed regulation, a State agency voiced opposition to the proposed changes to the H–2 programs, reasoning that such changes would confuse entities in the agricultural industry and increase the likelihood that they will violate labor laws in the future.

Response: While certain clarifying revisions that DHS has made in this final rule may address some of the commenters' concerns as discussed below, DHS is not making changes to the proposal in direct response to these comments. While a commenter identifies higher fees for filing petitions and certifications, this rule (both as proposed and finalized) does not include any higher filing fees. The concern from this commenter that employers would pass any costs on to workers is not persuasive as employers are already prohibited from passing costs to workers and this rule imposes new consequences on employers who pass those prohibited costs to workers. With respect to limiting which occupations qualify for H–2B visas, this rule did not remove any occupations from H–2B eligibility. While DHS appreciates a commenter's interest in streamlining the process, the commenter's broad characterization of the H–2 process as being complicated and time-consuming does not address the specific provisions contained in this regulation. Among other things, the commenter offers no support in speculating that extra costs imposed by this rulemaking will inevitably cause employers to leave the program and result in more immigrants working without documentation. DHS considered potential costs of this rule and consequences to employers, such as impacts of site visits and time estimates for these administrative visits, lost productivity due to whistleblower revelations, and completing filings for

porting H–2 workers, and determined that the benefits of the proposed provisions, as outlined in various parts of this rule, outweighed any costs.

DHS also maintains that the rule does not unfairly target compliant employers with loyal employees who return annually and refer their friends and family or, as the commenter characterizes it, ''debar'' good faith employers for minor infractions. As discussed below, and in the NPRM, this final rule is not punitive in nature, rather, it is adjudicative in nature, and, as is extensively explained throughout this preamble, intended to enhance the integrity of the H–2 program for the benefit of good faith employers and their workers alike, and to protect H–2 workers from exploitation and other abuses.

DHS nonetheless is revising the proposed due diligence language regarding third parties' collection of prohibited fees to minimize negative impacts on responsible employers who make ongoing, good faith, reasonable efforts to prevent prohibited fees. Further, as explained below, mandatory denial is reserved for final determinations involving very specific egregious conduct, while discretionary denial occurs only if USCIS has determined, taking into account the totality of the circumstances and the factors outlined in the proposed regulations, that the petitioner or successor has not established its intention or ability to comply with H–2 program requirements. Moreover, DHS is adding new 8 CFR 214.2(h)(10)(iv)(F) to assure petitioners with past violations who have established their intention and ability to comply with H–2A or H–2B program requirements in the course of USCIS' adjudication of a previously filed H–2 petition that USCIS will not seek to deny a subsequently filed petition under the discretionary denial provisions of this final rule based on the same violation(s), unless USCIS becomes aware of a new material fact or finds that its previous determination was based on a material error of law.

Regarding concerns about increased wages, DHS reiterates that this rulemaking does not address worker wages, which is an issue that broadly falls within the jurisdiction of DOL.

DHS acknowledges that employers will need time to familiarize themselves with the new regulations, which is why the final rule clarifies that DHS will apply certain provisions in a manner that balances the strong interest in enhancing H–2 program integrity and protection of H–2 workers with, as discussed below, the interest in providing petitioners with notice of new future effects applicable to certain conduct. DHS has determined that the benefits of the rule, including increased worker protections and flexibility as well as program integrity, outweigh time costs to employers. Finally, DHS notes that this rule does not create any new labor laws, which are under the jurisdiction of DOL or other labor agencies.

3. Other General Feedback Regarding the Rule

a. General Feedback Without Stating Support or Opposition to the Proposed Rule

Comment: An individual commenter provided remarks on labor abuses in the H–2A visa program without stating a position on the proposed rule. The commenter expressed the need to address concerns around abuse and power imbalances through congressional action and comprehensive immigration reform.

Response: DHS appreciates the commenter's concerns with the vulnerabilities of H–2 workers and would implement any legislative changes Congress might make. DHS, however, maintains that it has the authority to improve the program under current laws as expressed in the proposed rule and this final rule.

C. Legal Authority and Background

1. DHS/USCIS Legal Authority

a. Congressional Intent and Statutory Authority

Comment: Some commenters contended that DHS exceeded its authority to make some of the proposed changes. A joint submission from former DHS senior officials stated that, under the auspices of efficiency, equity, and ease of the administrative process, the proposed rule contradicts congressional authority and direction, makes semantic and substantive changes to undermine immigration enforcement, and removes one of our strongest defenses against the ''illegal job magnate [sic].'' However, other commenters, a group of Federal elected officials, stated that, in creating the H–2 programs, Congress struck a ''delicate balance'' between ensuring that industries have available workers and that employers in those industries maintain a standard level of protections, rights, and working conditions for those workers. The commenters said this rulemaking effectuates congressional intent for the H–2 programs by protecting vulnerable workers and holding employers accountable. A union stated that DHS has the necessary statutory authority to implement the proposed rule. Specifically, the commenter quoted section 103(a) of the INA and section 402 of the HSA as granting DHS broad authority to implement the regulations contemplated in the NPRM. Citing case law, the commenter said courts have consistently characterized section 103(a) of the INA as a broad delegation of authority to the Secretary of Homeland Security. The commenter further quoted section 214(c)(14) of the INA as granting the Secretary specific authority to impose penalties on employers for ''a substantial failure to meet any of the conditions of the petition,'' INA sec. 214(c)(14)(A)(i), 8 U.S.C 1184(c)(14)(A)(i), as well as the authority to deny or approve petitions for foreign temporary workers, INA sec. 214(c)(14)(A)(ii), 8 U.S.C. 1184(c)(14)(A)(ii). A form letter campaign stated that the rule would create flexibility inherent in DHS's immigration authority. The commenter said the proposed changes complement the improvements created by the DOL H–2 rule by utilizing the distinct authority of DHS to address abuses against farm workers.

Response: DHS agrees with commenters who indicated that DHS has broad statutory authority to implement the changes proposed in the NPRM through this final rule.[14] DHS set out the legal authority for the proposed changes in the NPRM in the Legal Authority section of the preamble at 88 FR 65040, 65045 (Sept. 20, 2023), and has specifically addressed the legal authority for the proposed changes in the sections pertaining to those changes. Section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), provides DHS with the authority to prescribe conditions for the admission of nonimmigrants, and section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1), establishes the nonimmigrant petition process as a prerequisite for obtaining H–2A or H–2B status (among others). Further, section 274A(a)(1), 8 U.S.C. 1324a(a)(1), prohibits employment of noncitizens who are not authorized for employment. Section 214(c)(14)(A) of the INA, 8 U.S.C. 1184(c)(14)(A), authorizes the Secretary of Homeland Security to impose administrative remedies and to

[14] *See Loper Bright Enters.* v. *Raimondo,* 144 S. Ct. 2244, 2263 (2024) (''In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes 'expressly delegate' to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable.' '') (cleaned up).

deny H–2B petitions for a period of at least 1 but not more than 5 years based on the substantial failure to meet any of the conditions of the H–2B petition or willful misrepresentation of a material fact in the H–2B petition. Section 214(c)(14)(B) of the INA, in turn, authorizes the Secretary to delegate to the Secretary of Labor the authority Congress provided to DHS under section 214(c)(14)(A)(i) to determine violations and impose administrative remedies, including civil monetary penalties. In addition to these specific statutory authorities, sec. 103(a) of the INA, 8 U.S.C. 1103, provides the Secretary general authority to administer and enforce the immigration laws and to issue regulations necessary to carry out that authority. Further, sec. 402 the HSA, 6 U.S.C. 202, charges the Secretary with broad authority to establish and administer rules governing the granting of visas or other forms of permission to enter the United States and establishing national immigration enforcement policies and priorities.

In this final rule, DHS similarly addresses the sources of its legal authority in the Legal Authority section. DHS is also addressing questions and comments regarding its authority to make specific changes in the respective sections of this rule. For example, DHS has specifically addressed comments challenging its authority to revise 8 CFR 214.2(h)(16)(ii) to preclude denials of a nonimmigrant visa petition solely on the basis of the filing of a permanent labor certification or immigrant visa petition for that beneficiary in Section IV.E.4, Effect on an H–2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or an Immigrant Visa, in the subsection titled *Opposition on the Basis of Legal Authority* of this final rule. In addition, in Section IV. D. 3.a. Legal Authority for Compliance Reviews and Inspections, DHS also at length addresses comments challenging the USCIS Fraud Detection and National Security Directorate (FDNS) authority to conduct compliance reviews and inspections.

DHS disagrees with the commenters asserting that DHS lacks authority to implement the changes proposed in the NPRM, including the mandatory and discretionary grounds for denial. Contrary to the commenters' assertion, and as noted in the NPRM, the mandatory and discretionary denial provisions best ensure the integrity of the H–2 programs and the protection of H–2 workers from exploitation and other abuses based on and consistent with the statutory authorities discussed above. DHS also disagrees that its proposed changes undermine immigration enforcement and remove defenses against unauthorized immigration and employment. To the contrary, the changes proposed in the NPRM and finalized in this rule strike a balance between improving the H–2 programs for workers and their U.S. employers while also furthering program integrity. First, this final rule does not alter DHS's authority to deny petitions, as is provided in sections 103(a), 214(a)(1), 214(c)(1), and 214(c)(14)(A)(ii) of the INA. Also, a number of the changes made through this rulemaking facilitate lawful participation in the H–2 programs. For example, and as discussed in more detail elsewhere in this rule, H–2 portability, harmonizing grace periods and periods of admission, removing the filing of a permanent labor certification/immigrant visa petition as a sole impediment to temporary petition approval, all in different ways help workers to find new H–2 employment and/or to timely depart the United States while maintaining their status. These protections in turn encourage workers, who may seek to enter the United States, to go through the proper channels of the temporary H–2 program and work for employers who need temporary H–2 workers. Similarly, H–2 workers who may face an unexpected cessation of employment or are exposed to adverse work environment that merits a revocation of the petition would not be faced with potentially finding other work without work authorization and/or accruing unlawful presence that could result in future bars to entry, which in turn might create the possibility that workers who are unable to participate in the program may opt to enter the United States via unauthorized means. Finally, contrary to the assertion by some commenters that this final rule ''undermines'' immigration enforcement, this final rule does not in any way limit the ability of DOL, pursuant to the authority DHS has delegated to DOL under section 214(c)(14)(B) of the INA, to impose appropriate civil monetary penalties and other administrative remedies, or any other remedy authorized by law. This final rule also does not limit the ability of U.S. Immigration and Customs Enforcement (ICE) to engage in worksite enforcement or enforce employment authorization rules.

Comment: A couple of trade associations said some proposed enforcement changes appear to conflict with current law or lack legal authority altogether. These commenters said DHS has proposed to implement investigative and enforcement authority that conflicts with DOL's investigative and enforcement authority in the H–2A and H–2B programs, and fails to acknowledge the existing legal investigative and enforcement structure. A couple of commenters, including one of the trade associations and an individual commenter stated that the Secretary of Homeland Security has delegated all of DHS's H–2B enforcement authority to DOL. Citing case law, the individual commenter stated that since this redelegation has been unchanged, the investigative and enforcement power belongs exclusively to DOL Wage and Hour Division (WHD), as DHS has ''incapacitated itself'' from exercising any such authority. In addition, citing NPRM references to ''general'' authority, the commenter said Congress subsequently spoke very specifically—even comprehensively—to the enforcement powers at issue in the NPRM. The commenter said ''those very-general provisions'' simply do not address the H–2B program or the fact that the Department has redelegated all of its authority.

Response: DHS disagrees that the changes conflict with the law or lack legal authority or that DHS's investigative and enforcement authority conflicts with DOL's or that DHS has delegated all of its enforcement authority to DOL.

With respect to both H–2A and H–2B nonimmigrant classifications, DHS has authority to make these changes under INA secs. 214(a)(1) and 214(c)(1), 8 U.S.C. 1184(a)(1) and 8 U.S.C. 1184(c)(1) and, with respect to the H–2B classification, INA sec. 214(c)(14)(A), 8 U.S.C. 1184(c)(14)(A). In addition to those specific statutory authorities, the Secretary has broad general authority under INA sec. 103(a), 8 U.S.C. 1103(a) to, among other things, administer the immigration system, issue regulations and delegate certain duties to any employee of former INS, including USCIS, as established by HSA sec. 451, 6 U.S.C. 271, and implemented through Delegation 0150.1 (Jun. 5, 2003). In addition, USCIS has the additional authority to interrogate aliens and issue subpoenas, administer oaths, take and consider evidence, and fingerprint and photograph aliens under INA section 287(a), (b), and (f), 8 U.S.C. 1357(a), (b), and (f), and INA section 235(d), 8 U.S.C. 1225(d). INA sec. 287. Through this final rule DHS is exercising the delegated authority conferred upon it by Congress to ensure that participants of the H–2 programs comply with applicable laws. In particular, as it relates to ensuring compliance with the

H–2B program, under INA sec. 214(c)(14)(B), Congress explicitly permitted DHS to delegate to DOL authority under INA sec. 214(c)(14)(A)(i) to impose certain administrative remedies and any other remedy authorized by law. *See* INA sec. 214(c)(14)(B). In 2009, DHS delegated this section 214(c)(14)(A)(i) authority to DOL *See* 88 FR 65040, 65046 n.5 (Sept. 20, 2023).

Significantly, the 2009 H–2B delegation to DOL cited in the NPRM is limited to section 214(c)(14)(A)(i) of the INA (as specifically authorized by section 214(c)(14)(B) of the INA), which focuses on administrative remedies, including civil monetary penalties. Notwithstanding the above-described delegation, DHS did not also delegate its authority to deny petitions for certain periods of time under INA section 214(c)(14)(A)(ii) pursuant to 214(c)(14)(B). A plain reading of the statute makes clear that DHS's delegation authority under section 214(c)(14)(B) does not extend to section 214(c)(14)(A)(ii). Furthermore, section 10.0 of the DHS–DOL Interagency Agreement implementing the delegation states that ''[n]othing in this IAA is intended to conflict with current law or regulation. If a term of this IAA is inconsistent with such authority, then that term shall be invalid, but the remaining terms and conditions of this IAA shall remain in full force and effect.'' Thus, as described further below, DHS maintains its authority to deny petitions filed by petitioners who failed to follow applicable laws.

DHS recognizes that the delegation mentions DHS's authority to deny petitions under section 214(c)(14)(A)(ii) of the INA, but it does so solely in the context of enabling DHS to rely, in DHS's discretion, on certain DOL findings of fact—after notice and an opportunity for a hearing—made by DOL in the context of DOL exercising authorities it was delegated under section 214(c)(14)(A)(i). Specifically, the delegation states that if DOL has issued a debarment order, DHS ''may'' (but need not) rely on the underlying DOL findings and ''take appropriate action with respect to the petition, including exercising [DHS] authorities under 214(c)(14)(A)(ii) of the INA, 8 U.S.C 1184(c)(14)(A)(ii) and other provisions of the immigration laws.'' Nowhere in the delegation, however, is it stated that DHS lacks the authority to make its own findings of fact, provide notice and an opportunity for a hearing, or deny petitions in connection with its exercise of section 214(c)(14)(A)(ii) authority. Under the statute and the implementing Interagency Agreement, DHS may deny H–2B petitions for a given period in two potential ways: (a) by relying on DOL findings, or (b) after conducting its own hearing and by relying on its own findings.[15] DHS's section 214(c)(14)(A)(i) delegation does not in any way limit DHS's authority under section 214(c)(14)(A)(ii), but findings by DOL provide an additional way for DHS to obtain information helpful or necessary to exercise its 214(c)(14)(A)(ii) authority, should facts be uncovered in the course of DOL's exercise of section 214(c)(14)(A)(i) delegated authority. The use of the word ''may'' highlights the nonbinding nature of how DHS uses any findings by DOL that DOL makes in the course of exercising any enforcement authority that DHS delegated to DOL with respect to section 214(c)(14)(A)(i). Under section 214(c)(1) of the INA, DHS—not DOL—is the sole U.S. governmental agency authorized to determine whether an H–2 (or other H, L, O, or P) petition may be approved.

DHS, in its discretion, may avail itself of or rely on fact determinations made by DOL in exercising its delegated authority under section 214(c)(14)(A)(i). DHS, however, did not delegate its own authority to make factual determinations (following notice and an opportunity for a hearing) for purposes of section 214(c)(14)(A)(ii), nor did DHS delegate its authority under section 214(c)(14)(A)(ii) of the INA to deny H–2B petitions (or other petitions filed under INA secs. 204 or 214(c)(1)) from petitioners determined by DHS—based on its findings of fact, whether in choosing to rely on DOL's fact findings or DHS's own or both—have violated applicable laws for a 1- to 5-year period.

The new denial provisions in this rule, as applied to H–2B petitions, are consistent with INA section 214(c)(14)(A). Specifically, INA section 214(c)(14)(A) provides that DHS may deny H–2B petitions for a period of at least 1 year, but not more than 5 years, based on the substantial failure to meet any of the conditions of the petition or a willful misrepresentation of a material fact in the petition. Under INA section 214(c)(14)(D), the term ''substantial failure'' means a willful failure to comply with requirements of INA section 214 that constitutes a significant deviation from the terms and conditions of a petition. As discussed in greater detail below, each of the violations triggering new denial periods in this final rule, as applied to H–2B petitions, stems from a willful failure to comply with program requirements. Such a willful failure to comply would constitute a significant deviation from the terms and conditions of the petition or a willful misrepresentation of a material fact. Consistent with caselaw, DHS interprets the term ''willfully'' in INA 214(c)(14)(A) to mean ''knowingly'' or ''recklessly,'' as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise.[16]

Each mandatory denial ground in new 8 CFR 214.2(h)(10)(iv)(A), as applied to H–2B petitions, requires a finding of willfulness that comports with the applicable case law on willfulness. Specifically, with respect to 8 CFR 214.2(h)(10)(iv)(A)(*1*), debarment by DOL from the H–2B program requires that DOL has found either that the employer willfully misrepresented a material fact or that the employer willfully failed to comply with program requirements and the failure constituted a significant deviation from such requirements. *See* 20 CFR 655.73(a); 29 CFR 503.19(a). DOL regulations defining willful violations for purposes of INA sec. 214(c)(14), state, ''A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer . . . knows a statement is false or that the conduct is in violation or shows a reckless disregard for the truthfulness of its representations or for whether its conduct satisfies the

[15] *See* sec. 5.6 of the IAA.

[16] *See, e.g., Safeco Ins. Co. of Am.* v. *Burr,* 551 U.S. 47, 57 (2007) (''We have said before that 'willfully' is a ''word of many meanings whose construction is often dependent on the context in which it appears; and where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well.'') (quotation marks and citations omitted); *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128, 132–33, (1988) (''willful,'' as used in a limitation provision for actions under the Fair Labor Standards Act, covers claims of reckless violation); *Trans World Airlines, Inc.* v. *Thurston,* 469 U.S. 111, 125–26 (1985) (same, as to a liquidated damages provision of the Age Discrimination in Employment Act of 1967); *United States* v. *Ill. Cent. R. Co.,* 303 U.S. 239, 242–43, (1938) (''willfully,'' as used in a civil penalty provision, includes '' 'conduct marked by careless disregard whether or not one has the right so to act'') (quotation marks and citation omitted); *Bedrosian* v. *United States,* 912 F.3d 144, 152 (3d Cir. 2018) (''[G]eneral consensus among courts is that, in the civil context, the term [''willfulness''] often denotes that which is intentional, or knowing, or voluntary, as distinguished from accidental, and that it is employed to characterize conduct marked by careless disregard whether or not one has the right so to act . . . In particular, where willfulness is an element of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well.'') (quotation marks and citations omitted); *Matter of Healy and Goodchild,* 17 l & N Dec. 22, 28 (BIA 1979) (''knowledge of the falsity of a representation'' is sufficient).

required conditions.''[17] 20 CFR 655.73(d); 29 CFR 503.19(b).

A finding of willful material misrepresentation of a material fact or a finding of fraud by USCIS, as relevant in 8 CFR 214.2(h)(10)(iv)(A)(*2*), likewise requires a finding of willfulness, in accordance with established case law. In addition, under 8 CFR 214.2(h)(10)(iv)(A)(*3*) a finding of violation under INA section 274(a) also requires the element of willfulness. In this regard, each subsection of INA section 274(a) includes an element of ''knowing'' and/or ''reckless disregard'' indicating that a finding under INA section 274(a) would meet the requirements of the term willfully referenced in INA 214(c)(14) and as defined in applicable civil case law.[18]

Finally, we note that, as a part of its application for a TLC, an employer must attest that they will comply with applicable Federal, State and local employment-related laws and regulations, and on the H–2 petition itself, they must also attest that they agree to the conditions of H–2 employment, which limits participation in the H–2 program to those petitioners who have not engaged in the types of criminal activities covered by INA section 274(a). Such a limitation is intended to ensure the integrity of the H–2 program, insofar as employers who have been found guilty of engaging in activities related to the bringing in and harboring of certain aliens have a demonstrated record of knowing or reckless disregard for adherence to the immigration law. Given the seriousness of the violations described in section 274(a), there is no assurance that they will take seriously their obligation to abide by the terms and conditions of the H–2 program, or that they have the intention and ability to do so absent the passage of a sufficient time period for them to demonstrate that they in fact will abide by the terms and conditions of the H–2 program. For this reason, DHS has determined that precluding approval of H–2 petitions for employers convicted of a violation of section 274(a) for the period of time specified in this rule is necessary not only to ensure compliance with the H–2 program but to serve as a disincentive to employers from engaging in the types of criminal activities specified in section 274(a) should they wish to avoid the mandatory denial periods set forth in this rule. For these reasons, a violation of INA section 274(a) therefore constitutes a willful violation of section 214 that constitutes a significant deviation from the terms and conditions of a petition that calls into question the petitioner's intent and ability to comply with the requirements of the H–2 program.

In addition, the 1-year denial period for H–2B petitions set forth in new 8 CFR 214.2(h)(6)(i)(C) stems from a willful failure to comply with program requirements that constitutes a significant deviation from the terms and conditions of the petition. Specifically, new 8 CFR 214.2(h)(6)(i)(C) will only apply after USCIS issues a decision denying or revoking on notice an H–2 petition for violation of the prohibited fee provision at paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), or if a petitioner withdraws a petition following USCIS issuance of a request for evidence or notice of intent to deny or revoke the petition for prohibited fees under one of those provisions. The cited provisions, as finalized in this rule, enable a petitioner to avoid denial or revocation—and thus avoid the 1-year denial period—by demonstrating that it made ongoing, good faith, reasonable efforts throughout the process to prevent and learn of the prohibited fee collection or agreement, that it took immediate remedial action upon learning of the fee, that it has made all necessary reimbursements, and, for cases where the petitioner itself collected the fee, that its failure to prevent the fee resulted from extraordinary circumstances beyond its control. As discussed in the NPRM and in this final rule, the prohibitions related to fees charged to workers are a longstanding and important H–2 program requirement, and petitioners have to attest in the H–2 petition that, among other things, they have taken reasonable steps to ensure that prohibited fees are not being charged. As such, it is a petitioner's responsibility and obligation to make ongoing, good faith, reasonable efforts toward the prevention of such fees being charged by its employees and by any third parties within the recruitment chain, to take immediate remedial action if a violation occurs, and to reimburse the affected parties. Accordingly, as the same steps that are required to avoid denial or revocation are in fact petitioner obligations for compliance with program requirements and/or the terms and conditions of the H–2 petition, DHS considers the failure to take steps described above in order to prevent the payment of prohibited fees, and/or provide evidence that such steps were taken, to constitute a substantial failure, that is, a willful failure to comply with INA section 214 requirements that constitutes a significant deviation from the terms and conditions of the H–2B petition.[19]

Similarly, the additional 3-year period described in new 8 CFR 214.2(h)(6)(i)(D) only applies in instances where the petitioner has failed to provide the evidence necessary to avoid denial or revocation under paragraph (h)(6)(i)(B) or (h)(5)(xi)(A). Further, during this 3-year period, USCIS may approve the petition notwithstanding such a denial or revocation upon a showing that each affected beneficiary has been reimbursed or that the beneficiary's designee has been reimbursed if the beneficiary cannot be located or is deceased. DHS considers a petitioner's failure to reimburse all relevant parties despite knowledge of the reimbursement requirement, or failure to provide evidence of such reimbursement, to constitute a willful failure to comply with program requirements that constitutes a significant deviation from the terms and conditions of the petition.[20]

As a matter of policy and condition of participation in H–2 programs, DHS is imposing denials based on a predecessor's substantial failure to comply with program requirements or a willful misrepresentation of material facts, including a predecessor's denial under new 8 CFR 214.2(h)(6)(i)(C) or (D) and (h)(10)(iv), on any successors in interest. While the acceptance of certain liabilities may not be agreed upon by the successor within the documents underlying the acquisition, merger, or other transfer resulting in a successor in interest relationship, under this final rule, DHS has decided to extend the

[17] *See Temporary Non-Agricultural Employment of H–2B Aliens in the United States,* 80 FR 24042, 24086–87, 24129, 24139 (Apr. 29, 2015).

[18] For the purposes of civil liability (as opposed to criminal liability), the term ''willful'' includes both knowing violations and reckless violations. *See, e.g., United States* v. *Hughes,* 113 F.4th 1158, 1161–62 (9th Cir. 2024). *See also, Safeco Ins. Co. of Am.,* 551 U.S. at 56; *McLaughlin,* 486 U.S. at 132–33; *Trans World Airlines,* 469 U.S. at 125–26; *Ill. Cent. R. Co.,* 303 U.S. at 242–43.

[19] In this regard, DHS notes that its regulations and petition instructions have long prohibited petitioners and recruiters from collecting prohibited fees and therefore violations of such prohibitions necessarily constitute a significant deviation from longstanding publicly known terms and conditions of a petition.

[20] DHS has noted that there are steps a petitioner can take to ensure they will be able to successfully provide reimbursement in the event that a prohibited fee violation occurs. Specifically, in the NPRM, DHS suggested that petitioners, as a matter of best practice, obtain in writing the beneficiary's full contact information (including any contact information abroad), early on during the recruitment process, and to maintain and update such information as needed, as well as obtain full designee information, early on during the recruitment process, and to maintain and update such information as needed to ensure the petitioner's ability to comply with the reimbursement requirement. 88 FR 65040, 65056 (Sept. 20, 2023).

periods of denial based on a predecessor's willful failure to comply with program requirements to successors in interest regardless of whether any such successor in interest has agreed to succeed to all of the liabilities of the predecessor entity. Accordingly, as proposed in the NPRM and after this rule becomes effective, a successor in interest will be subject to any applicable denial period stemming from the violations of this rule. DHS has made this determination to prevent predecessors that have willfully violated program requirements or mispresented material facts from avoiding any consequences by simply reorganizing into a successor entity. This regulation puts prospective successors in interest on notice that they would assume liability for the predecessor's willful violation(s). To permit successors in interest to avoid successor liability would defeat the purpose/objective of this regulation and would create a loophole to avoid the consequences of a willful failure to abide by the terms and conditions of the H–2 programs. This policy furthers the statutory purpose of ensuring integrity in the H–2 programs.

Comment: An attorney commenter stated that the NPRM is premised on the belief that there are no material differences between the H–2A and H–2B programs, but they have been developed independently since 1986 and each is subject to its own statutory provisions. The commenter wrote that failing to differentiate between the programs fails to follow congressional policy and rewrites statute. The commenter also said another major premise of the NPRM is the apparent conclusion that H–2B workers deserve or are entitled to extensive regulatory protection, but it is well-established that Congress created all H visas to promote the national interests and alleviate U.S. labor shortages for temporary positions by providing nonimmigrant labor. The commenter said there is no ''credible statutory language, structure, or legislative history suggesting that H–2B workers are a protected class'' but instead they are ''merely a conduit to safeguard the true protected class'' by reducing the incentive to bypass U.S. workers and avoid wage depression. The commenter stated that the preamble includes ''virtually no discussion'' of the national interest, employer interests, or the interests of even U.S. workers, while DHS is effectively erecting a completely new and groundless regulatory structure.

Response: DHS disagrees with the commenter's assertion that the NPRM is premised on the beliefs that there are no material differences between the H–2A and H–2B programs and that failing to differentiate between them is contrary to congressional intent. While DHS generally agrees with the commenter that the H–2 programs were created to alleviate U.S. labor shortages, and thus promote the national interest, those objectives are consistent with providing protections from abuses common to both H–2A and H–2B workers. Further, the commenter stated that the NPRM failed to address the interests of U.S. workers; however, it is well established that providing protections for H–2 workers also benefits U.S. workers.[21] For example, the 2023 report of the H–2B Worker Protection Taskforce stated that H–2B workers work alongside U.S. workers in some of our country's most critical occupations, but that structural disincentives to report or leave abusive work conditions not only harm H–2B workers but also undermine the wages and working conditions of U.S. workers who work with them.[22] With respect to the commenter's contention that the rulemaking fails to address the national interest and employer interests, DHS also disagrees. The NPRM specifically discussed the importance of the H–2 programs to U.S. employers, including the expansion in their use in recent years in a section titled *Importance of the H–2 Programs and the Need for Reforms.* 88 FR 65040, 65049 (Sept. 20, 2023). In this section DHS detailed the administration's policies to increase interest and expand access to these programs for employers, as well as the need to balance the expanded use of the H–2 programs with greater protections for workers. *Id.* The NPRM also specifically addressed the proposals that would most benefit U.S. employers, such as portability, as well as both the elimination of the eligible countries lists and the revision of the calculation of the maximum period of stay for H–2 workers.

DHS also explained that with respect to the H–2B program specifically, the proposed regulations which are also being finalized in this rule are intended to ensure that only those employers who comply with the requirements of the H–2B program will be able to compete for the limited number of available cap-subject visas, by precluding those employers who fail to demonstrate an intent to do so from participating in the H–2B program. 88 FR 65040, 65051–65052 (Sept. 20, 2023).

2. H–2 Program Background

a. Worker Vulnerability

Comment: A few commenters discussed the vulnerability of H–2 workers to labor abuses and expressed their support for additional labor protections to be put into place. For example, a religious organization stated that foreign workers are uniquely vulnerable given that they are temporary workers, rely on their employers for basic needs, often have a language barrier, and many other factors. The commenter expressed their support for the Department's effort to address ongoing issues within the H–2 programs. A union and a trade association also expressed their support for additional worker protections for H–2 workers, reasoning that H–2 programs are a public benefit and that employers who use them need to be held to the highest possible standards. Similarly, a joint submission expressed their support for the proposed regulatory changes which they stated ''would make some badly overdue improvements for these most vulnerable workers.''

Response: DHS agrees with, and appreciates, the commenters' feedback concerning the vulnerability of H–2 workers and the need for programmatic reforms, as well as their overall support for the rule's efforts to enhance H–2 worker protections.

b. Violations of Labor Laws

Comment: Several commenters discussed labor violation issues within the H–2 programs and how employers can abuse their H–2 workers due to excessive leeway and weak oversight. Some labor unions stated that the program gives too much leeway to employers and that USCIS does not effectively enforce existing labor rules. The commenters said that this allows employers to bypass hiring procedures even though there are domestic workers available for these jobs. A research organization discussed how both H–2 programs have been plagued with controversy regarding undocumented immigration and human trafficking. The commenter cited reports from DOL showing that 70 percent of the audits for temporary labor certifications (TLCs) led to enforcement actions against the employer ranging from a warning to program debarment. The commenter further stated that Department of State

[21] *See generally* Daniel Costa, EPI, ''Second-class workers: Assessing H–2 visa programs' impact on workers'' (July 20, 2022) (testimony before the Subcommittee on Workforce Protections in the United States House Committee on Education and Labor), *https://www.epi.org/publication/second-class-workers-assessing-h2-visa-programs-impact-on-workers/.*

[22] The White House, ''Strengthening Protections for H–2B Temporary Workers: Report of the H–2B Worker Protection Taskforce'' (Oct. 2023), *https://www.whitehouse.gov/wp-content/uploads/2023/10/Final-H-2B-Worker-Protection-Taskforce-Report.pdf.*

(DOS) reports showed that these programs enabled human trafficking and that between 2018 and 2020 there were 3,694 potentially identified victims of labor trafficking within the H–2A program. Lastly, the commenter noted that of over 200,000 investigations DOL had done in the seven major H–2B industries, 80 percent found labor violations. A trade association noted that DOL figures showed that only a small percentage of farms, about 5 percent, accounted for 71 percent of all violations over a 15-year period.

A union and a religious organization stated that they have witnessed abuses against migrant workers such as charging fees for basic services, inadequate housing, long work hours, and limited training for the operation of heavy machinery. The commenters further discussed how in addition to these abuses, farm workers are often subject to restrictions on mobility, such as being prohibited from leaving their residences, insufficient health care, and isolation from the community. Lastly, a religious organization stated that workers have reported practices where an employer works its employees for 1 or 2 months with no days off, then replaces them with a different group, and repeats the process. The commenter stated that these practices might even be considered human trafficking under the Trafficking Victims Protection Act of 2000. A joint submission from a union and numerous advocacy organizations noted that 72 percent of labor trafficking victims between 2018 and 2020 reported holding an H–2A or another temporary visa.

A union further discussed how recruitment fees can be predatory and place a worker into an indentured servitude relationship with their employer, and further stated that the H–2 programs are one of the sources of modern forced labor. The commenter cited a study that it said showed about half of all H–2A workers from Mexico surveyed between 2006 and 2011 took out loans to pay for these fees. A separate joint submission from a union and numerous advocacy organizations brought up reports that over half of H–2A workers paid recruitment fees, with some upwards of $4,500. The commenter also brought up concerns related to issues within the construction industry, and cited studies on how foreign workers are more vulnerable to injuries in this dangerous workplace environment.

Commenters also addressed violations related to wage theft and its prevalence among H–2 employers. For example, a union cited studies that it said showed how H–2B employers often pay H–2B employees below what is required by State and Federal law and that this practice has led to almost 2 billion dollars in stolen wages. The commenter noted that another study showed that within the construction sector, foreign workers earn about 24 percent less than domestic workers while in the overall economy, this figure is about 11 percent. A joint submission from a union and numerous advocacy organizations cited other studies that they said showed 73 percent of the back wages and civil money penalties owed by farm employers were due to H–2A violations, and when investigated, agricultural employers are often found to be committing wage or hour theft from employees. A different union noted that this abuse leads workers to be deprived of job opportunities and subjected to lower wages.

Response: DHS thanks these commenters, many of whom have on-the-ground experience speaking to or working with participants in the H–2 programs, for bringing attention to the violations of various labor laws that many H–2 workers experience and the harms they cause them. Several of the provisions finalized in this rule, such as the strengthened prohibited fee provisions and the new mandatory and discretionary grounds for denial, aim to mitigate against some of these harms and vulnerabilities.

c. Economic and Industry Reliance on H–2 Workers

Comment: A few commenters, including a religious organization, discussed the current role of H–2 programs in the economy and how it is being used to fulfill labor demands that the domestic workforce is unable to meet. A few commenters discussed the use of the H–2 programs in the agricultural sector and how the industry has become more reliant on H–2A workers. A trade association stated that in part due to increased industrial job opportunities in Mexico, Texas farmers have begun to rely more heavily on H–2A workers to fill labor gaps. A business association noted that due to a shrinking domestic workforce, employers have had to rely more on H–2A workers in recent years and that the number of H–2A workers that are hired can range between a few dozen or thousands per entity. A separate business association discussed how the number of H–2A agricultural workers in states like Washington, Oregon, and Idaho has increased by significant margins in the past few years. The commenter stated that the number of H–2A workers in Washington has increased from 18,800 in 2017 to 38,664 in 2023, while in Oregon the number of H–2A workers increased by a third between 2018 and 2021. The commenter also noted that about 90 percent of these workers return to the same place of employment in the following years.

A trade association noted that over the last decade, an aging domestic workforce and changing economic conditions in Mexico have led the agricultural industry in border states such as Texas to rely on H–2A workers to meet labor demands that are difficult to fulfill through domestic workers and Mexican day laborers. A professional association stated that there was an acute need for the H–2 and other similar programs to fill labor gaps in the U.S. economy, such as the construction industry where the ratio of openings to employment has climbed to 4.4 percent from 2.3 percent in 2015 and there were over 300,000 openings at the time of commenting.

Response: DHS is aware of the considerable increase in recent years in the utilization of both the H–2A and H–2B programs by U.S. employers and appreciates these commenters offering information on this growth. As noted in the NPRM, both the H–2A and H–2B programs have experienced significant growth over the last decade. H–2A visa issuances have increased by over 365 percent over the last decade, and H–2B visa issuances have nearly doubled over the last decade.[23] 88 FR 65040, 65049 (Sept. 20, 2023). Whether due to U.S. workers seeking employment opportunities in sectors other than agriculture, or due to an aging domestic workforce, or for other reasons, the strong interest from U.S. employers in seeking temporary workers through the H–2 programs is apparent, as these commenters note. The changes to the H–2 programs finalized in this rule will benefit these employers by further streamlining and improving the overall integrity of the programs as these programs grow.

d. H–2B Program Size

Comment: A couple of commenters generally discussed the growing size of the H–2 programs and, in particular, issues with the H–2B program exceeding the statutory 66,000 cap in recent years. A union expressed concern with how, through annual riders included in recent appropriations laws and DHS regulations including

[23] As further explained in the NPRM, while Congress has capped the number of H–2B visas available, the number of H–2B visas issued has regularly far-exceeded the statutory cap as a result of congressionally-provided limited authority to increase the cap over the past several years. 88 FR 65040, 65049 (Sept. 20, 2023).

returning worker exemptions, the government has been able to effectively increase the cap well above the 66,000 originally set when the H–2B program was established. The commenter also expressed concern that the increase in size and lax enforcement of labor laws has led to an undercutting of domestic labor.

A research organization raised concerns over how the NPRM does not discuss the impact of portability on the H–2B annual cap, the number of extensions of stay with the same employer for the H–2B program, nor the true size of the H–2B program in terms of the total number of H–2B workers employed in a given fiscal year. The commenter noted that publicly available data at the time of comment do not convey the total number of positions filled by H–2B workers, which they stated was ''critical to know since H–2B workers who change employers or extend with the same employer will have filled two positions under one slot under the annual cap.'' The commenter said that the number of beneficiaries approved for the H–2B program was important to know because the number of H–2B beneficiaries has grown far beyond the annual cap set by statute. The same commenter noted that USCIS calculates the total number of H–2B workers by adding the number of visas approved and the number of new H–2B workers that do not need visas, but that it leaves out H–2B workers that were approved to continue their status with the same employer or were approved to change employers. The commenter said that a similar issue exists with more recent data regarding the total number of H–2B workers because they do not differentiate between a new worker and one that is extending their current status or changing employers. Lastly, the commenter concluded that over the past few years, there have been significantly more H–2B workers than what is allowed by the statutory and supplemental caps. The commenter estimated that there would be a similar proportion of H–2B workers compared to the statutory and supplementary cap in 2023.

Response: As alluded to by a commenter, the INA sets the annual number of noncitizens who may be issued H–2B visas or otherwise provided H–2B status at 66,000, to be distributed semi-annually beginning in October and April. *See* INA sec. 214(g)(1)(B), 8 U.S.C. 1184(g)(1)(B). Under this semi-annual cap, up to 33,000 noncitizens may be issued H–2B visas or provided H–2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation, including any unused nonimmigrant H–2B visas from the first half of a fiscal year, will be available for employers seeking to hire H–2B workers during the second half of the fiscal year. *See* INA sec. 214(g)(10), 8 U.S.C. 1184(g)(10). There are some exceptions to the cap, for example, as workers in the United States in H–2B status who extend their stay, change employers, or change the terms and conditions of employment are not subject to the cap. *See* 8 CFR 214.2(h)(8)(ii). Similarly, H–2B workers who have previously been counted against the cap in the same fiscal year that the proposed employment begins will not be subject to the cap if the employer names them on the petition and indicates that they have already been counted. *See id.*

Once the H–2B cap is reached, USCIS may only accept petitions for H–2B workers who are exempt or not subject to the H–2B cap. No provisions adopted in this final rule allow DHS to exceed the statutory limitation on the number of H–2B visas issued per fiscal year. Similarly, no provisions adopted in this final rule alter the current exemptions to the statutory cap for workers in the United States in H–2B status who extend their stay, change employers, or change the terms and conditions of employment.

In recent fiscal years, Congress has authorized the Secretary of Homeland Security to temporarily increase the statutory cap. Before authorizing the additional visa numbers, the Secretary, in consultation with the Secretary of Labor, considers the needs of businesses and other factors, including the impact on U.S. workers and the integrity of the H–2B program. Most recently, on December 2, 2024, DHS and DOL jointly published a temporary final rule (TFR) increasing the numerical limit for FY 2025.[24] Thisincrease is based on time-limited statutory authority that does not affect the H–2B program in future fiscal years.

DHS appreciates the commenter's analysis regarding the portability provision but does not agree with the conclusion that DHS fails to adequately assess the impact of the type of portability proposed on the growth and overall size of the H–2B program. Much of the comment's substance focuses on aspects of the H–2 program that, as described above, would not be affected by this rulemaking and therefore should not be considered as an impact of the rule. For instance, this rulemaking does not *establish* the ability to extend stay nor does it speak to which workers are cap exempt or subject to the respective caps. DHS believes that the NPRM's discussion of the marginal impact of portability on the affected population of porting workers is an accurate and sufficient articulation of the impacts of this rule. *See* 88 FR 65040, 65074, 65079–80 (Sept. 20, 2023).

Additionally, DHS appreciates the commenters' analysis of available H–2 data and agrees that the combination of data sources and methods described in the comment leads to overcounting of the total universe of H–2B workers in the country in a given fiscal year. More specifically, the commenter noted that the H–2B Data Hub's ''Continuing Approvals'' field likely overcounts total H–2B workers because of a lack of data on workers who switched employers or changed job conditions while at the same employer. In order to address concerns raised by the commenter, USCIS is providing relevant data in Table 2 and Table 3 below:

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[24] This increase in the cap is in accordance with Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47, as extended by sections 101(6) and 106 of Division A of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83, which gave the Secretary of Homeland Security the authority to make available additional H–2B visas for FY 2025.

Table 2: Historical Data for H-2B Petitions and Beneficiaries Extending Stay Without a Change in Employer

Year	Approved H-2B petitions for extensions of stay with the same employer	Approved H-2B beneficiaries for extensions of stay with the same employer
2011	293	2,155
2012	197	1,186
2013	214	1,811
2014	224	1,443
2015	214	1,734
2016	60	697
2017	112	1,099
2018	116	2,171
2019	148	2,296
2020	248	3,553
2021	326	5,138
2022	474	6,862
2023	675	8,888

Source: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, data queried February 2024, TRK 14143

Table 3: Historical Data for H-2B Petitions and Beneficiaries Extending Stay with a Change in Employer		
Year	Approved H-2B petitions for extensions of stay and change in employer	Approved H-2B beneficiaries for extensions of stay and change in employer
2011	348	3,464
2012	283	2,915
2013	259	2,798
2014	300	2,971
2015	390	3,705
2016	402	3,767
2017	543	5,729
2018	726	7,014
2019	806	6,959
2020	789	7,705
2021	1,092	9,611
2022	1,764	15,769
2023	2,254	20,241
Source: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, data queried February 2024, TRK 14143		

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Regarding the comment that the increase in H–2 program size and ''lax enforcement'' of labor laws has led to an undercutting of domestic labor, DHS disagrees and emphasizes that enforcement of labor laws involving domestic labor generally falls under the jurisdiction of DOL. DHS notes that, to avoid the undercutting of domestic workers as mentioned by the commenter, it is a requirement under both H–2 programs that the Secretary of Labor must certify that there are not sufficient able, willing, qualified, and available U.S. workers who can perform such services or labor.[25] Additionally, H–2 employment may not adversely affect the wages and working conditions of workers in the United States.[26] An H–2A or H–2B petition must be accompanied by an approved TLC from DOL, issued pursuant to regulations established at 20 CFR part 655, or from the Guam Department of Labor (GDOL) for H–2B workers who will be employed on Guam. The TLC serves as DHS's consultation with DOL or GDOL with respect to whether a qualified U.S. worker is available to fill the petitioning H–2A or H–2B employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages and working conditions of similarly employed workers in the United States.[27]

D. Program Integrity and Worker Protections

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

a. Use of Phrase ''Related to''

Comment: Several commenters, including a trade association, a union, a joint submission, some advocacy groups, and a religious organization, expressed support for conforming USCIS regulations to DOL's regulatory language, such as the prohibition of fees ''related to'' employment, or clarifying the term ''prohibited fee'' to include any fee, penalty, or compensation. The religious organization expressed support for the language change to prohibit fees ''related to'' H–2 employment in order to better protect workers and urged DHS to adopt the regulation as proposed.

Response: DHS appreciates the commenters' support for conforming USCIS regulations to DOL's regulatory language. These conforming changes are expected to increase clarity regarding prohibited fees and better protect workers. As discussed below, DHS is making some changes to the proposed regulation in light of other comments that suggested specific changes.

Comment: A union and a State agency generally supported the language change to prohibit fees ''related to'' H–2 employment but suggested that USCIS include a list describing prohibited fees

[25] *See* INA secs. 101(a)(15)(H)(ii)(a)–(b), 8 U.S.C. 1101(a)(15)(H)(ii)(a)–(b), 218(a)(1), 8 U.S.C. 1188(a)(1); 8 CFR 214.2(h)(5)(ii), (h)(6)(i).

[26] *See* INA sec. 218(a)(1)(B), 8 U.S.C. 1188(a)(1)(B) (H–2A); INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b) (H–2B); 8 CFR 214.2(h)(5)(ii), (h)(6)(i).

[27] *See* INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(5)(i)(A), (h)(5)(ii), (h)(6)(iii)(A), (h)(6)(v).

in the regulatory text, similar to the list in the preamble.

Response: As the commenters noted, the preamble of the NPRM provided examples of fees that are ''related to'' H–2 employment including, but not limited to, the employer's agent or attorney fees, visa application and petition fees, visa application and petition preparation fees, and recruitment costs.[28] However, DHS declines the suggestions to include this or another listing of specific prohibited fees in the regulatory text. As noted in the NPRM, DHS is replacing the term ''as a condition of'' with ''related to'' to substantially conform with DOL prohibited fee regulations. DHS is also finalizing the clarification that ''[t]he passing of a cost to the beneficiary that, by statute or applicable regulations is the responsibility of the petitioner, constitutes the collection of a prohibited fee.'' New 8 CFR 214.2(h)(5)(xi)(A), (h)(6)(i)(B). As DOL regulations already provide a non-exhaustive list of fees that are ''related to'' employment and thus are the responsibility of the employer,[29] it is unnecessary to repeat that non-exhaustive list in DHS regulations.

Comment: An attorney expressed concern with the phrase ''related to,'' stating it was ''unrestricted'' and allows the Department to ''sweep up'' any and all violations, including violations that are simply inadvertent or technical by ''even the most innocent employer.''

Response: DHS disagrees with the commenter's characterization that the phrase ''related to'' is ''unrestricted'' and allows the Department to ''sweep up'' any violations that are simply inadvertent or technical. Instead, that phrase seeks to balance an interest in protecting workers from prohibited cost-shifting by employers while recognizing that not all payments or reimbursements by workers are forbidden. Moreover, this change in terminology provides consistency across agencies by conforming to the long-standing use of the phrase in DOL regulations.[30]

The term ''related to'' is meant to be read broadly to ensure that employers bear the cost of bringing in noncitizen workers under the H–2 programs and prevent employers from passing those costs to H–2 workers, with the resulting consequences of indebtedness, intimidation, and exploitation of nonimmigrant workers that can occur. This is consistent with the intent expressed by DOL in promulgating its own prohibited fee regulations, to ''requir[e] employers to bear the full cost of their decision to import foreign workers [as] a necessary step toward preventing the exploitation of foreign workers, with its concomitant adverse effect on U.S. workers.'' 75 FR 6884, 6925 (Feb. 12, 2010); 73 FR 77110, 77158 (Dec. 18, 2008). However, the phrase ''related to'' is not ''unrestricted,'' as the commenter claimed. Consistent with DOL regulations, DHS recognizes that an H–2 employer is not responsible for costs that are primarily for the benefit of the H–2 worker and will finalize regulatory text making this clear. *See* new 8 CFR 214.2(h)(5)(xi)(A), (h)(6)(i)(B) (''This provision does not prohibit petitioners (including their employees), employers or any joint employers, agents, attorneys, facilitators, recruiters, or similar employment services from receiving reimbursement from the beneficiary for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.''). DHS therefore disagrees with the commenter's concerns about the phrase ''related to'' being ''unrestricted.''

b. Clarification of Acceptable Reimbursement From the Beneficiary for Costs That Are the Responsibility and Primarily for the Benefit of the Worker

Comment: A professional association expressed support for the clarification that some costs to workers are acceptable if they are for the benefit of the worker and are the worker's responsibility. An advocacy group also supported this new regulatory language, noting that it improves clarity and affirms that an employer is responsible for all costs related to an H–2 worker's employment, other than those costs primarily for the benefit of the worker.

Response: DHS appreciates the commenters' support for the rule's clarification of certain fees that may be reimbursed by H–2 workers. As noted above, new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B), as modified, will clarify that the prohibited fees provisions do not prohibit petitioners (including their employees), employers or any joint employers, agents, attorneys, facilitators, recruiters, or similar employment services from receiving reimbursement from the beneficiary for costs that are the responsibility and primarily for the benefit of the worker. DHS is slightly modifying this provision from what was proposed by adding ''from the beneficiary.'' As noted in the proposed rule, it is not the Department's intention to pass to petitioners, employers, agents, attorneys, facilitators, recruiters, or similar employment services, the costs of services or items that are truly personal and voluntary in nature for the worker.

Comment: Many commenters, including trade associations, a research organization, and a joint submission, stated that DHS should provide additional guidance on what costs, in addition to government-required passport fees, may be considered ''the responsibility and primarily for the benefit of the worker'' such that they are acceptable for reimbursement by the worker. A professional association noted that ''[p]assport fees are expressly excluded in the definition of prohibited fees'' but that ''there may be other fees that could benefit both employers and the workers not clearly addressed in the proposed rule.'' The commenter noted that ''[g]reater specificity would be helpful in the scope of the definition of prohibited fees, given that subsequent reimbursement would no longer remedy the error.''

Response: As explained in the NPRM and codified in this final rule, fees that are ''related to'' H–2 employment are those that are the responsibility of and primarily for the benefit of the employer and may not be collected at any time from a beneficiary of an H–2A or H–2B petition. *See* new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B); 88 FR 65040, 65052 (Sept. 20, 2023) (stating that fees that are ''related to'' H–2 employment include, but are not limited to, the employer's agent or attorney fees, visa application and petition fees, visa application and petition preparation fees, and recruitment costs; however, such fees would not include those that are ''the responsibility and primarily for the benefit of the worker, such as government-required passport fees.''). Thus, an employer may not seek reimbursement from a worker for fees that are related to H–2 employment. However, an employer may seek reimbursement from a worker for fees

[28] 88 FR 65040, 65052 (Sept. 20, 2023) (citing DOL, WHD, ''Fact Sheet #78D: Deductions and Prohibited Fees under the H–2B Program,'' *https://www.dol.gov/agencies/whd/fact-sheets/78d-h2b-deductions*).

[29] *See* 20 CFR 655.20(o) (stating that fees ''related to'' H–2B employment ''include the employer's attorney or agent fees, application and H–2B Petition fees, recruitment costs, or any fees attributed to obtaining the approved *Application for Temporary Employment Certification*''); 29 CFR 503.16(o) (containing a similar list for fees ''related to'' H–2B employment); 20 CFR 655.135(j) (stating that fees ''related to'' H–2A employment include ''payment of the employer's attorney fees, application fees, or recruitment costs'').

[30] *See* 20 CFR 655.135(j) (H–2A); 20 CFR 655.20(o) (H–2B). For readability purposes, this rule refers to all of the H–2B-related provisions of 20 and 29 CFR as ''DOL regulations'' notwithstanding DHS's joint issuance of some rules affecting these provisions.

that are ''the responsibility and primarily for the benefit of the worker.'' As finalized at new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B), fees that are ''the responsibility and primarily for the benefit of the worker'' include ''government-required passport fees.'' [31] This intentionally mirrors DOL's language that its prohibited fee provisions do not ''prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.'' 20 CFR 655.20(o), 655.135(j). Since DOL's regulatory language does not contain examples beyond government-required passport fees, DHS also will not provide other examples in new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B).

However, to be responsive to commenters' requests for additional guidance on what costs, in addition to government-required passport fees, may be considered ''the responsibility and primarily for the benefit of the worker,'' DHS hereby clarifies that such fees may also include H–4 visa fees for dependent family members and filing fees for Forms I–539, Application to Extend/Change Nonimmigrant Status, requesting extension of the same status for any H–4 dependents. There may be other instances in which a fee is considered primarily for the benefit of the worker, although, such instances will be limited in light of the fact that employers are responsible for all costs ''related to'' H–2 employment.

c. Clarification of Acceptable Reimbursement to the Beneficiary for Certain Costs That Are ''Related to'' H–2 Employment

Comment: A trade association urged DHS to allow employers to reimburse workers for meals and other costs associated with their travel to the United States, stating that this practice benefits workers. A joint submission expressed concern that leaving the proposed regulation vague about what other fees are acceptable for reimbursement could result in inconsistent application of the regulation. A professional association suggested that '''visa application' should be removed from this section [of prohibited fees] because [visa application fees, that is the DS–160 fee] is recognized elsewhere justifiably as a reimbursable cost.''

Response: DHS recognizes that it is permissible, in certain limited circumstances, for a worker to initially pay a fee related to H–2 employment and then to be reimbursed by the employer for that expense. In such a case, the fee is still the responsibility of the employer and may not be passed on to the worker, but reimbursement has been deemed to be an allowable mechanism by which the employer can fulfill its responsibility to pay the fee. For example, 20 CFR 655.20(j)(2) states with respect to H–2B workers that ''[t]he employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the H–2B worker . . . .'' Thus, all visa, visa processing, border crossing, and other related fees are the responsibility of the employer, but DOL allows for the employer to satisfy its obligation to pay these fees by reimbursing the worker within the first workweek.

DHS does not intend to prohibit reimbursement of fees where such reimbursement is specifically allowed by statute or regulations governing the H–2 programs. Therefore, DHS is modifying the regulatory text in this final rule at 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) to add that ''This provision does not prohibit employers from allowing workers to initially incur fees or expenses that the employers are required to subsequently reimburse, where such arrangement is specifically permitted by, and performed in compliance with, statute or regulations governing the [H–2A/H–2B] program.''

In addition, nothing in the regulation prevents an employer from seeking reimbursement from the worker after initially paying costs that are the worker's responsibility and are primarily for the benefit of the worker (such as passport costs). In determining the employer's responsibility to cover expenses related to H–2 employment, the question is not whether H–2 workers derive a benefit from payment of such fees, but whether, under applicable regulations and guidance, the payment is made primarily for the benefit of the employer.[32]

d. Prohibiting Breach of Contract Fees and Penalties

Comment: Several commenters, including multiple trade associations, a union, and a joint submission, generally supported the inclusion of a breach of contract or penalty as a prohibited fee but requested DHS to clarify what constitutes a prohibited breach of contract fee or penalty. For example, multiple trade associations and a joint submission requested that DHS clarify what would constitute a breach of contract fee or penalty in circumstances where workers abandon or are terminated for cause from their work. The commenters requested that DHS clarify that the employer would not be deemed to have charged a breach of contract fee for failing to offer guaranteed work hours or provide return transportation in those cases. The joint submission asked whether the new regulation would preclude an employer from incorporating into the H–2A or H–2B contract a ''no complete, no rehire'' clause stating that workers will not be rehired for future contracts if they resign without cause prior to the agreed-upon end date.

Response: DHS will not consider the petitioner's failure to offer guaranteed work hours, provide return transportation, and pay subsistence costs as a breach of contract fee or penalty, where DOL or DHS regulations relieve a petitioner of its responsibility to offer guaranteed work hours, provide return transportation, and pay subsistence costs for a beneficiary who has voluntarily left employment or was terminated for cause. *See, e.g.,* 20 CFR 655.20(y) (abandonment/termination of employment for H–2B workers); 20 CFR 655.122(n) (abandonment of employment or termination for cause for H–2A workers). Similarly, with respect to the commenters' question about a ''no complete, no rehire'' clause for a beneficiary who voluntarily left employment or was terminated for cause, DHS will not consider this clause a prohibited ''fee or penalty for breach of contract'' under new 8 CFR 214.2(h)(5)(xi)(A) or (6)(i)(B) so long as the consequence to the worker is limited to not being rehired by the petitioner

[31] *See* WHD, ''Fact Sheet #78F: Inbound and Outbound Transportation Expenses, and Visa and Other Related Fees under the H–2B Program,'' *https://www.dol.gov/agencies/whd/fact-sheets/78f-h2b-fees;* DOL, Field Assistance Bulletin NO. 2009–2 (Aug. 21, 2009).

[32] *See, e.g.,* 29 CFR 531.3(d)(1) (''The cost of furnishing 'facilities' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.''); 80 FR 24042, 24063 (Apr. 29, 2015) (''DOL's longstanding position is that deductions or costs incurred for facilities that are primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore may not be charged to the worker.''); *see also* DOL, ''Travel and Visa Expenses of H–2B Workers Under the FLSA'' (Aug. 21, 2009) (stating that in determining which pre-employment expenses incurred by the employee must be reimbursed back to the employee, ''the question is whether these expenses for H–2B nonimmigrant workers are 'an incident of and necessary to the employment, and therefore are primarily for the benefit or convenience of the employer''), *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FieldAssistanceBulletin2009_2.pdf.*

and does not include a monetary or financial penalty or fee for such termination or voluntary departure. However, DHS cautions that while such a clause does not fall under the ''prohibited fee'' provisions, it may implicate other statutory or regulatory provisions such as DOL's prohibition on discrimination or retaliation under the H–2A program at 29 CFR 501.4. Petitioners and employers should take these other provisions into account when adopting such a clause or taking actions pursuant to such a clause.

Comment: A State agency stated it is ''understandable to not charge excessive fees for the worker not completing the contract,'' but expressed concern that by prohibiting the charging of breach of contract fees, an employer could pay upfront several hundreds or thousands of dollars for a worker, just for the worker to leave the job after a short time without any consequences to the worker.

Response: DHS acknowledges that an employer may be required to invest significant resources in petitioning for H–2 workers. However, certain costs associated with participation in the H–2 program are the responsibility of the employer. These costs remain the responsibility of the employer even if the worker departs prior to the end of the petition period and the employer may not seek to recover these costs through a ''breach of contract'' fee or otherwise.

Comment: A few commenters, including advocacy groups and a professional association, expressed support for the proposed changes prohibiting breach of contract fees and penalties. An advocacy group recommended that USCIS strengthen this language even further by prohibiting non-monetary penalties or penalties imposed on a worker's relations or anyone acting on behalf of the worker. The advocacy group also proposed specific language adjustments for section 214.2(h)(5)(xi)(A) with corresponding changes for section 212.4(h)(6)(i)(B), to specify that ''Requiring a beneficiary or any person related to the beneficiary or acting on the beneficiary's behalf to sign a negotiable instrument or grant a security interest in any collateral constitutes the collection of a prohibited fee.''

Response: In response to the comment from the advocacy group, DHS is adding text to clarify that a prohibited fee may not be collected from a beneficiary ''or any person acting on the beneficiary's behalf'' at new 8 CFR 214.2(h)(5)(xi)(A) and (6)(i)(B). This language is meant to clarify that an employer may not circumvent these provisions by collecting an otherwise prohibited fee from a third party (such as a family member) acting on the beneficiary's behalf.

DHS declines to add the remaining suggested text to the final regulation regarding ''a negotiable instrument or grant a security interest in any collateral.'' While DHS agrees that prohibited fees may be collected in a variety of ways, including by requiring a beneficiary or someone acting on their behalf to grant a security interest in any collateral, the changes to 8 CFR 214.2(h)(5)(xi)(A) and (6)(i)(B) to prohibit any ''other fee, penalty, or compensation (either direct or indirect), related to the H–2[A/B] employment'' are sufficiently broad to cover this and similar types of scenarios. Additionally, while DHS agrees that requiring a beneficiary or someone acting on their behalf to sign a negotiable instrument (such as a promissory note) to pay a prohibited fee would not be permissible, the phrases ''agreement to collect'' and ''agreed to pay'' at 8 CFR 214.2(h)(5)(xi)(A)(*1*) and (6)(i)(B)(*1*), and 8 CFR 214.2(h)(5)(xi)(A)(*2*) and (6)(i)(B)(*2*), respectively, are sufficiently broad to cover this scenario and similar types of scenarios. There may be other fact patterns that could constitute the collection of or an agreement to collect a prohibited fee, and as such, codifying the technical terms ''negotiable instrument,'' ''security interest,'' and ''collateral'' is unnecessary.

e. Strengthening the Prohibited Fee Provisions

Comment: Citing reports and statistics showing the pervasiveness of prohibited fees, an advocacy group welcomed the Department's efforts to strengthen enforcement against such fees. Another advocacy group, citing a statement from an H–2A worker, similarly expressed strong support for DHS's efforts to provide more effective enforcement on recruitment fees and other unlawful fees. A union generally endorsed the Department's efforts to increase accountability for employers who use foreign recruiters and other third-party agents through the proposed fee provisions.

An advocacy group similarly expressed support for the proposal to strengthen the existing prohibition on and consequences for charging certain fees to H–2A workers. The commenter concurred with the Department's assessment that the consequences for employers charging prohibited fees could, in conjunction with the whistleblower protections, reduce disincentives for workers to report prohibited fees.

Citing various statistics and reports, a joint submission expressed broad support for DHS's proposals with respect to prohibited recruiter fees. The commenters agreed with the Department's rationale that targeting employers who charge prohibited fees would also help to target human and labor trafficking. The commenters concluded that the pervasiveness of trafficking in the H–2A program and the egregiousness of the associated crimes justify DHS's proposals and require the rule's swift implementation.

A union expressed strong support for DHS's proposal to eliminate the current regulatory exemptions that allow employers to avoid liability for the charging of prohibited fees. The union reasoned that the current regulations provide too many exemptions and eliminating them would make it more difficult for employers to avoid the consequences of their actions, as well as the actions of their agents.

An advocacy group expressed overall support for the proposed language to strengthen the applicability of the prohibited fees provisions while citing provisions that would narrow the circumstances in which petitioners could avoid revocation or denial. The group acknowledged that the ''very high standard'' established in the regulations would require petitioners to take an active role in ensuring that their employees do not charge prohibited fees, and that a ''mere lack of awareness'' would not allow petitioners to avoid consequences. Citing examples, the commenter reasoned that many H–2 employers rely on employees to recruit new H–2 workers, without taking any steps to ensure that these employees are not charging fees to their recruits. The commenter additionally reasoned that H–2 petitioners are already obligated to ensure their employees comply with various legal obligations, so compliance with the H–2 regulations on prohibited fees should not be an exception. While similarly describing the standards under this section of the rule, another advocacy group emphasized the need for employers to discourage their agents and employees from charging prohibited fees, rather than allowing them to claim ignorance of fees to avoid penalties. The group concluded that the proposed affirmative obligations for employers would improve and maintain the integrity of the H–2 program.

Response: DHS appreciates the broad support offered by these commenters for the changes made in relation to strengthening the H–2 prohibited fees provisions. Despite existing regulatory provisions against charging certain fees

to H–2 employees, incidents of workers reporting prohibited fees were levied on them at some point during the recruitment and hiring process remain pervasive, as the commenters note. The changes proposed in the NPRM to enhance the integrity of the H–2 programs and provide additional worker protections are adopted in this final rule with some clarifying revisions; any amendments to those proposals based on public comment are discussed in detail under the appropriate section.

Comment: Multiple commenters expressed concern with DHS's proposal to eliminate exceptions to prohibited fee-related denials or revocations that are based solely on a petitioner's reimbursement, pre-payment cancellation of a prohibited fee agreement, or notification to DHS, as summarized below.

A joint submission wrote that, under current regulations, employers must take remedial action as a condition of approval, which provides employers with a reasonable opportunity to resolve and remedy violations that occur without their knowledge or involvement. The commenters said that the proposal to remove such opportunities is ''unbalanced'' and penalizes employers disproportionately. Similarly, a business association wrote that the proposal is concerning to businesses and would cause unnecessary disruptions for well-meaning employers that rely on the H–2 program to meet their workforce needs. A research organization wrote that the proposal to remove the exception to denial when an employer reimburses the fee before filing the petition is ''unjustifiable,'' as it would create an automatic denial in every situation where a prohibited fee is identified anywhere in the chain of recruitment.

A few trade associations wrote that they supported strong enforcement against the unlawful collection of or threats to collect prohibited fees. However, they expressed concern that the proposal to eliminate these exceptions would prevent employers from accessing the program through correctional mechanisms (that is, through reimbursement or correctional action with DHS) whereby they can rectify situations in which the unlawful collection of fees occurred outside of their knowledge, or where it was ''impossible'' to prevent unlawful fee collection. A couple of these associations additionally wrote that DHS's proposal to eliminate the exceptions ''takes a sledgehammer to an issue that requires a scalpel.''

Another trade association similarly expressed support for enforcement against prohibited fee collection, but said that the proposal to eliminate the exemptions would prevent growers from accessing a program on which they depend due to reasons ''far outside of their control,'' including actors deliberately and deceptively acting contrary to the employer's direction not to collect prohibited fees. A few trade associations additionally reasoned that the collection or threatened collection of prohibited fees often occurs in home countries, and U.S. employers have limited control in such situations, so it would be inappropriate to impose serious penalties any time a prohibited fee is discovered. Another trade association added that the Department's ''shortsighted'' proposal would disregard the totality of the implications in such situations and would negatively impact both employers and employees, rather than holding the parties conducting the unlawful collection of fees accountable.

A business association wrote that the Department did not consider other alternatives to removing the current exception, such as retaining the exception to avoid petition revocation or denial only if workers are fully reimbursed and where the petitioner had no knowledge of the unlawful fee, and only denying or revoking a petition for egregious cases where employers knowingly charged or threatened a prohibited fee. A joint submission suggested that the Department consider making an ''exception contingent on the employer attesting, under penalty of perjury, that it had no actual or constructive knowledge of the fee scheme.'' The commenter further suggested that the Department make this exemption inapplicable if there is evidence demonstrating that the petitioner had direct involvement or actual knowledge of the scheme or benefitted from it financially.

Response: DHS declines to make any revisions based on these comments to its proposed strengthening of the H–2 prohibited fees provisions. The proposed changes in the NPRM, and now finalized in this rule, are meant to address, in part, two major vulnerabilities with respect to current regulatory provisions requiring reimbursement of beneficiaries as a condition of approval. First, DHS adopts these strengthened provisions in recognition of the potential harm to beneficiaries and in some cases their families who may have to borrow or otherwise incur debt to pay prohibited fees. Indebted noncitizen workers are more vulnerable to exploitation and coercive actions of unscrupulous employers or agents working on the employer's behalf. So, despite later reimbursement of the fees charged to these workers, significant damage may have already occurred. Second, in finalizing these new provisions, DHS recognizes that under the current, long-standing regulatory framework, reports of prohibited fees paid by beneficiaries remain prevalent.[33] Current provisions allow petitioners to avoid any liability for these types of fees being charged in cases where they have reimbursed the worker, or if the worker is unavailable, they claim reasonable efforts have been made to locate the worker.

Though reimbursing workers charged prohibited fees is vital, and provisions adopted in this final rule require fully reimbursing such workers or their designees, DHS's intent here is to maximize incentives for petitioners to take affirmative measures to prevent workers from being charged or threatened with these fees in the first instance. The commenters' suggestions that DHS should maintain the current exceptions to prohibited fee-related denials or revocations that are based solely on a petitioner's reimbursement, pre-payment cancellation of a prohibited fee agreement, or notification to DHS, do not adequately recognize the harm already done to affected beneficiaries by having to come up with the funds to pay those fees upfront. Similarly, the commenters' suggestions to make an exception for petitioners who have no knowledge of or direct involvement in the prohibited fees do not adequately recognize the harm already done to affected beneficiaries, and furthermore, may even incentivize petitioners to remain ignorant about prohibited fee practices affecting their workers. These suggestions also do not adequately address the inadequacies of the current regulatory provisions which focus solely on reimbursement as the appropriate remedy rather than providing incentives for a petitioner to prevent these violations from occurring in the first place.

f. Similar Employment Services

Comment: Multiple trade associations expressed concern about a lack of clarity around ''similar employment services.''

[33] See, *e.g.,* GAO, GAO–10–1053, ''Closed Civil and Criminal Cases Illustrate Instances of H–2B Workers Being Targets of Fraud and Abuse'' (2010) (describing various instances when employer charge excessive fees), *https://www.gao.gov/assets/gao-10-1053.pdf;* GAO, GAO–15–154, ''Increased Protections Needed for Foreign Workers'' (2015) (specifying instances of abuses during the recruitment process, including the charging of prohibited fees), *https://www.gao.gov/assets/gao-15-154.pdf.*

Some of these associations regarded the lack of a definition for ''similar employment services'' as concerning given the Department's push for employers to recruit from Northern Central American countries through their Ministries of Labor. A few of the associations asked whether ministries of labor would count as ''similar employment services.'' Providing examples from recent cases of illegal activity within a Northern Central American ministry of labor and the Georgia State Workforce Agency, the commenters added that the vague provision surrounding ''similar employment services'' is concerning for employers.

Response: DHS thanks these commenters for their submissions regarding clarification for the phrase ''similar employment services.'' Noting that this phrase has long been included in DHS H–2A and H–2B regulations, it is reasonable to amend these provisions to offer clarification for what may constitute ''similar employment services'' in the context of the strengthened prohibitions on charging H–2 workers certain fees. Based on feedback from commenters, DHS is amending its regulatory provisions at new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) to now read, ''The term 'similar employment service' refers to any person or entity that recruits or solicits prospective beneficiaries of the [H–2] petition.'' In accordance with this clarification, this includes recruitment or employment services offered by private, nongovernmental individuals and entities, quasi-governmental entities (such as private entities working jointly with ministries of labor), and governmental entities (such as ministries of labor).

g. Due Diligence Standard

Comment: An advocacy group welcomed DHS's clarification around the petitioners' responsibility to conduct ''due diligence'' to ensure that recruiters and other agents in their labor supply chain are not charging prohibited fees. Another advocacy group wrote that workers were generally optimistic that the due diligence provisions would cause employers to be more cautious in the recruitment process, particularly with regard to fees charged by third-party recruiters and their own employees.

A joint submission generally acknowledged that under the proposed rule, H–2 employers would be responsible for conducting due diligence to ensure that their recruiters and other employees do not charge workers unlawful recruitment or other fees. The commenters said that the proposed provisions would strengthen the enforcement of prohibitions on charging unlawful fees, which severely harm workers.

Response: DHS appreciates the support from these commenters. H–2 employers are responsible for ensuring that individuals and entities that recruit, or that otherwise act on behalf of the employer and/or the recruiter, comply with all H–2 program requirements, including the prohibition on collection of fees related to H–2 employment. Based on feedback requesting clarification as to what constitutes due diligence that DHS received on its proposed rule, DHS is revising the provisions introduced in the NPRM as discussed in detail below.

Comment: Numerous trade and business associations and a professional association expressed concern with the requirement that employers demonstrate to USCIS that they engaged in ''due diligence'' to prevent the collection of prohibited fees on the basis that the provision lacks a clear explanation for satisfying the requirement and is overly broad as to what ''due diligence'' would entail. A trade association urged the Department to address this concern in the final rule.

A joint submission wrote that the provisions do not offer a definition of ''due diligence'' or provide examples of what this requirement would look like, except to say that a written contract ''by itself'' is insufficient. The commenters said that the Department's attempt to mitigate uncertainty through this statement is inadequate to protect against the provision's overreach. The commenters wrote that, as the rule does not adequately apprise the regulated community as to its obligations, the rule is impermissibly vague and violates due process.

A couple of trade associations similarly remarked that the proposed rule is impermissibly vague and fails to define what specific objective steps must be taken to fulfill the ''due diligence'' requirement. The associations said that the proposed rule's failure to discuss the applicable standard of proof and failure to establish an objective standard deprive the public of the opportunity to comment on the proposal.

A trade association reasoned that the ''broad and vague'' wording around due diligence would leave employers with a lack of understanding of agency expectations and would create challenges for employers to avoid penalties despite their ''good faith efforts'' to adhere to due diligence obligations. The association additionally wrote that vague due diligence requirements without parameters would prevent the application of a consistent standard and raise the risk of penalization for employers depending on how the agency interprets the requirement in each situation.

Another association wrote that the proposed due diligence standard is unreasonably broad and unattainable such that employers would ''never be able to reasonably meet its conditions.'' The association further remarked that while the Department explains that a lack of knowledge of an incident or even explicit contract terms prohibiting such fees are not sufficient to meet the ''due diligence'' standard, it does not explain what measures it would deem sufficient.

A research organization stated that, under the proposed rule, ''a mere lack of awareness'' is no excuse for employers, yet the rule does not offer advice to employers on what constitutes ''due diligence'' to avoid mistakes or the collection of prohibited fees.

Response: DHS appreciates the attention paid by commenters on its proposed provisions on prohibited fees and reiterates its commitment that employers conduct due diligence to ensure all parties acting on the employers' behalf comply with all H–2 program requirements. In light of commenters' calls for additional clarity regarding the due diligence standard, however, the Department is revising proposed 214.2(h)(5)(xi)(A)(*2*) and 214.2(h)(6)(i)(B)(*2*) to offer greater clarification and simplification. Specifically, DHS is foregoing the proposed ''did not know and could not, through due diligence, have learned'' language and instead requiring the petitioner to demonstrate ''ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by such third parties throughout the recruitment, hiring, and employment process.'' This revision is intended to clarify what ''due diligence'' means and better aligns the regulatory language at new 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*) with new 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*).[34] This revision also

[34] As will be discussed below, DHS is making corresponding revisions to new 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*) to clarify the standards under which a petitioner will be held accountable for its own prohibited fee-related violations or those of its employees. As finalized, new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1) will require the petitioner to demonstrate that it ''made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its employees throughout the recruitment, hiring, and employment process.'' This language replaces the

more clearly explains the petitioner's obligation to not only prevent prohibited fee collection or agreement, but also an ongoing obligation to prevent and learn of such fees, given that such fees could be collected or agreed upon at various points in time during the recruitment, hiring, or employment process. Although DHS is replacing ''due diligence'' with ''ongoing, good faith, reasonable efforts'' in light of comments requesting clarity on the ''due diligence'' standard, DHS emphasizes that is not a substantive change as ''due diligence'' and ''ongoing, good faith, reasonable efforts'' in this context require the same diligent level of effort by the petitioner.[35]

Further, new 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*) require the petitioner to take immediate remedial action as soon as it becomes aware of the payment of or agreement to pay the prohibited fee. While this requirement was initially proposed for 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*), it was not initially proposed for 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*), and is now included in the final regulatory text to better ensure parity between 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*), and 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*). These changes also are responsive to comments about the importance of ensuring that the petitioner take immediate remedial action to resolve and remedy violations, which can include immediate termination of the relationship with the recruiter or agent (in addition to full reimbursement to the beneficiary or the designee). DHS agrees with these comments and, as reflected by these changes, emphasizes that a petitioner should take immediate remedial action as soon as it becomes aware of the payment of or agreement to pay the prohibited fee, regardless of whether the prohibited fee payment or agreement to pay the prohibited fee was made to the petitioner, or to its agent, attorney, employer, facilitator, recruiter, or similar employment service, or joint employer as applicable.

To summarize, under new 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*), if it is determined that the beneficiary paid or agreed to pay a prohibited fee related to the H–2 employment to any agent, attorney, employer, facilitator, recruiter, or similar employment service, or any joint employer as applicable, whether before or after the filing of the H–2 petition, the petition will be denied or revoked on notice unless the following factors are demonstrated through clear and convincing evidence:

(1) The petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its employees throughout the recruitment, hiring, and employment process;

(2) The petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; and

(3) The petitioner fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, it fully reimbursed the beneficiaries' designees.

Overall, these changes clarify what specific steps a petitioner must take to avoid liability for prohibited fee collection or agreement by a third party. These changes should help alleviate the commenters' concerns about the proposed provisions being overly broad, vague, unattainable, or having undefined standards. To provide further clarity, DHS discusses additional non-exclusive examples of how a petitioner may demonstrate that it made ongoing, good faith, reasonable efforts in another comment response below. DHS assures petitioners that the intent of the ''ongoing, good faith, reasonable efforts'' requirement is to ensure the integrity of the H–2 programs and to provide worker protections by better ensuring petitioners exercise ongoing reasonable efforts, based on the totality of the circumstances, to prevent the payment or collection of prohibited fees.

Comment: A trade association said that placing the burden on employers to root out prohibited fee collection among various actors, is ''unfairly strict and impractical.'' The group wrote that, under the proposed rule, employers could be held responsible for monitoring actions hundreds or thousands of miles away. A few individual commenters remarked that ''forcing'' employers to show due diligence would be ''onerous'' and suggested that this work be carried out by enforcement on recruiters. An individual commenter stated that the provisions to deny or revoke H–2 petitions based on undefined standards are ''heavy-handed and arbitrary.'' The commenter wrote that employers would have to go to ''extreme lengths'' to show due diligence that they worked to prevent prohibited recruitment fees under the proposed provisions. A professional association similarly regarded the proposed rule's standards as ''extremely high'' and ''relentless'' with respect to employer requirements, penalties, and limited opportunities for relief.

A trade association wrote that placing the burden on petitioners to ''police'' the payment of prohibited fees would be unreasonable and unfair. The association remarked that it would not be feasible for petitioners to conduct every step of recruitment themselves and thus, they must rely on foreign recruiters. The association, along with another trade association, said that, as proposed, DHS unfairly places the burden on petitioners to prevent the collection of prohibited fees and issues unjust consequences if they fail.

Other commenters claim that, by removing the knowledge requirement from the violation and abolishing the current safe harbor provision, the Department is proposing a ''strict liability system'' in which the mere allegation of the payment or solicitation of fees results in the petitioner being deemed guilty and then the petitioner must prove by an extraordinarily high burden that he is innocent. A trade association wrote that placing ''strict liability'' on U.S. employers for actions taken by a foreign recruiter is not an appropriate solution. Another association said that the broadly defined due diligence requirement would amount to ''strict liability.''

A joint submission wrote that employers would be limited in their ability to prevent wrongdoing by third parties, and they cannot guarantee compliance with the rules at all times by all persons. While acknowledging that the risk to employers may increase with the scale of the agent or facilitators they hire, the commenters warned that the proposed rule may have the opposite of its intended effect and instead incentivize employers to hire smaller, less reputable, less ethical agents or facilitators as they may be perceived to be easier to monitor, which would result in less compliance and more worker exploitation.

''significant efforts'' language in proposed 8 CFR 214.2(h)(5)(xi)(A)(*1*), 8 CFR 214.2(h)(6)(i)(B)(*1*), and also the proposed ''due diligence'' language in proposed 8 CFR 214.2(h)(5)(xi)(A)(*2*), 8 CFR 214.2(h)(6)(i)(B)(*2*). These changes clarify that the proposed ''significant efforts'' and ''due diligence'' standards were not meant to be materially different from each other.

[35] One dictionary definition of ''due diligence'' is ''action that is considered reasonable for people to be expected to take in order to keep themselves or others and their property safe.'' Cambridge Dictionary, ''Due Diligence,'' *https://dictionary.cambridge.org/us/dictionary/english/due-diligence; see also* Merriam Webster Dictionary (defining ''due diligence'' as ''the care that a reasonable person exercises to avoid harm to other persons or their property''), *https://www.merriam-webster.com/dictionary/due%20diligence;* Black's Law Dictionary (12th ed. 2024) (''The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.'').

A professional association expressed opposition to the prohibited fee provision that would impose liability on employers for the actions of third parties. The association stated that employers would have to take affirmative steps to demonstrate that the third party was not engaging in prohibited conduct, or else be liable for the associated penalties. The association warned that such punitive measures would disincentivize employers to participate in the H–2 program to avoid the risk of liability for actions outside of their control.

While articulating the need for petitioners to take steps to monitor their supply chains, a professional association voiced concern that employers cannot reasonably know everything that is happening. The association said that petitioners should not be held liable for the actions of third parties if they took immediate remedial action upon learning about a potential violation.

Another trade association expressed concern that employers acting in good faith and engaging recruitment services from vetted entities would not be able to preclude the possibility of prohibited fees by any one employee of a third-party entity and, under the proposed provisions, would effectively be barred from the program no matter what preventative measures they took. The association urged the Department to be more judicious in considering what standards are fair to place on the regulated community. The association concluded that the Department should consider ''reasonable'' alternative measures, though offering no specific proposals, to reduce instances of prohibited fee payments while allowing employers to protect workers, rather than subjecting them to ''strict liability'' for unknown actions of third parties.

A couple of trade associations expressed concern that employers would be held liable for actions by individuals who are not in contractual privity with them. The associations also stated that the Department's proposal fails to account for varying circumstances and different actors in the context of the collection of prohibited fees. For example, the associations indicated that under the proposed rule, employers would be liable for actions beyond their control, such as the collection of improper fees by foreign government officials. In considering these issues, the associations regarded DHS's proposal to punish employers for actions by third parties beyond their control, including those with whom they have no contractual relationship, as ''imprudent'' and ''unreasonable.''

Response: DHS disagrees with commenters' statements that the Department is being unfair, impractical, unreasonable, or imprudent in ensuring the burden is on petitioners to properly monitor and assume responsibility for the actions of third parties engaging in recruitment activities on its behalf. DHS acknowledges the comments that petitioners cannot always conduct each step of the recruitment process themselves and therefore often rely on foreign recruiters, agents, or other third parties to do so. Nevertheless, it is reasonable to place the burden on the petitioner to ensure that prohibited fees are not collected by such third parties. The petitioner, in hiring recruiters or other third parties, is in a position to condition the hiring of such parties upon the latter monitoring the activities of those further down the recruitment and hiring chain, even if the latter are located outside of the United States. In this regard, it is in the mutual interest of petitioners and recruiters to ensure against denials of petitions based on payment of prohibited fees. Furthermore, DHS reminds these commenters of the long-standing regulatory provisions against prohibited fees being charged to H–2 workers by foreign recruiters. It is therefore reasonable to expect that petitioners who currently work with foreign recruiters already have at least some practices in place in which to effectively monitor the activities of those recruiters and ensure compliance with H–2 regulations. In other words, the requirement to oversee or monitor the charging of prohibited fees is not new with the NPRM or with this final rule.

This final rule does adopt measures to better ensure petitioners are liable for the actions of the third parties they engage for recruitment services. It is possible, however, for petitioners to avoid liability and possible consequences of a finding of prohibited fees charged by third parties if they demonstrate through clear and convincing evidence that they made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by such third parties throughout the recruitment, hiring, and employment process; they took immediate remedial action as soon as it became aware of the payment of the prohibited fee or agreement; and that all affected beneficiaries or, in certain circumstances, their designees have been fully reimbursed. *See* new 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*). Therefore, DHS disagrees with some commenters' characterizations of these provisions as creating a new ''strict liability'' standard that would effectively deny a petitioner ''no matter what preventative measures they took.'' To the contrary, the new provisions incentivize petitioners to exercise ongoing, good faith, reasonable efforts, based on the totality of the circumstances, to prevent the payment of prohibited fees in the first place.

Finally, regarding the concerns that these provisions may incentivize employers to hire smaller, less reputable, less ethical agents which would result in less compliance and more worker exploitation, or may even disincentivize employers from participating in the H–2 program, such an assertion is speculative. For the reasons stated above, DHS assumes that good faith employers and agents have and, under this rule, will continue to have a strong incentive to ensure compliance with the terms and conditions of the H–2 program.

Comment: Several commenters who opposed the proposed ''due diligence'' provisions expressed specific concerns about the negative impact these provisions would have on H–2 workers. For instance, a research organization articulated its concern that the proposed rule would not be a rights-enhancing provision for the impacted population. The organization further remarked that the rule would be unfair to workers who would lose their ability to work in the United States for an employer who wants to rectify the infraction. The commenter urged DHS to consider what would happen to workers who are unjustly denied a visa under the proposed rule and concluded that restricting the H–2 visa would lead to unauthorized immigration.

Another commenter, along with a joint submission, further remarked that the nature of the proposal is such that it would discourage workers from reporting fee violations for fear of losing employment or jeopardizing their relationships with the employer.

Other commenters said that the rule, as proposed, would harm domestic and H–2A farm workers by reducing employment opportunities and diverting employer resources away from workers by making employers spend more resources to prove that prohibited fee collections or agreements did not occur.

Response: DHS appreciates the commenters' concerns about the potential negative effects of the proposed changes on H–2 workers. DHS anticipates that other provisions in this rule, such as the new whistleblower protections, grace periods, and permanent portability provisions, will

provide significant relief to affected workers by increasing their ability to seek new employment and potentially lessening the impact of reporting fee violations or otherwise jeopardizing their relationships with an employer.

With respect to the comment that the prohibited fee provisions of this rule would lead to unauthorized immigration, DHS disagrees with this assertion, which is speculative and assumes that participants in the H–2 program will be inclined to violate immigration laws rather than comply with the terms and conditions of the H–2 program. Regarding the comment asserting that the provisions would reduce employment opportunities and divert employer resources away from workers by making employers spend more resources to prove that prohibited fee collections or agreements did not occur, the commenter did not provide support for this assertion. While DHS anticipates this rule may result in some increased costs for employers in instances where there is evidence that prohibited fees may have been paid or agreed to, the commenter provides no basis for its claims that the costs in these limited instances will cause additional harm to workers, and the rule does not otherwise create any new reporting or evidentiary requirements for employers related to prohibited fees. Any employer costs incurred to prevent prohibited fees are not new costs imposed by this rule as the regulations this rule replaces already prohibits the collection of such fees and as such, petitioners were reasonably expected under the previous rule to have taken appropriate steps to ensure against the collection of such fees.

Comment: In light of concerns with respect to the proposed ''due diligence'' standard, a business association requested that the Department provide a definition of ''due diligence'' and asked DHS to clarify what documentation would suffice to demonstrate a petitioner's efforts to meet this standard. The association requested that the Department consider allowances for situations in which a petitioner is not aware of an improper action by an agent, despite conducting due diligence and including expectations within the contract, and asked what courses of action are available for petitioners when a third party is not responsive.

A trade association urged the Department to define ''measurable, reasonable 'affirmative steps''' employers could take to prevent the collection of prohibited fees while recognizing the good practices that employers already use. The association also recommended that the Department consider which mitigating factors would be appropriate to avoid debarment. A joint submission similarly requested that DHS articulate specific guidance around due diligence, such as specifying whether it is sufficient to require agents and facilitators to ask workers during intake whether they have paid or been solicited to pay fees, or have workers sign a written attestation that they have not paid fees.

A trade association suggested that DHS clarify that an employer's documented, good faith vetting of third parties would allow them to avoid liability for conduct outside of their knowledge. The association provided examples of this due diligence, such as written inquiries with responses from the third party, requests to review employment documents, and payment ledgers between visa applicants.

While discussing the due diligence provisions, a member farm organization stated the need to establish reasonable expectations as to what an employer can do from the United States when recruiters may be ''hundreds and even thousands of miles away.'' The group requested that DHS reconsider what it considered to be overly strict provisions and work with agricultural employers to find a ''healthy middle ground'' that benefits all parties.

Some advocacy groups responded to DHS's request for comment regarding the types of due diligence activities that employers should be required to undertake. The advocacy groups suggested that employers:

- Create mechanisms to communicate with workers directly during the recruitment process and promptly investigate any reports of prohibited fees;
- Seek out ways to be available to workers during the recruitment process and create procedures for addressing abuses promptly (for example, through a designated Compliance Officer who reports to the employer and investigates and addresses unlawful fee collection);
- Take immediate remedial action in the event a petitioner discovers that a recruiter or agent has charged or entered into an agreement to charge a prohibited fee (including, at a minimum, full reimbursement and immediate termination of the relationship with the recruiter or agent);
- Implement rigorous vetting and monitoring procedures, such as through: (1) obtaining the agent's financial records, documentation of compliance with applicable laws, and records related to their prior recruitment of H–2 workers; (2) identifying agents or intermediaries upon which recruiters rely, and creating processes to identify agents or intermediaries not voluntarily disclosed; (3) conducting periodic audits of recruiters' practices and finances and communicating policies against recruitment fees; and
- Ensure that all agreements with recruiters provide for a realistic fee structure that will not incentivize recruiters to pass costs to workers to remain profitable.

The other advocacy group endorsed the above commenters' recommendations in their submission and wrote that the first recommendation would be especially critical for the proposed rule to benefit workers.

A professional association expressed concerns with the examples of relevant documentation provided in the NPRM, including ''evidence of communications showing the petitioner inquired about the third party's past practices and payment structure to ensure that it obtains its revenue from sources other than the workers and/or any documentation that was provided to the petitioner by the third party about its payment structure and revenue sources.'' In this regard, the association said it should not be mandated for disclosure to DHS ''for a [f]ishing expedition'' and that DHS must show cause on an individual basis prior to soliciting this type of ''proprietary'' information.

Response: DHS acknowledges the concerns raised by these commenters regarding the potential need for additional clarity as to the steps employers should implement to exercise appropriate due diligence. As clarified elsewhere, DHS is responding to feedback on its NPRM by revising and clarifying the proposed due diligence provisions. Specifically, DHS is removing the term ''due diligence'' from the regulatory text to instead state that petitioners must have made ongoing, good faith, reasonable efforts throughout the recruiting and employment period to prevent and learn of the collection of a prohibited fee. DHS emphasizes again that this revision is not intended to be a less stringent standard than the proposed due diligence requirement, but instead the change is offered as a more descriptive process than the provision included in the NPRM.

DHS is particularly appreciative of those commenters who provided specific examples in response to the NPRM's request for public input in the NPRM. Indeed, the Department anticipated some interest and feedback on this provision, and in the NPRM explicitly requested public input regarding specific types of evidence that may be relevant and available to meet the proposed changes. 88 FR 65040,

65055 (Sept. 20, 2023). Based on these comments, DHS is providing the following examples of non-exclusive factors that may demonstrate whether a petitioner has made ongoing, good faith, reasonable efforts to prevent such fees. These factors may include, but are not limited to (1) whether the petitioner was providing compensation to the third party entity such that the third party would have no incentive to pass on costs to workers; (2) whether the petitioner had procedures to contact and monitor the performance of relevant parties in the recruitment chain, whether located in the United States or abroad; and (3) whether the petitioner has a mechanism to communicate directly with workers during and after the recruitment process and properly investigate any reports of prohibited fees. As noted above, the determination under new 214.2(h)(5)(xi)(A)(*2*) and 214.2(h)(6)(i)(B)(*2*) will be made on a case-by-case basis, taking into consideration all of the facts presented.

To show that a petitioner was providing compensation to the third party entity such that it would have no incentive to pass on costs to workers, the NPRM provided examples of documentation that could be submitted including ''communications showing the petitioner inquired about the third party's past practices and payment structure to ensure that it obtains its revenue from sources other than the workers and/or any documentation that was provided to the petitioner by the third party about its payment structure and revenue sources.'' 88 FR 65040, 65054–55 (Sept. 20, 2023). Contrary to a commenter's claim that ''[t]his type of information is proprietary and should not be mandated to be disclosed to DHS for a [f]ishing expedition,'' these are merely examples of the types of evidence a petitioner may submit to demonstrate due diligence (which DHS now calls ''ongoing, good faith, reasonable efforts''). New 214.2(h)(5)(xi)(A)(*2*) and 214.2(h)(6)(i)(B)(*2*) do not mandate the submission of any specific document nor the disclosure of any specific financial or proprietary information. Further, the petitioner may redact or sanitize a document in a manner that the document is still sufficiently detailed and comprehensive yet does not reveal sensitive financial or proprietary information. These clarifications should alleviate the petitioner's concerns about providing proprietary or sensitive financial information to DHS. DHS therefore disagrees with the commenter's suggestion that in providing these examples in its NPRM as to evidence that may meet the proposed due diligence requirement that the Department would solicit proprietary information to engage in a ''[f]ishing expedition.''

To show what procedures a petitioner has in place to properly vet and monitor the recruiters, agents, or other third parties that it utilizes to recruit H–2 workers, commenters provided various examples such as: written inquiries with responses from the third party, requests to review relevant employment documents, evidence that agents/facilitators asked workers during intake whether they have paid or been solicited to pay fees; evidence that the petitioner asked recruiters to identify agents or intermediaries upon which the recruiters rely and created processes to identify agents or intermediaries not voluntarily disclosed; and evidence that the petitioner conducted periodic audits of recruiters' practices and finances and communicate policies against recruitment fees. DHS agrees with these examples, and notes that they are non-exhaustive examples of the types of documentation a petitioner may submit under this factor; no one document will be dispositive, and all of the circumstances will be considered as a whole. DHS reminds petitioners that, under new 214.2(h)(5)(xi)(A)(*2*) and 214.2(h)(6)(i)(B)(*2*), a written contract between the petitioner and the third-party agent, attorney, facilitator, recruiter, similar employment service, or member employer stating that such fees were prohibited will not, by itself, be sufficient to demonstrate reasonable efforts. While the language of such a contract may be considered, additional documentation must be provided.

To show whether the petitioner has a mechanism to communicate directly with workers during and after the recruitment process and promptly investigate any reports of prohibited fees, commenters suggested that a petitioner could submit evidence that it has a designated Compliance Officer who reports to the employer and investigates and addresses unlawful fee collection. A commenter further suggested that a petitioner could submit evidence that they require their recruiters to provide the Compliance Officer's contact information to workers as part of the initial job offer, as well as information about their rights in the recruitment process and assurances against retaliation for reporting any concerns. Again, these are just illustrative examples of the types of documentation a petitioner may submit under this factor; no one document will be dispositive, and all of the circumstances will be considered as a whole.

Comment: An advocacy group and a union supported the proposed specification that the prohibited fee provisions would also apply to joint employers in the H–2A context and any employers in addition to the petitioner in the H–2B context.

Response: DHS appreciates these commenters' support and adopts the proposed specifications that prohibited fee provisions apply to joint employers in the H–2A context, and any employer if different from the petitioner in the H–2A and H–2B context, in this final rule.

Comment: A few trade associations indicated that they cannot support the proposed regulations regarding joint employers and due diligence as proposed. These commenters said that while they support employers performing due diligence, an innocent member of an association of U.S. agricultural producers should not have their enterprise jeopardized by a ''bad actor'' within the association.

Response: As noted by the commenters, the provision at new 8 CFR 214.2(h)(5)(xi)(A) prohibits fees collected by any joint employer including a member employer if the petitioner is an association of U.S. agricultural employers. Further, under new 8 CFR 214.2(h)(5)(xi)(A)(*2*), a USCIS determination that a beneficiary has paid or agreed to pay such a fee to a member employer will result in a denial or revocation unless the petitioner (in this case the association U.S. agricultural employers) can establish that it qualifies for the limited exception in that provision, which among other things, requires evidence that it engaged in ongoing, good faith, reasonable efforts to prevent and learn of its member employers' collection of prohibited fees. It is reasonable to expect that any petitioner filing on behalf of both itself and joint employers, including an association of U.S. agricultural employers acting as petitioner, will take steps to ensure that the representations it makes on other entities' behalf are accurate, and that such entities in fact comply with program requirements.[36]

DHS recognizes that, under the new rule, a member employer who complies with H–2 program requirements with

[36] When filing the Form I–129 petition, an association of agricultural employers certifies to the accuracy of the information in the petition, including the representations it makes on behalf of its joint employers, and agrees to the conditions of H–2A employment. Each joint employer also signs the petition, assuming responsibility for the representations in the petition and agreeing to the conditions of H–2A eligibility.

respect to its own workers could nonetheless be impacted by the prohibited fee violation of a different employer listed on the same petition. Specifically, such a prohibited fee violation may ultimately lead to denial or revocation of the entire petition if the petitioner is unable to demonstrate eligibility for the narrow exception. It is worth noting, however, that the 1- to 4-year denial period following a denial or revocation for prohibited fees would apply to the petitioner—that is, the U.S. association of agricultural producers—and not to each member employer listed as a joint employer on the petition. Regardless, DHS notes that member employers have the option to file individual petitions, and it is DHS's expectation that employers will exercise care in determining with which, if any, entities they will file jointly.

Comment: Several commenters cited examples of prohibited fees being charged by government officials of countries where the United States government has helped to promote recruitment of H–2 workers. The commenters provided these examples to ask for more clarity regarding the due diligence standard.

Response: DHS acknowledges the concerns regarding instances of prohibited fees by some ministry of labor officials in foreign governments which the United States government partnered with to promote the H–2 programs. DHS clarifies that it may consider whether the petitioner used one of these recruitment systems as a relevant factor in determining whether the petitioner engaged in ongoing, good faith, reasonable efforts. However, the fact that a petitioner used a recruitment system developed in partnership with the U.S. government will not by itself excuse an employer's failure to engage in the requisite reasonable and ongoing efforts to ensure against the payment of such prohibited fees. In all cases, DHS will make its determination with respect to the question of prohibited fees based on all of the facts presented.

Comment: Regarding the due diligence standard, a joint commenter asked whether it would matter if ''the agent or facilitator has been certified by a third-party such as the Equitable Food Initiative, the U.N. Global Compact, or other organizations.''

Response: DHS declines to address third party certifications, as the commenter did not provide any additional information about the referenced certification programs nor demonstrate these programs' relevance to how a petitioner might demonstrate due diligence, now phrased as ''ongoing, good faith, reasonable efforts,'' under new 214.2(h)(5)(xi)(A)(*2*) and 214.2(h)(6)(i)(B)(*2*).

Comment: A professional association recommended that, instead of placing the burden on employers to perform due diligence, DHS should provide safe harbor for employers who use recruiters included in DOL's H–2B Foreign Labor Recruiter List.

Response: DHS declines to adopt the suggestion to provide safe harbor for employers who use recruiters included in DOL's H–2B Foreign Labor Recruiter List. As stated on DOL's Foreign Labor Recruiter List web page, by providing the information on this list, DOL ''will be able to verify whether a recruiter is recruiting for legitimate H–2B job opportunities in the United States.'' [37] However, the web page expressly states that DOL ''does not endorse any foreign labor agent or recruiter included in the Foreign Labor Recruiter List, nor does inclusion on this list signify that the recruiter is in compliance with the H–2B program.'' DHS disagrees, therefore, that use of recruiters from the list is a sufficient factor to provide a safe harbor for petitioners, in part because DOL does not endorse any foreign labor agent or recruiter included in the list and inclusion on the list does not signify that the recruiter is in compliance with the H–2B program, and because DHS does not verify this recruiter list or vet any of the individual recruiters listed therein.

Comment: An advocacy group suggested that the Federal Government provide more information about and control over the H–2 hiring process overall and work to develop a multilingual, accessible platform providing access to vetted employers and verified job offers. While quoting a member of the affected population, the commenter reasoned that such an application would eliminate the need for recruiters, thereby eliminating prohibited recruitment fees.

Response: DHS is not implementing this suggestion in this final rule. While appreciative of the goal of eliminating prohibited recruitment fees, it is not the intent of this final rule to eliminate the use of recruiters. Nor does DHS intend to be involved in matching or otherwise facilitating recruitment between an H–2 worker and a prospective H–2 employer. However, nothing in this rule prevents the private, nonprofit, or voluntary sector from creating such a platform.

[37] DOL, Employment and Training Administration, ''Foreign Labor Recruiter List,'' *https://www.dol.gov/agencies/eta/foreign-labor/recruiter-list.*

h. Legal Authority and Burden of Proof Relating to the Requirements on Prohibited Fees

Comment: Some trade associations said that DHS's proposal to make employers ''strictly liable'' for any payment of, or any allegation of payment of, an improper fee by a worker lacks statutory authority. The commenters went on to say that the proposal fails to establish any clear or objective standard, thus denying a petitioner notice of what conduct is required to satisfy the law and depriving the public of an opportunity to comment on the complete proposal.

Response: DHS disagrees that it lacks the authority to promulgate its regulations governing the H–2 programs, including the provisions related to prohibited fees. The Legal Authority sections of both the NPRM and this final rule clearly address the DHS Secretary's authority to administer and ensure compliance with the immigration laws and to issue regulations necessary to carry out that responsibility. Specific to the H–2 programs, the HSA transferred to DHS the authority to by regulation set the condition for the admission of H–2 nonimmigrants and to adjudicate petitions for H–2 nonimmigrant status including establishing the form and content of such petitions. *See* INA 214(a)(1) and (c)(1), 8 U.S.C. 1184(a)(1), (c)(1), and INA 103(a)(1), (a)(3), 1103(a)(1), (a)(3),; and, with respect to the H–2B classification, INA 214(c)(14)(A), 1184(c)(14)(A); *see also* 6 U.S.C. 202(3), 271, 557. The HSA also established the Bureau of Citizenship and Immigration Services, now USCIS, and transferred to USCIS the authority over petitions adjudicated by service centers (including H–2 nonimmigrant petitions), establish policies for performing that function, and set national immigration services policies and priorities. *See* HSA secs. 451(a)(3), (b); 6 U.S.C. 271(a)(3), (b). Reading the expansive delegated authority over immigration and H–2 programs, including its administration, to include the authority to strengthen the prohibited fee provisions (that have been a part of the H–2 regulatory scheme since 2008),[38] and thus prevent

[38] In a response to public comments on the 2008 H–2A final rule, DHS explained that it has plenary authority to determine conditions for the admission of all nonimmigrants, including H–2A workers. 73 FR 76891,76899 (Dec. 18, 2008) (''Under section 214(a) of the INA, 8 U.S.C. 1184(a), DHS has plenary authority to determine the conditions of admission of all nonimmigrants to the United States, including H–2A workers. It is within the authority of DHS to bar the payment by prospective workers of recruitment-related fees as a condition of an alien worker's admission to this country in H–

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the exploitation of H–2 workers, is the best reading of that authority, as it is consistent with the plain language of the statutes and will enhance the integrity of the H–2 programs and thus further this important statutory purpose.[39]

DHS also disagrees with other assertions from the commenters. Firstly, the commenters fail to recognize that the provisions finalized in this rule do not impose strict liability on petitioners but provide limited ways for petitioners to avoid liability for prohibited fees. The ways in which petitioners may avoid potential denial or revocation of a petition differ depending on whether the beneficiary was charged by the petitioner itself or one of its employees, or whether the beneficiary paid or agreed to pay a third party recruiting on behalf of the petitioner. *See* new 8 CFR 214.2(h)(5)(xi)(A), 214.2(h)(6)(i)(B). *See also* the detailed description of these provisions in the comment response below. As noted above, this final rule in general, and these provisions in particular, are being promulgated in order to ensure the integrity of the H–2 programs and worker protections. Furthermore, DHS disagrees that it has deprived the public of the opportunity to comment on the complete proposal, and notes that the NPRM expressly sought comments on all of DHS's proposals, and explicitly requested public input on different aspects of several of its proposals, including specifically on the types of evidence that may be relevant to meet the proposed due diligence requirement and the clear and convincing standard that the petitioner did not know or could not have known of a third-party charging beneficiaries prohibited fees. DHS is making revisions to several of its proposals based on the comments it received on the NPRM, as discussed in these comment responses and in Section III which shows that petitioners understood DHS's proposals pertaining to the prohibited fee provisions and were able to provide salient and helpful feedback.

Comment: Several commenters, including a professional association and a few individual commenters, expressed concerns that employers would be ''forced'' to prove their innocence under the proposed regulations, which would be incongruent with the U.S. justice system. A few commenters additionally expressed concern that the proposed rule would be based on the idea that all H–2 employers should be presumed guilty, or that it would defy the concept of ''innocent until proven guilty.'' A couple of trade associations, echoing these remarks, added that the ''illegal'' regulatory scheme surrounding the prohibited fees provisions would deny petitioners of basic due process. The professional association urged the Department to discard—or, at minimum, revise—the worker protection provisions to allow DHS to enforce regulations against prohibited fees without forcing employers to prove their innocence.

Response: DHS disagrees that the proposed prohibited fees provisions, finalized in this rule with minor revisions, are counter to the concept of ''innocent until proven guilty'' or otherwise deny petitioners of basic due process. These provisions do not purport to assign ''guilt'' or ''innocence,'' but instead address those situations where, as a factual matter, workers have paid or agreed to pay prohibited fees. Nothing proposed in the NPRM and finalized in this rule departs from DHS's current regulatory framework whereby USCIS may approve a benefit request only if the petitioner establishes eligibility for the requested benefit.[40] If the evidence fails to establish eligibility, the benefit request will be denied on that basis, generally preceded by an RFE or a notice of the agency's intent to deny, with the opportunity for the benefit requester to provide additional evidence in response to the request or notice and an opportunity to appeal any such denial.[41] H–2 petitioners continue to be afforded this process under the provisions of this final rule.

i. Extraordinary Circumstances

Comment: Several comments requested clarity concerning what constitutes ''extraordinary circumstances,'' noting that this term is not defined in the proposed regulation nor does DHS explain how it plans to evaluate the facts in making its decision. Several trade associations commented that the Department did not explain what ''extraordinary circumstances'' would allow an employer to avoid liability for prohibited fees charged ''by a third-party.'' Additionally, a professional association wrote that the framework proposed by DHS to enforce the prohibition of fees requires greater detail to the required showing of circumstances that were ''rare and unforeseeable.'' A joint submission, providing detailed remarks on DHS's proposal and offering suggestions, recommended that the Department soften the ''extraordinary circumstances'' and ''rare and unforeseeable'' requirements to more lenient standards (for example, ''took reasonable steps'').

Response: In light of these comments, DHS is revising the regulatory text at new 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*) to clarify the ''extraordinary circumstances'' framework. As described above, as well as in Section III, DHS is finalizing the proposed provisions at new 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*) to state, in pertinent part, that if USCIS determines that a petitioner or any of its employees,[42] whether before or after the filing of the H–2 petition, has collected or entered into an agreement to collect a prohibited fee related to the H–2 employment, USCIS will deny or revoke the petition on notice unless the petitioner demonstrates through clear and convincing evidence that, among other things, ''the petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee

2A classification.''). Similarly, in response to public comments on the 2008 H–2B final rule DHS stated that the ''this provision is necessary to ensure that the actual wages specified on the temporary labor certification will, in fact, be paid to the H–2B worker, thereby ensuring the validity of the labor market test and compliance with section 101(a)(15)(H)(ii)(B) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(B). The choice whether to use recruiters or facilitators and the terms and costs for such services is left entirely to the employer.'' 73 FR 78104, 78113 (Dec. 19, 2008).

[39] *See Loper Bright Enters.* v. *Raimondo,* 144 S. Ct. 2244, 2263 (2024) (''In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes expressly delegate'' to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable.'" (cleaned up)).

[40] *See* 8 CFR 103.2(b)(1) (''An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication.''); *see also* USCIS, Policy Manual Chapter 4, ''Burden and Standards of Proof'' (''The burden of proof to establish eligibility for an immigration benefit always falls solely on the benefit requestor. The burden never shifts to USCIS.''), *https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-4#:~:text=The%20burden%20of%20proof%20to%20establish%20eligibility%20for,or%20she%20has%20made%20a%20prima%20facie%20case.*

[41] *See generally* 8 CFR 103.2(b)(8), 103.3.

[42] DHS notes an inaccuracy in some of the comments that confuse an important distinction in how the new prohibited fees provisions treat instances of prohibited fees charged by petitioners or its employees and such fees charged by third parties. The ''extraordinary circumstances'' determination is applicable only to instances of prohibited fees charged by the petitioner itself or by its employees, not in situations where such fees are charged by third party entities. Prohibited fees charged by third party entities are covered by new 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*).

collection or agreement by its employees throughout the recruitment, hiring, and employment process'' and that ''extraordinary circumstances beyond the petitioner's control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees.'' Specifically, DHS is eliminating the part of the proposed regulatory text referring to ''rare and unforeseeable'' circumstances. This phrase may have caused unnecessary confusion, as DHS had always meant the phrase ''rare and unforeseeable'' to specifically explain the meaning of ''extraordinary circumstances,'' not to create another standard separate and apart from ''extraordinary circumstances.''

Further, DHS is eliminating the part of the proposed regulatory text stating, ''To qualify for this exception, a petitioner must first establish. . ..'' That proposed language was intended to refer back to how to demonstrate ''extraordinary circumstances,'' not to create another exception.

These changes are intended to clarify that there is only one exception for a petitioner to avoid liability for prohibited fees by itself or its employees. DHS is also deleting ''and that it has fully reimbursed all affected beneficiaries or the beneficiaries' designees'' because this is duplicative of the sentence, ''Moreover, a petitioner must establish that it has fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, that it has fully reimbursed their designees,'' which is being retained.

To summarize, under new 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*), if it is determined that a petitioner or any of its employees, whether before or after the filing of the H–2 petition, has collected or entered into an agreement to collect a prohibited fee related to the H–2 employment, the petition will be denied or revoked on notice unless the following factors are demonstrated through clear and convincing evidence:

(1) The petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its employees through the recruitment, hiring, and employment process;

(2) Extraordinary circumstances beyond the petitioner's control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees;

(3) The petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; and

(4) The petitioner fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, it fully reimbursed the affected beneficiaries' designees.

With respect to comments specifically requesting clarification of the phrase ''extraordinary circumstances,'' this phrase is currently used in other areas of immigration administration and therefore is not ambiguous or ill-defined as commenters have asserted.[43] Based on the plain meaning of ''extraordinary,'' extraordinary circumstances are ''very unusual, special, unexpected, or strange''[44] (in other words, rare and unforeseeable). To provide an example for illustrative purposes only, the unexpected death, serious illness, or incapacity of the petitioning entity's supervisor or other key employee with responsibility for recruiting beneficiaries and ensuring against the payment of prohibited fees may qualify as ''extraordinary circumstances'' beyond the petitioner's control, although a minor illness or short-term incapacity likely would not qualify. In evaluating whether the circumstances in a particular case were ''extraordinary'' and ''beyond the petitioner's control,'' USCIS will take into account all relevant information and evidence, including but not limited to who within the organization collected or entered into an agreement to collect prohibited fees, and the relationship of the asserted circumstances to the actions of such individual(s). It is worth emphasizing that demonstrating the existence of extraordinary circumstances beyond the petitioner's control is only part of the exception under new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). Not only does a petitioner need to demonstrate extraordinary circumstances beyond the petitioner's control, but the petitioner must also establish that these circumstances ''resulted in the petitioner's failure to prevent collection or entry into agreement for collection of prohibited fees,'' as required under new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B). Circumstances that had no connection to the petitioner's failure to prevent collection or entry into agreement for collection of prohibited fees, such as a serious illness that occurred after the prohibited fee had already been collected, would not be sufficient to meet the regulatory standard.

Additionally, the petitioner needs to demonstrate that it meets the remaining factors of the exception at new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B), specifically: that the petitioner had made ongoing, good faith, reasonable efforts to prevent and learn of such prohibited fee collection or agreement throughout the recruitment, hiring, and employment process; the petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; and that the petitioner fully reimbursed all affected beneficiaries or, in certain circumstances, the beneficiaries' designees. Overall, this exception is intentionally narrowly drawn as it is critical in furthering the primary intent of this final rule, which is to better ensure the integrity of the H–2 programs and to provide protections to H–2 workers.

j. Significant Efforts

Comment: Several commenters, including numerous trade and business associations and a professional association, requested clarity concerning what constitutes ''significant efforts to prevent prohibited fees prior to the collection or agreement to collect such fees.''

Response: As discussed above, DHS is finalizing the proposed provisions at new 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*) to offer greater clarification and simplification. Specifically, new 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*) eliminates the phrase ''significant efforts'' and instead provides that the petitioner must demonstrate that it ''made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its

[43] For example, the concept of ''extraordinary circumstances'' beyond the petitioner or applicant's control is found in regulatory provisions relating to certain extension of stay or change of status requests, *see* current 8 CFR 214.1(c)(4) and 248.1(b)(1), and in a precedent decision of the Board of Immigration Appeals and respective guidance implementing provisions of the Child Status Protection Act, Pub. L. 107–208 (2002). *See* INA secs. 203(h); *see also Matter of O. Vasquez,* 26 I&N Dec. 817, 821 (BIA 2012), USCIS Policy Memorandum, ''Guidance on Evaluating Claims of 'Extraordinary Circumstances' for Late Filings When the Applicant Must Have Sought to Acquire Lawful Permanent Residence Within One Year of Visa Availability Pursuant to the Child Status Protection Act'' (June 6, 2014); *cf.* 8 CFR 208.4(a)(5) (defining ''extraordinary circumstances'' for purposes of the one-year filing deadline for asylum applications). DHS recognizes those examples are not related to H–2 prohibited fees, but the point remains that the phrase ''extraordinary circumstances'' is generally well understood.

[44] Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/extraordinary; see also* Merriam Webster Dictionary (defining ''extraordinary'' as ''going beyond what is usual, regular, or customary''), *https://www.merriam-webster.com/dictionary/extraordinary;* Black's Law Dictionary (12th ed. 2024) (''Beyond what is usual, customary, regular, or common.'').

employees throughout the recruitment, hiring, and employment process.'' Although DHS is replacing ''significant efforts'' with ''ongoing, good faith, reasonable efforts'' in light of comments requesting clarity, DHS emphasizes that is not a substantive change as ''significant efforts'' and ''ongoing, good faith, reasonable efforts'' in this context requires the same level of effort by the petitioner. This change clarifies what DHS initially meant by ''significant,'' and more effectively explains the petitioner's obligation to not only prevent prohibited fees prior to the collection of or agreement to collect such fees, but also undergo an ongoing obligation to prevent and learn about such fees given that such fees could be collected or agreed upon at various points in time during the recruitment, hiring, or employment process.

This change better aligns the provisions at new 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*) with the provisions at new 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*). As finalized, all of these provisions require petitioners to demonstrate their ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement throughout the recruitment, hiring, and employment process, regardless of whether the prohibited fee collection or agreement was made by the petitioner (including its employees) or by third parties.[45] These changes clarify that the proposed ''significant efforts'' and ''due diligence'' standards were not meant to be materially different from each other.

Similar to the examples of non-exclusive factors that DHS offered for ''ongoing, good faith, reasonable efforts'' at new 214.2(h)(5)(xi)(A)(*2*) and 214.2(h)(6)(i)(B)(*2*), DHS is offering the following examples of factors that may demonstrate ''ongoing, good faith, reasonable efforts'' at new 214.2(h)(5)(xi)(A)(*1*) and 214.2(h)(6)(i)(B)(*1*). These factors include: (1) whether the petitioner had procedures to contact and monitor the performance of relevant parties in the recruitment chain, whether located in the United States or abroad; and (2) whether the petitioner has a mechanism to communicate directly with workers during and after the recruitment process and properly investigate any reports of prohibited fees. As noted above, the determination under new 214.2(h)(5)(xi)(A)(*1*) and 214.2(h)(6)(i)(B)(*1*) will be made on a case-by-case basis, taking into consideration all of the facts presented.

k. Clear and Convincing Evidence Standard

Comment: A professional association said that it opposed the imposition of a ''clear and convincing'' standard concerning an employer's burden of proof to demonstrate that a failure to prevent an inadvertent payment resulted from extraordinary circumstances beyond the employer's control. The association reasoned that the standard would be unduly burdensome. An attorney additionally expressed concern that the Department proposed to adopt the ''little-understood'' ''clear and convincing'' standard without justification and with ''virtually no guidance'' to meet this standard. While stating that there is no way that a U.S.-based employer would know what another agent or recruiter is doing, the attorney concluded that the proposed rule would amount to ''a trap for the most conscientious.''

A joint submission, providing detailed comments, remarked that the proposed evidentiary standards would be too high of a threshold for petitioners to satisfy ''even under the best of circumstances.'' The commenters said that it is not clear from the proposed rule what evidence a petitioner may provide to demonstrate its lack of knowledge and said that it would be unreasonable to require evidence under the clear and convincing standard to prove a negative. The commenters wrote that it would be unlikely that any petitioner could satisfy the proposed standard, leading to inequitable outcomes for employers. Therefore, the commenters recommended that the Department reduce the standard of proof to a ''preponderance of the evidence standard.''

Additionally, while providing alternative regulatory text, the joint commenters suggested that the Department, at minimum, consider scaling back the rigidity of the proposed rule and propose that USCIS maintain discretion to evaluate a petitioner's unique circumstances. Such an approach, the commenters reasoned, would allow the petitioner to provide evidence in their defense and demonstrate possible mitigating circumstances. The commenters further reasoned that this approach would align with due process obligations and avoid unduly penalizing employers.

With respect to the vetting of third parties, a trade association suggested that DHS establish a ''reasonable'' clear and convincing standard so that the impermissible actions of H–2B facilitators cannot constitute grounds for punishment of an employer except under extraordinary circumstances.

Response: DHS declines to change the ''clear and convincing'' evidentiary standard at new 8 CFR 214.2(h)(5)(xi)(A) or 8 CFR 214.2(h)(6)(i)(B). DHS does not agree that the standard is ''little understood.'' Rather, it is a longstanding term in the law that is generally understood to mean ''[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.''[46] Further, the ''clear and convincing'' standard is currently used in other areas of immigration administration, including in the H–2B regulations with respect to an exception to the limitation on the period of admission,[47] so some employers likely already have experience in the application of this standard in H–2B petitions.

Nor does DHS agree that the ''clear and convincing'' standard is unduly burdensome for employers. The heightened standard appropriately balances the importance of strengthening protections for H–2 workers and preventing prohibited fees, with employers' ability to provide the necessary evidence to meet an exception to the requirement, in the event that USCIS determines that H–2 workers have paid or agreed to pay prohibited fees. As stated in the NPRM, DHS recognizes that despite current regulations on prohibited fees, significant numbers of H–2 workers have reported paying prohibited fees, and that stronger protections are needed for the nonimmigrant workers who participate in the H–2 programs. 88 FR 65040, 65050 (Sept. 20, 2023). The current regulations on prohibited fees, which petitioners can currently satisfy under the preponderance of the evidence standard, have not adequately deterred against prohibited fees. By ensuring that petitioners are taking proactive measures to prevent the collection of prohibited fees, the heightened evidentiary standard will help ensure that petitioners will avoid liability for prohibited fees only where they have taken necessary steps to avoid

[45] As discussed earlier, the requirement to demonstrate that the petitioner ''made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its employees throughout the recruitment, hiring, and employment process'' replaces the proposed ''due diligence'' language in proposed 8 CFR 214.2(h)(5)(xi)(A)(*2*), 8 CFR 214.2(h)(6)(i)(B)(*2*). Although DHS is replacing ''due diligence'' with ''ongoing, good faith, reasonable efforts'' in light of comments requesting clarity on the ''due diligence'' standard, DHS emphasizes that is not a substantive change as ''due diligence'' and ''ongoing, good faith, reasonable efforts'' in this context requires the same level of diligent effort by the petitioner.

[46] Black's Law Dictionary (11th ed. 2019), ''Evidence.''

[47] 8 CFR 214.2(h)(13)(v).

the collection of prohibited fees and have reimbursed workers who have paid prohibited fees.

Where petitioners have taken proactive measures to prevent the collection of prohibited fees, it is reasonable to expect that these measures could be documented sufficiently to satisfy the ''clear and convincing'' evidentiary standard. For example, under new 8 CFR 214.2(h)(5)(xi)(A)(*1*)-(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*1*)-(*2*) a petitioner may avoid denial of its petition by showing, among other things, ''that it had made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement.'' In addition to the examples discussed above of relevant evidence suggested by commenters, it is reasonable to expect a petitioner to be able to provide evidence such as documentation relating to compensation paid to a recruiter, documentation of the procedures implemented by the petitioner to monitor the performance of relevant parties in the recruitment chain and to communicate directly with workers during and after the recruitment process and properly investigate any reports of prohibited fees.

l. Requirement to Comply With Prohibited Fee Provisions as a Condition of Approval

Comment: A joint submission objected to the proposal for petitioners to comply with the prohibited fee provisions as a condition of their approval, reasoning that the proposal would be ''unduly punitive.'' The commenters expressed concern that the proposed provision would result in ''automatic denial of a petition'' even where there was no harm to workers.

Response: The phrase ''condition of approval'' does not mean that USCIS would automatically deny a petition. The regulations at new 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) clearly state that the petition ''will be denied or revoked on notice'' unless the petitioner demonstrates eligibility for the limited exception allowed under those regulations. As with current practice, USCIS will generally afford a petitioner an opportunity to demonstrate that its petition should not be denied or revoked in accordance with 8 CFR 103.2(b). Thus, DHS disagrees with the commenter that the new regulations would not afford employers an ''opportunity to resolve and remedy violations.'' DHS also disagrees with the commenter's characterization that the new regulations would be ''unduly punitive.''

m. Consequences of a Denial or Revocation Based on Prohibited Fees

Comment: A union wrote that employers and recruiters who charge prohibited fees must be ''barred'' from the program.

A couple of commenters endorsed the Department's proposed timelines for ''debarment.'' An advocacy group wrote that the timelines for the denial periods, as proposed, are appropriate, given the harm that prohibited fees cause workers and the need for improved deterrence. In addition, a joint submission urged DHS not to reduce the proposed timeframes for the denial periods.

A group of Federal elected officials wrote that, under current regulations, employers and recruiters are incentivized to break the law with respect to charging prohibited fees. The elected officials said that the proposed rules would put an end to these practices by heightening the consequences for charging prohibited fees, including debarment for up to 4 years after a violation has been found. An advocacy group similarly stated that the proposed denial periods related to prohibited fees would reduce violations by employers and reduce harm to workers. The commenter added that the consequences and remediation measures should apply to petitioners whether they were directly involved in the charging of prohibited fees, or it occurred through a third party if the petitioner was to benefit from the worker's presence.

Response: DHS appreciates these commenters' support for the provisions strengthening the consequences of a denial or revocation based on prohibited fees being charged to H–2 employees. The provisions finalized in the rule reflect the seriousness of prohibited fee violations and the significant harm caused to workers who are charged such fees.

Comment: An advocacy group said that while it supported the imposition of consequences on employers for charging prohibited fees, DHS should find ways to incentivize and encourage workers to report prohibited fees, reasoning that H–2 workers who lose their jobs as a result of these consequences ''bear the brunt of their employer's violation.''

Response: DHS appreciates the commenter's concern and acknowledges that the provisions of this rule do not eliminate the risk that H–2 workers who report prohibited fees may need to seek new employment if the petition filed on their behalf is ultimately denied or revoked. This rulemaking does, however, include several provisions that are meant to increase worker flexibility in ways that mitigate such disincentive to reporting prohibited fees and other abuses. Specifically, the whistleblower protection and extended grace periods for revocation and cessation of employment, in conjunction with the changes to portability, should facilitate the ability of a worker facing abuse to seek and transfer to a new employer.[48]

Finally, the prohibited fee provisions in this rulemaking include strong reimbursement incentives, with petitioners facing up to a 4-year period of denial unless all affected beneficiaries have been reimbursed. The increased likelihood that reporting a prohibited fee will lead to a full reimbursement for affected workers may also serve to encourage whistleblowers to come forward.

Comment: Multiple commenters wrote that the proposed consequences for petitioners are severe, significant, overly punitive, strict, or not commensurate with the alleged violation, particularly in cases where the petitioner has reimbursed the worker in full, or the behavior is unintentional, unknown, and out of the petitioner's control. An individual commenter stated that the proposal would create ''extreme penalties for potentially minor violations.''

Many commenters remarked on the negative impacts of this proposal on employers and others who rely on them. For example, a State Government agency said that DHS's proposed 1- to 4-year debarment would hinder the hiring of workers. Furthermore, several commenters including trade associations and a joint submission expressed concern that a year without access to the H–2 program could result in irreparable harm to U.S. employers and put them out of business, which would impact the nation's food supply and national security.

Multiple commenters, including a few professional associations and several individual commenters, additionally expressed concern that the proposed consequences would penalize employers for ''doing the right thing.''

[48] The H–2 NPRM referenced a GAO report's statement that the incidence of abuses in the H–2A and H–2B programs may currently be underreported, in part due to workers' fear of retaliation by their employer, and noted that ''[t]he proposed whistleblower provision, in conjunction with other proposed changes in this rulemaking, including those related to grace periods and portability, may help mitigate the above-discussed structural disincentives that workers could face with respect to reporting abuses.'' *Modernizing H–2 Program Requirements, Oversight, and Worker Protections,* 88 FR 65040, 65062 (Sept. 20, 2023) (citing GAO, GAO–15–154, ''Increased Protections Needed for Foreign Workers,'' p. 37 (2015), *https://www.gao.gov/assets/gao-14-154.pdf*).

The commenters said that employers who take corrective action or report prohibited recruitment fees would be penalized by possible denial or revocation, or debarment from the program, with limited exceptions.

While describing a detailed scenario, a joint submission said that under the Department's proposed framework, a single fee violation occurring at any level could cause significant harm to an enterprise if an employer cannot meet the ''impossibly high'' standards of evidence. Precluding an entire corporate structure from utilizing the H–2 program for 1 year, the commenters said, would amount to an ''extreme punishment'' resulting in ''catastrophic financial losses'' and downstream economic consequences for the employer and the totality of its workforce. Thus, the commenters continued, the Department's proposal may cause workers more harm, contrary to the proposed rule's objective, due to the disruption in employment and lack of earning potential. Further, the commenters stated that a ''prohibited fee death sentence'' could translate into missed career opportunities for skilled U.S. workers who benefit from employers' abilities to fill their entry-level labor needs through the H–2 programs.

The joint commenters additionally emphasized that employers are not in a position to solve endemic corruption, and most do not have the financial resources to investigate recruitment activities outside of the United States. In expressing their view that no amount of due diligence is a perfect safeguard against bad actors, the commenters said that employers would inevitably come across a fee violation or potential violation at some point in their H–2 program history. The commenters further remarked that bad actors unaffiliated with employers have engaged in fraudulent activities under their clients' names, which would make it difficult for an employer to prove that they were not involved in such activity and could lead to ''wrongful convictions.'' Thus, the commenters concluded that the Departments' ''rigid'' proposal would be ''completely untenable'' and represent a ''massive overreach.''

Response: DHS acknowledges the significance of the potential consequences of a petition denial or revocation based on a USCIS finding that an associated H–2 beneficiary paid or agreed to pay prohibited fees. The Department disagrees, however, that the consequences are ''overly punitive'' and not commensurate with a violation of the prohibited fees provisions. Instead, the consequences as finalized in this rule recognize the seriousness of these types of offenses and the severity of situations in which beneficiaries go into debt before obtaining an employment opportunity and the urgent need to ensure that beneficiaries not be subject to exploitation or other forms of coercion as a result of incurring such debt.

DHS also acknowledges the potential financial losses some employers may experience if they are precluded from utilizing H–2 workers under the finalized 1-year and additional 3-year periods. These more robust consequences are not intended to force petitioners to remedy all ''endemic corruption'' prevalent in noncitizen worker recruitment and are intended to incentivize petitioners to take appropriate responsibility for their own employees, or any third party entities it engages, as well as those further downstream, in the recruitment process and in obtaining workers under the H–2 programs.

Finally, DHS disagrees with the comments that this rule ''penalize[s] employers for 'doing the right thing.''' Instead, in recognizing some petitioners may still encounter bad actors, DHS is putting in place mechanisms such that petitioners may avoid liability under certain circumstances, by taking proactive steps to prevent the collection of such fees and taking immediate remedial action, as described in multiple areas in this preamble.

Comment: Numerous commenters, including a joint submission and several associations, encouraged DHS to re-evaluate the proposed enforcement measures or its handling of circumstances involving prohibited fee violations. Specifically, instead of focusing on denials and revocations, the commenters urged the Department to propose clear, reasonable alternatives for public comment that constitute a comprehensive strategy to protect workers while balancing employers' challenges to preventing the unlawful collection of fees with their need to access the program. Similarly, another trade association encouraged the Department to consider measures that would allow employers to protect workers, rather than subjecting them to ''strict liability'' for unknown actions of third parties.

Several commenters offered specific alternatives to the proposed regulations around denials and revocations for the collection of prohibited fees, detailed below.

Numerous commenters suggested reduced or graduated penalties for fee violations. For example, a joint submission wrote that the denial of one petition and the inability to secure workers pursuant to that petition would constitute an appropriate punishment for a fee violation. The joint commenters recommended that the Department consider making the 1-year ''bar'' applicable only to willful violations, repeat occurrences, or cases where the employer did not take affirmative steps to comply with the regulations. The commenters suggested that this punishment not extend to first-time violators or instances where the employer undertook reasonable efforts to comply or promptly rectified the issue.

A few trade associations and a professional association encouraged the Department to ''gradient'' penalties commensurate with the circumstances of the violation and reserve denials or revocations for repeat, ''intentional'' or ''egregious'' violations. The business association added that denial or revocation must only occur after the petitioner has the opportunity to rebut adverse information. Instead of a ''one-size-fits-all'' approach that removes agency discretion to evaluate cases based on their merits, a business association similarly suggested a graduated scale of penalties, owed by the petitioner to the Department and based on the company's track record. The association said that such penalties would be reasonable if the petitioner ''directly committed'' or was a ''knowing accomplice'' to the questionable activity. The association remarked that a harsher penalty of a denial or revocation would be fitting in situations where the imposition of fees could be deemed a pattern, but the Department's ''one-size-fits-all'' approach that removes the discretion to evaluate cases based on their merits is unnecessarily punitive and should be abandoned.

A professional association recommended that the Department impose fines for first-time violations when it determines that the H–2 beneficiary has paid or agreed to pay a prohibited fee.

A trade association suggested, instead of a denial or revocation, that DHS require a mutual attestation for an employee's file, whereby both the petitioner and the worker sign an agreement that prohibited fees were not charged. If the worker discloses that fees were charged, then the petitioner would be required to follow the current reimbursement requirements.

A research organization said that the proposed denial periods for charging prohibited fees are ''far in excess of the infraction in many cases,'' as the

prohibited fee could constitute ''a very small percentage of total remuneration for the worker.'' The commenter suggested that, in cases where the prohibited fees are less than 5 percent of the total value of the contract, DHS should not impose a ''bar'' and instead should afford an opportunity for the employer to make the worker whole.

Response: DHS declines to make the changes as articulated by the commenters and disagrees that the provisions finalized in this rule are excessive or lead to a ''one-size-fits-all'' approach. With respect to the commenter's assertion that the 1-year denial period should only apply to ''willful'' violations, for the reasons discussed in an earlier response, DHS considers a denial or revocation for prohibited fees to constitute a substantial failure to meet conditions of the petition, that is, a willful failure to comply with program requirements that constitutes a significant deviation from the terms and conditions of the petition. Furthermore, it is inaccurate to state that USCIS decisions will not be based on the merits of any specific case. In making a determination as to whether a violation of the prohibited fees provisions has occurred, USCIS evaluates each case based on the totality of the submitted evidence to determine whether: the petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement throughout the recruitment, hiring, and employment process; the petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; all affected beneficiaries, or designees only if such beneficiaries cannot be located or are deceased, have been fully reimbursed; and, if applicable, that extraordinary circumstances beyond the petitioner's control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees. Where DHS intends to either deny or revoke a petition, the petitioner will be notified and afforded the opportunity to respond to the agency's intent to deny or revoke the petition, as provided under 8 CFR 103.2(b)(8).

In declining to adopt the commenters' specific suggestions for amending the consequences for prohibited fee violations, such as reserving denial or revocation of petitions based on ''egregious'' infractions, only denying petitions filed by repeat offenders, or fining first-time offenders instead of denying their petition, DHS finalizes the proposals from the NPRM in the belief that the provisions will be more effective when the potential consequences of such violations are clear and unambiguous. Basing the severity of the consequences on a gradient basis, or denying or revoking only certain petitions even after determining that a prohibited fee was collected, would unacceptably introduce ambiguity and uncertainty and risk inconsistent adjudications, thereby potentially weakening the deterrent effect intended by these provisions. Further, where a petitioner can demonstrate that it was truly acting in good faith to prevent and/or remedy a prohibited fee violation, the new regulations will provide those petitioners with a mechanism to avoid denial or revocation of their petition.

DHS further declines to adopt the suggestion to require a mutual attestation whereby both parties sign an agreement that no prohibited fees were paid or agreed to by workers. As noted in the NPRM, DOL already requires employers to contractually forbid third parties whom they engage for the recruitment of workers from seeking or receiving payments or other compensation from prospective employees. 88 FR 65040, 65054 (Sept. 20, 2023). *See* 20 CFR 655.9(a), 20 CFR 655.20(p), and 20 CFR 655.135(k). Accordingly, USCIS' acceptance of such a contract alone would mean that nearly all petitioners could avoid liability by simply requiring their prospective or current worker to sign such an agreement.

Finally, the suggestion to allow the petitioner to simply reimburse a beneficiary when the prohibited fees are less than 5 percent of the total value of the contract, without facing any other consequence, fails to recognize the harm already done to a beneficiary who has incurred debt to pay such fees and fails to deter this harm from occurring in the first place, as intended by this provision.

Comment: A couple of commenters suggested more aggressive penalties for violations of the prohibited fee provisions. A union urged DHS to take more aggressive action and increase denial periods in light of the pervasiveness of prohibited fee collection. The commenter recommended increasing the penalties beyond what is proposed in the rulemaking and provided detailed modifications to the proposed regulatory language. Specifically, the union recommended increasing the denial period under section 214.2(h)(6)(i)(C) from 1 year to 3 years and increasing the denial period under section 214.2(h)(6)(i)(D)(*1*) to 2 years, for a total potential 5-year bar. Citing 8 U.S.C. 1184(c)(14)(A)(ii), the union said that DHS can deny petitions based on a failure to meet program requirements for a period of up to 5 years and, as such, DHS would not be fully exercising its authority to deny petitions for charging prohibited fees unless it increases the proposed denial periods.

A research organization recommended that DHS increase what the commenter refers to as the ''debarment'' periods to a 5-year minimum for a first offense and permanent debarment for all other offenses, reasoning that a 1-year debarment following an H–2 denial or revocation based on prohibited fees is insufficient to deter employers from engaging in such conduct. The organization, citing DHS's justification in the proposed rule, reasoned that recruitment fees put workers at risk of debt bondage, human trafficking, and other abuses. The commenter further remarked that payment of such fees by workers strengthens incentives for employers to prefer a foreign workforce over U.S. workers, which would violate the law and congressional intent behind the H–2 programs (INA sec. 101(a)(15)(h)(ii)). Conversely, the commenter reasoned that raising the penalty for collecting such fees would protect workers and better reflect the seriousness of these violations.

Response: DHS appreciates these comments but declines to adopt the suggested revisions. As finalized in this rulemaking, the consequences of a denial or revocation for prohibited fees within the time period prescribed in this final rule strikes an appropriate balance in creating a reasonable and strong deterrent against employers or entities working on their behalf charging prohibited fees to H–2 workers, while also recognizing that employers or entities may make lasting changes to practice, policies, and personnel over time to remedy deficiencies. The rule also adopts robust measures to incentivize the full reimbursement of such fees to H–2 beneficiaries or their designees in those instances where such improper fees have already been paid.

Comment: A union wrote that the Department must ban recruitment fees in ways that do not penalize workers and encouraged agencies to work together to reverse the policy of denying visas to workers who admit to being charged such prohibited fees. In addition to other measures, the union suggested that USCIS grant humanitarian parole and work authorization to workers for at least a year following the identification of a prohibited fee violation. The union additionally suggested that the Department take steps to ensure that

employers do not continue to use foreign labor recruiters who have charged prohibited fees, such as by issuing a notice to employers who may have used that recruiter.

Response: DHS appreciates the commenter's feedback but is not making any changes based on this comment. Regarding beneficiary reluctance to admit to being charged prohibited fees, this rule adopts several provisions that are meant to remove some of the disincentives to reporting such violations. Specifically, the permanent adoption of portability provisions, as well as new whistleblower protections and extended grace periods in cases of revocation and cessation of employment, provide workers with flexibility to find new H–2 employment and certain protections from potential employer retaliation for reporting program violations. Additionally, the strengthened prohibited fee provisions in this rulemaking should increase the likelihood that reporting a prohibited fee will lead to a full reimbursement for affected workers and may also serve to encourage those workers to report these violations. DHS acknowledges that these provisions would mainly benefit workers already in the United States, however, the suggestion to reverse the existing policy of denying visas to workers who admit to being charged illegal fees would require Department of State action and is outside the scope of this rulemaking.

Further, DHS declines to adopt the suggestion to create a new process of issuing notices to employers who may have used foreign recruiters identified as having charged prohibited fees, as such a notification process would prove overly difficult for DHS to implement, accurately matching foreign recruiters accused of wrongdoing to specific employers outside of the normal petition adjudication process. However, DHS notes that, if during the adjudication of a petition USCIS received information that an employer may have used a foreign labor recruiter found to have charged illegal fees, USCIS could issue a notice to the employer and request additional evidence on that basis. In addition, DHS is adopting in this rulemaking robust provisions that require petitioners to conduct ongoing, good faith, reasonable efforts to ensure against the collection of prohibited fees throughout the recruitment, hiring, and employment process. These provisions should address the commenter's concern that petitioners will use recruiters who have been identified as having charged prohibited fees.

With respect to the grant of humanitarian parole with work authorization to workers subject to the payment of prohibited fees, DHS notes that parole based on urgent humanitarian reasons may be granted based on certain factors such as, but not limited to, whether the circumstances are pressing, and the degree of suffering that may result if parole is not authorized. A grant of parole is a discretionary authorization by USCIS to be given on a case-by-case basis and is not addressed in or limited by this rulemaking, which only focuses on the H–2 programs.

n. Reimbursement of Prohibited Fees to Workers

Comment: A few trade associations, a union, and a professional association expressed general support for the reimbursement of unlawfully collected fees.

Response: DHS agrees that it is important to require reimbursement of prohibited fees. Bearing in mind the serious nature of prohibited fee violations and the significant harm to beneficiaries who are charged such fees, it is appropriate in such circumstances to provide strong incentives to ensure that beneficiaries or their designees are fully reimbursed. In addition to requiring reimbursement, this final rule aims to provide strong incentives to prevent the payment or agreement to pay prohibited fees in the first place, given the concerns regarding beneficiaries incurring a debt burden in order to obtain H–2 employment.

Comment: A union suggested that petitioners who are unable to reimburse the beneficiary or their designee within the proposed 4-year period should thereafter be required to contribute the entirety of the fee to a fund for victims of H–2 violations as a condition for regaining access to the program.

Response: DHS declines to require petitioners to contribute to a fund for victims when a beneficiary or designee cannot be reimbursed as this suggestion would require DHS to create a new process and regulatory scheme that would separately be subject to notice and comment rulemaking, particularly since DHS would need to define the universe of ''victims of H–2 violations,'' determine eligibility for receiving payments from the fund, including the amounts that would be distributed and how those would be set, create a process to request or initiate reimbursement, as well as create an appeal/dispute resolution process. In addition, DHS may need additional statutory authorities to both expend resources to establish this process, as well as to collect and hold unlawfully collected fees, and distribute funds to victims of H–2 violations. The commenter's proposal would also be operationally difficult and costly to administer because DHS may need to locate victims abroad.

Comment: While expressing overall support for the proposed prohibited fee provisions, an advocacy group encouraged the Department to expand the reimbursement requirements to include full compensation for all monetary damages associated with the unlawful collection of fees. The commenter reasoned that prohibited fees cause H–2 workers to incur debt with high interest rates and ensuring that reimbursement must cover all damages would achieve the goal of making workers whole. The commenter suggested the following regulatory text, to be added to 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 212.4(h)(6)(i)(B)(*1*): ''To fully reimburse a beneficiary who was charged a prohibited fee, the petitioner must reimburse the beneficiary for the prohibited fee in full plus any actual damages the beneficiary incurred as a result of the prohibited fee, such as interest.''

Response: DHS appreciates this comment but declines to make any changes with respect to the requirement to fully reimburse all beneficiaries or their designees for any collected prohibited fees. DHS acknowledges that the collection or agreement to collect a prohibited fee has the potential to harm an H–2 worker even if the fee is later reimbursed or the agreement is cancelled prior to collection, such as by causing the worker to go into debt related to the payment, or anticipated payment, of the fee. Thus, DHS is finalizing the regulatory provisions at 8 CFR 214.2(h)(5)(xi) and 8 CFR 214.2(h)(6)(i) in order to incentivize petitioners to prevent the collection of prohibited fees and to require reimbursement of beneficiaries (or, in limited circumstances, a designee) in the event that such fees are collected. However, DHS declines to extend the reimbursement requirement to damages or interest beyond the prohibited fees themselves as it would be too difficult for USCIS to determine the amount of such damages or interest, as well as the connection of any possible collateral harm to the worker resulting from payment of the prohibited fees. Nothing in this final rule, however, is intended to prevent a worker from seeking damages for such harms in a private cause of action against an offending employer or other person or entity.

Comment: In light of concerns related to the strengthened prohibited fees provisions and the proposed consequences, a few trade associations encouraged DHS to work with petitioners to identify and establish proper safeguards and protocols to prevent the extortion of workers and establish methods for swift reimbursement. One of the associations wrote that employers should be assessed based on their policies to prevent prohibited fees from being charged or threatened, and whether they respond properly upon discovery of a problem by reimbursing the worker and appropriately dealing with the offending party (for example, the employee or recruiter). One of the associations further suggested, as an alternative to denial or revocation, that DHS require reimbursement in situations where the petitioner did not have knowledge of the prohibited fee.

Response: The provisions at 8 CFR 214.2(h)(5)(xi) and 8 CFR 214.2(h)(6)(i)(B), as finalized, appropriately balance concerns about proper safeguards to prevent the collection of prohibited fees and recognize the limitations of petitioners. New 8 CFR 214.2(h)(5)(xi)(A) and 8 CFR 214.2(h)(6)(i)(B) provide narrow exceptions under which petitioners may avoid liability for prohibited fees. These narrow exceptions recognize the reality that petitioners may not always be able to prevent prohibited fees, while also recognizing the importance of the petitioner taking proactive measures to prevent the collection of fees in the first place as well as full reimbursement to the beneficiary or, in limited circumstances, a designee regardless of whether one of these exceptions applied.

Specifically, where USCIS determines that a petitioner or any of its employees collected a prohibited fee, USCIS will deny or revoke an H–2 petition on notice unless the petitioner demonstrates through clear and convincing evidence that extraordinary circumstances beyond the petitioner's control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees, and that it had made ongoing, good faith, reasonable efforts to prevent and learn of prohibited fees. Further, a petitioner must establish that it took immediate remedial action as soon as it became aware of the payment of the prohibited fee. The petitioner must also demonstrate that it has fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, that it has fully reimbursed their designees. New 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*).

Where USCIS determines that a prohibited fee has been collected by a third party, USCIS will deny or revoke the H–2 petition on notice unless the petitioner demonstrates to USCIS through clear and convincing evidence that it made ongoing, good faith, reasonable efforts to prevent and learn of such payment or agreement throughout the recruitment, hiring, and employment process. Further, a petitioner must establish that it took immediate remedial action as soon as it became aware of the payment of the prohibited fee or agreement. The petitioner must also demonstrate that all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, their designees have been fully reimbursed. Thus, the petitioner will have the opportunity to avoid denial or revocation of a petition by demonstrating its policies and efforts to prevent the collection of prohibited fees in the first place, as well as what remedial actions it took including full reimbursement of affected beneficiaries or their designees, as described in these provisions. New 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*).

Comment: A professional association suggested that, in circumstances when there is no evidence that the employer knew or should have known about a recruiter's violation of the prohibitions against the collection and payment of fees, the recruiter should reimburse the workers, rather than the employer. The association added that H–2 employers should not be responsible for reimbursing payments collected by attorneys who also fail to advise the employers or who otherwise act without the employer's knowledge in the collection of legal or other fees.

Response: Unlike the provisions regarding prohibited fees charged by the petitioner or its own employees at 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 8 CFR 214.2(h)(6)(i)(B)(*1*), which specifically require evidence that the petitioner itself has fully reimbursed all affected beneficiaries or their designees in order to avoid denial or revocation, the provisions at 8 CFR 214.2(h)(5)(xi)(A)(*2*) and 8 CFR 214.2(h)(6)(i)(B)(*2*) require evidence ''that all affected beneficiaries or their designees have been fully reimbursed'' without specifying the reimbursing party. This wording accounts for the possibility that in some cases the offending recruiter or third party may provide the reimbursement. Ultimately, however, it is the petitioner's responsibility as the H–2 program user to ensure that the reimbursement takes place.

As the party seeking the benefit of using the H–2 program to employ temporary workers, it is the petitioner—not any third party it may engage to assist in the process—who is required to certify their agreement to abide by the conditions of the H–2A or H–2B program.[49] It is therefore both appropriate and reasonable to require the petitioner to ensure its H–2 workers are reimbursed in the event that the workers are charged a prohibited fee by a third party that the petitioner engaged.

Comment: A professional association expressed concern regarding the proposal to require reimbursement as a condition of approval of H–2B petitions following the denial or revocation of a petition for prohibited fees. Specifically, the commenter was concerned with the requirement that ''all'' workers be fully reimbursed and asked what the outcome would be for employers who ''have trouble contacting'' former employees from 2 or 3 years prior and whether the employer would be ''debarred for life.'' The association discouraged DHS against using absolute terms in the regulatory language that could unjustly penalize employers.

Response: DHS declines to make any changes to these provisions based on this comment which appears to have misunderstood the provision and its consequences. Even when USCIS determines that the petitioner collected or entered into an agreement to collect a prohibited fee under new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1), the petitioner would not have its petitions denied ''for life.'' Where a petitioner is found to have collected or entered an agreement to collect prohibited fees, USCIS will deny or revoke the petition unless the petitioner can demonstrate that it meets the exception at new 8 CFR 214.2(h)(5)(xi)(A)(1) and 8 CFR 214.2(h)(6)(i)(B)(1). Where a beneficiary has paid or agreed to pay a prohibited fee to a third party, USCIS will deny or revoke the petition unless the petitioner can demonstrate it meets the exception at new 8 CFR 214.2(h)(5)(xi)(A)(2) and 8 CFR 214.2(h)(6)(i)(B)(2). USCIS will deny any H–2 petition filed by the same petitioner or a successor in interest within 1 year after the decision denying or revoking on notice an H–2 petition on the basis of paragraph (h)(5)(xi)(A) or (h)(6)(i)(B). *See* 8 CFR 214.2(h)(5)(xi)(B) and 8 CFR 214.2(h)(6)(i)(C).

[49] *See* USCIS, Form I–129, ''Petition for a Nonimmigrant Worker,'' *https://www.uscis.gov/i-129* (last updated June 3, 2024).

Subsequently, USCIS will deny any H–2 petition filed by the same petitioner or successor in interest for an additional 3-year maximum period, unless the petitioner or successor in interest demonstrates to USCIS that each beneficiary or designee has been fully reimbursed. If the petitioner or successor in interest demonstrates to USCIS that each beneficiary or designee has been fully reimbursed, they can avoid a subsequent denial of their petition during this 3-year period. The commenter is correct that, during the additional 3-year period described in 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D), a petitioner will need to demonstrate reimbursement as a condition of approval of an H–2 petition. However, DHS notes that the additional 3-year period described in 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D) is a maximum of 3 additional years, and thus would not result in an employer having its petitions denied ''for life.'' Further, there is nothing requiring a petitioner to wait to reimburse beneficiaries or designees until the additional 3-year period described in 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D) has passed. Indeed, under this final rule, the petitioner should make every effort to reimburse beneficiaries or designees as soon as the prohibited fee is discovered. By promptly reimbursing the beneficiary or designee, a good faith petitioner may avoid denial or revocation of the petition (provided all the other conditions of the exception are met), and even in the event of denial or revocation, avoid a subsequent denial during the time period described in 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D).

The commenter is also correct that a failure to reimburse due to ''trouble contacting'' beneficiaries or their designees will not satisfy the requirements of 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D). However, DHS is firmly of the view that it is both appropriate and reasonable to require the petitioner to ensure its H–2 workers are reimbursed, given the harm already done to workers who incurred debt to pay the prohibited fees. As noted in the NPRM, petitioners are expected, as a matter of best practice, to obtain in writing the beneficiary's full contact information (including any contact information abroad), early on during the recruitment process, and to maintain and update such information as needed, to better ensure the petitioner's ability to fully reimburse the beneficiary, or the beneficiary's designee(s), for any sums the petitioner may be liable to pay the beneficiary.

o. Beneficiary Designees

Comment: An advocacy group encouraged the Department to finalize the language defining ''designee'' as currently proposed at 8 CFR 214.2(h)(5)(xi)(A)(*1*), 212.4(h)(6)(i)(B)(*1*). The group reasoned that while many workers will choose to identify designees, some may prefer non-governmental organizations or other entities due to concerns about retaliation against family members.

Response: DHS is finalizing the definition of ''designee'' as originally proposed at 8 CFR 214.2(h)(5)(xi)(A)(*1*) and 212.4(h)(6)(i)(B)(*1*), although it is incorporating the definition at new 8 CFR 214.2(h)(5)(xi)(A)(*3*) and 212.4(h)(6)(i)(B)(*3*) to clarify that it applies to all prohibited fee provisions at paragraph (h)(5)(xi) and (6)(i) of this section. As noted by the commenter, the definition enables beneficiaries to provide an individual or entity as their designee, which accommodates those who may choose to use a non-governmental organization as their designee.

Comment: A few trade associations endorsed the proposal that employees would identify beneficiary designees during the initial application and recruitment processes for the purposes of reimbursement but expressed concern with the application of the beneficiary designee provision in practice. For example, the associations stated that it is most likely that a petitioner would be required to reimburse a beneficiary or designee following the end of a petition period and that it is unclear from the proposed rule the length of time or efforts the employer would need to undergo to ''maintain and update'' the designees following a petition's validity period. The associations additionally remarked that the proposed rule lacks a description of ''exhaustion of efforts'' to locate the worker or designee. The commenters encouraged the Department to establish a clear procedure to satisfy this criterion and steps to reimburse the worker or beneficiary designee. Alternatively, a couple of these commenters suggested that DHS instead require petitioners to take ''reasonable steps'' to reimburse the worker or designated beneficiary, with one association suggesting that DHS define ''reasonable steps.'' The commenters concluded that the ''Department must establish a clear procedure to provide notice to petitioners of what reasonable steps must be taken to attempt to reimburse the worker or beneficiary designee.''

Response: DHS declines to make changes based on these comments. Although commenters expressed concern that a petitioner would most likely be required to reimburse a beneficiary or designee following the end of a petition period, that would generally not be true in the case of a petition denial. While a revocation could take place after the petition period, this generally would not occur long after the petition period, thus it would not be unreasonable to expect a petitioner to retain records that would allow them to reimburse a beneficiary or designee as necessary. DHS expects each petitioner to determine its own best practices on how to comply with this provision. DHS also declines to codify an exception to the reimbursement requirement for ''exhaustion of efforts'' or ''reasonable steps'' to attempt to reimburse the worker or beneficiary, as it is not clear how such an exception would be materially different than the regulations that were in effect prior to the effective date of this final rule which allowed petitioners to satisfy the requirement that it reimburse the beneficiary based on reasonable efforts to locate the beneficiary, including contacting the beneficiary's known addresses. *See* current 8 CFR 214.2(h)(5)(xi)(C) and 8 CFR 214.2(h)(6)(i)(D).

Comment: A couple of trade associations expressed concern that the proposed beneficiary designee provisions could negatively impact enterprises in cases where a beneficiary has passed away before appointing a designee, in which case the employer would be unable to comply with the requirement.

Response: As noted in the preamble to the NPRM, upon finalization of this provision, DHS expects petitioners to inform the beneficiary early in the recruitment process of the beneficiary's ability to independently name a designee, to obtain full designee information, and to maintain and update such information as needed to ensure that the petitioner has in fact complied with the reimbursement requirement. 88 FR 65040, 65056 (Sept. 20, 2023). Taking these measures as a matter of best practice will help alleviate the risk of the scenario envisioned by the commenters.

p. Successors in Interest

Comment: A union articulated its strong endorsement of the proposal to apply the consequences for the collection of prohibited fees to successors in interest, reasoning that this approach, in combination with other related prohibited fee provisions,

would be an important first step to root out abusive farm labor contractors. The union mentioned its own experiences with H–2A farm labor contractors found to have committed extensive violations of the H–2A regulations as a result of court actions or investigations by Federal agencies, but who continue to operate, usually with an associate or family member becoming the formal employer.

Response: As recognized by the commenter, applying the consequences for prohibited fees to a petitioner's successor in interest is intended to address the issue of petitioning entities avoiding liability by changing hands, reincorporating, or holding itself out as a new entity.

Comment: A trade association expressed concern that, as proposed, the provisions precluding a petitioner or successor in interest from participation in the H–2 programs on the basis of prohibited fees would extend to ''legitimate'' successors in interest, who the commenter said are ''completely uninvolved with the underlying violation.'' Providing examples, the association wrote that this consequence is ''excessive,'' ''too broad,'' and ''fails to provide any additional protection to workers.'' The association further reasoned that the proposed provision requires no discretion on DHS's part and that the Department's enforcement authority ''is more than capable'' of undertaking an investigation to determine whether a successor in interest is a ''reinvented version'' of its predecessor. Finally, the association wrote that it is unclear whether other petitions of a successor in interest who already employed H–2 workers would be implicated and expressed concern with the harmful consequences of such an approach. The association concluded that the Department should reject the successor in interest provisions altogether.

A professional association wrote that the ''overly broad'' definition of a successor in interest, which assigns liabilities to new entities that have not succeeded to all the rights and liabilities of the predecessor entity, could negatively impact other visa categories. The association expressed concern that, should the proposed definition be promulgated and subsequently applied to other visa categories without petitioners' knowledge or opportunity to provide input, the definition could violate the Administrative Procedure Act (APA). Furthermore, the association wrote that imputing liability upon purchasing a business defies an employers' free will to engage in business transactions, and it unfairly assigns liability to employers that did not participate in the predecessors' business conduct. The commenter concluded that the successor-in-interest relationship should apply only when the employer that is carrying on the business of a previous employer has agreed to succeed to all of the rights and liabilities of the predecessor entity via a written contract. The professional association additionally expressed concern about what it calls the overbroad definition of a successor under proposed 8 CFR 214.2(h)(6)(i)(D)(*2*) for the purposes of applying the 1-year bar on subsequent approvals. The association appreciated USCIS' consideration of multiple enumerated factors to determine a successor in interest but suggested additional language ''regarding notice and knowledge a successor had or could have had regarding a prior determination resulting in a 1-year ban.''

An attorney wrote that the expansive definition of a successor in interest ''virtually guarantees'' that an affected employer would be unable to sell their business, ''even in an arms-length transaction.''

Response: DHS declines to make any changes as a result of these comments. As noted above, applying the consequences for prohibited fees to a petitioner's successor in interest is intended to address the issue of petitioning entities avoiding liability by changing hands, reincorporating, or holding itself out as a new entity. In such cases, the successor in interest may be considered a continuation of the petitioner and applying the consequences to the successor in interest would be appropriate. Thus, new 8 CFR 214.2(h)(5)(xi)(C)(*2*) clarifies that an entity will only be considered a successor in interest where it is ''controlling and carrying on the business of a previous employer.'' Successor liability is a longstanding concept and has been applicable to H–2 employers since 2008, when DOL codified it in H–2A and H–2B regulations.[50] DHS notes that the definition of successor in interest and factors listed in new 8 CFR 214.2(h)(5)(xi)(C)(*2*) and 8 CFR 214.2(h)(6)(i)(D)(*2*) are substantially similar to the definition and factors that have been in the DOL H–2 regulations. Therefore, the regulation is sufficiently clear and is generally familiar to the regulated public.

DHS disagrees with the suggestion that the successor in interest provision should apply ''only when the employer that is carrying on the business of a previous employer has agreed to succeed to all of the rights and liabilities of the predecessor entity via a written contract.'' Adopting such a high standard would essentially create an easy loophole for a successor entity to avoid liability and could defeat the goal of preventing petitioners from easily avoiding liability simply by entering into a formal contract with the predecessor entity disclaiming certain liabilities. Further, regarding the suggestion to include ''notice and knowledge a successor had or could have had regarding a prior determination'' in the factors, DHS does not believe this is necessary. This would be too high of a standard and create an easy loophole for a successor entity to avoid liability by choosing to remain ignorant of the previous employer's actions. Again, the provision is intended to address situations where a petitioner has sought to avoid liability by simply changing hands, reincorporating, or holding itself out as a new entity. It is reasonable to assume that, as part of a legitimate arms-length transaction, a successor entity would, as a matter of course, familiarize itself with applicable law, including this rule that might affect its rights and obligations. It is further reasonable to assume that a successor in interest would make inquiries into any outstanding liabilities of the predecessor entity, and that the predecessor entity would make appropriate disclosures. Requiring DHS to consider all circumstances as a whole will prevent the unfair assignment of liability on an unrelated entity. In this regard, while an entity can be a successor whether or not it possesses knowledge of a prior determination, the presence of some of the factors listed at new 8 CFR 214.2(h)(5)(xi)(C)(*2*) and (6)(i)(D)(*2*) indicate that the successor entity had or could have had notice and knowledge of a prior determination, such as if there was similarity of supervisory personnel, or the former management or owner retains a direct or indirect interest in the new enterprise, or familial or close personal relationships between predecessor and successor owners of the entity.

DHS disagrees with the comment that the successor in interest provision ''requires no exercise of discretion from the Department.'' The regulation explicitly states that ''all of the circumstances will be considered as a whole.'' This ''totality of the circumstances'' approach necessarily involves some level of discretion in which DHS must assess the weight to

[50] *See, e.g.,* 20 CFR 655.5, 655.103(b); 29 CFR 503.4.

give facts as applied to the regulatory factors in order to determine whether an employer is a successor in interest.

Finally, with respect to the concern that the definition of a successor in interest at new 8 CFR 214.2(h)(5)(xi)(C)(*2*) and 8 CFR 214.2(h)(6)(i)(D)(*2*) could ''negatively impact other visa categories'' and potentially violate the APA, DHS reiterates that this definition is limited to the H–2 programs.

2. Mandatory and Discretionary Denials for Past Violations

a. General

Comment: A couple of advocacy groups and a research organization expressed support for the proposed provisions, reasoning it would increase accountability, curb employer violations and abuse, reduce harm faced by workers, and level the playing field for employers who obey the law. Similarly, a union expressed support for the proposed provisions, in particular the mandatory denials for administrative determinations, criminal convictions, or civil judgments. A group of Federal elected officials wrote that in addition to the consequences based on prohibited fees, barring employers for other violations for several years would put an end to illegal employer and recruiter practices, as it would no longer be cheaper for them to break the law than to comply with it.

Response: DHS agrees that the proposed provisions, and the provisions as finalized in this rule, are important steps to increasing employer accountability, curbing employer violations and abuse, reducing harm faced by workers, and leveling the playing field for employers who obey the law. DHS also generally agrees that these provisions will help put an end to illegal and abusive employer and recruiter practices, although DHS cannot verify the commenter's assertion that it will no longer be cheaper for H–2 employers and recruiters to break the law than to comply with program requirements as the commenter did not provide corroborating details or data about the costs for compliance versus non-compliance.

Comment: A religious organization expressed support for the proposed provisions, reasoning that they would be important to improve program integrity, protect H–2 workers, and deter potential petitioners who have previously committed labor law violations or H–2 program abuse. The commenter suggested that DHS consider taking additional steps to strengthen these provisions by referencing U and T visa grants when considering whether an employer should be barred, adding that these visa applications may lead to investigations but not prosecutions for fraud, but that they should be considered against an employer's participation in the H–2 program.

Response: DHS agrees that the provisions are an important step to encourage employers to comply with all applicable H–2 requirements, improve program integrity, and deter employers from engaging in labor law violations and abuse of the H–2 program. However, DHS declines to expand the mandatory and discretionary denial provisions to include consideration of grants of U and T nonimmigrant status visas that were based on investigations into H–2 employers. Information relating to noncitizens who are applying for or have been granted U or T nonimmigrant status visas is subject to strict confidentiality protections that would generally preclude DHS from disclosing such information to an H–2 petitioner. *See* 8 U.S.C. 1367(a)(2). Further, an investigation into fraud, standing alone, would not trigger the new mandatory and discretionary denial provisions because an investigation by itself would not constitute a ''final'' determination as required under new 8 CFR 214.2(h)(10)(iv).

Comment: Several commenters, including a professional association, stated that the provisions that would allow for the denial of H–2 petitions for employers that have been found to have committed labor law violations or other violations of H–2 program regulations were ''overly broad and vague.'' Some of these commenters stated that the provision was vague and did not provide the public with the ability to evaluate and comment on what would result in a denial or the standards against which an employer's conduct would be measured. A few individual commenters stated that the proposed rule would grant DHS the authority to deny and revoke H–2 petitions based on ''arbitrary, undefined standards'' such as perceived labor violations or an employer's lack of cooperation with an agency. The commenters asked whether an incorrect pay stub would be grounds for denial or revocation of a petition under the proposed rule. As a result, these commenters urged the department to reconsider its implementation of the proposed section.

Similarly, a couple of trade associations provided an example of an inspector entering the employer's worker housing and seeing that workers had removed a battery from a smoke detector to stop it from going off during meal preparation. The commenters questioned whether this violation would be subject to a mandatory or discretionary denial. Additionally, while discussing the recently issued DOL ''Adverse Effect Wage Rate'' regulation, the commenters expressed concern that violations under that regulation would subject the petitioner to mandatory or discretionary denials.

Response: DHS disagrees that the provision is overly broad or vague. Rather, the mandatory grounds for denial in new 8 CFR 214.2(h)(10)(iv)(A) are specific and focused on violations that show a petitioner's past inability to abide by the requirements of the H–2 programs and, that due to their severity, are alone sufficient to conclude that the petitioner lacks the requisite intent and ability to comply with the requirements of the H–2 programs in the future. Likewise, the discretionary grounds for denial discussed in new 8 CFR 214.2(h)(10)(iv)(B) enumerate specific violations pertaining to the petitioner's compliance with immigration and employment laws. Because these still very serious violations could potentially be less egregious in nature or less directly related to the H–2 programs than the mandatory grounds, DHS recognizes that this would require additional analysis before determining whether application of one of the discretionary grounds is warranted.

In addition to delineating the applicable violations that could give rise to a discretionary denial, the proposed rule also provided detailed information on how USCIS will examine the applicable violations to determine whether a denial should apply. As described in the proposed rule, specific considerations include: the recency and number of violations; the egregiousness of the violation(s), including how many workers were affected, and whether it involved a risk to the health or safety of workers; overall history or pattern of prior violations; the severity or monetary amount of any penalties imposed; whether the final determination, decision, or conviction included a finding of willfulness; the extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential financial injury to the workers; timely compliance with all penalties and remedies ordered under the final determination(s), decision(s), or conviction(s); and other corrective actions taken by the petitioner or its successor in interest to cure its violation(s) or prevent future violations. *See* 88 FR 65040, 65106 (Sept. 20, 2023).

With respect to the specific examples raised by commenters, DHS notes that the mandatory grounds for denial only

apply in three limited circumstances: (1) when there is a final debarment determination by DOL or GDOL; (2) where there is a final USCIS denial or revocation decision issued during the pendency of the petition or within 3 years prior to filing the petition that included a finding of fraud or willful misrepresentation of a material fact with respect to a prior H–2A or H–2B petition; and (3) when there is a final determination of violation(s) under section 274(a) of the Act during the pendency of the petition or within 3 years prior to filing the petition. With respect to discretionary denials, DHS declines to state in absolute terms whether the violations in those examples would or would not trigger a discretionary denial. Providing specific examples is not advisable because USCIS will evaluate each violation together with all the other relevant factors on a case-by-case basis. By including a very broad scope for the types of violation determinations that may lead to a discretionary denial under 8 CFR 214.2(h)(10)(iv)(B) generally and the catch-all provision under 8 CFR 214.2(h)(10)(iv)(B)(*3*) specifically, DHS recognizes that the violations underlying these determinations can vary widely in nature and severity.

Comment: Several commenters expressed concerns about the impact of petition adjudication delays as a result of these provisions, noting that these provisions will result in an increase in RFEs, denials, and appeals which could take several weeks to resolve. For example, a couple of trade associations expressed concern that the proposed section did not consider the time-sensitive nature of H–2 petitions, stating that refusing to process an employer's petition serves as an ''effective debarment from the program for at least a year.'' The commenters added that because the current appeal process is ''slow,'' a denial or a refusal to process a petition prevents an employer from obtaining an approved petition regardless of whether an appeal is successful. Another commenter noted that the time needed to resolve these requests for evidence is ''time that petitioners do not have in seeking their critical workforce for jobs related to perishable commodities.'' Some commenters urged DHS to guarantee ''expeditious timelines'' of these adjudications. Another commenter urged DHS to consider ''the opportunity for an expedited appeal process.''

Response: DHS understands that H–2 petitions are time sensitive and strives to adjudicate each H–2 petition in a timely manner. However, DHS will not ''guarantee expeditious timelines during periods of alleged consequences'' nor create a new ''expedited appeal process'' as suggested by some commenters. DHS already provides expedited processing of Form I–129 for H–2A petitioners without requiring an additional fee.[51] This final rule does not change this practice. If an H–2B petitioner seeks expedited processing of their H–2B petition, they may file Form I–907, Request for Premium Processing Service, with fee, with USCIS.[52]

With respect to comments about DHS ''refusing to process an employer's petition,'' the commenters appear mistaken as to what was proposed. DHS is not refusing to process an employer's petition but rather finding that prior violations can be so significant as to indicate the petitioner's inability and lack of intent to comply with the requirements of the H–2 programs, such that denial of the petition is warranted under either the mandatory or discretionary provisions. DHS will not neglect to process the petition but will rather take adjudicative action consistent with the new regulations. Regarding the appeal process, DHS understands that the seasonal nature of some H–2 petitions could be impacted by appeals processing timelines. However, that is not unique to or caused by these provisions. This is something faced by any petitioner who fails to demonstrate eligibility for the benefit sought such that their petition is denied or revoked by USCIS.

Comment: While voicing concerns that the proposed rule does not address abuse by recruiters and preparers, an individual commenter stated that the regulations should specify clearly how recruiters and preparers can be ''debarred,'' reasoning that it is often recruiters or preparers, not employers, who collect prohibited fees. The commenter also encouraged USCIS to specify that a failure to list a recruiter when one has been used can be considered a ''material misrepresentation'' for purposes of the mandatory and discretionary grounds for denial. Additionally, the commenter suggested that the prior use of prohibited recruiters or preparers could serve as a discretionary basis for precluding approval of an employer's petition.

Response: DHS appreciates the opportunity to clarify that new 8 CFR 214.2(h)(10)(iv) does not create a ''debarment'' process for recruiters, nor does it create any type of official registry or list of recruiters who may participate in the H–2 programs. Recruiters do not register or directly file for benefits with DHS. DHS currently has no existing framework to exclude or identify a recruiter as ''prohibited'' from the H–2 program in a registry or similar list, and creating such a framework is outside the scope of this rule. While DOL's Office of Foreign Labor Certification (OFLC) currently publishes an H–2B ''Foreign Labor Recruiter List,'' which includes the name and location of persons or entities identified on the TLC as an agent or recruiter, DOL clearly states that it ''does not endorse any foreign labor agent or recruiter included in the Foreign Labor Recruiter List, nor does inclusion on this list signify that the recruiter is in compliance with the H–2B program.''[53] Without a mechanism for a petitioner to identify a specific recruiter as ''prohibited,'' DHS currently lacks the means to implement the commenter's suggestion to codify the prior use of a ''prohibited'' recruiter as part of new 8 CFR 214.2(h)(10)(iv).

Notwithstanding the above, if a petitioner fails to disclose on the H–2 petition that it has used a recruiter to locate and/or recruit the intended beneficiaries, USCIS may consider this to be a material misrepresentation or omission, depending on the circumstances. With this final rule, the Form I–129 is being revised to ask H–2 petitioners whether they used or plan to use an agent, facilitator, recruiter, or similar employment service to locate and/or recruit the H–2A/H–2B workers that they intend to hire by filing the petition. The Form I–129 is also being revised to ask H–2 petitioners to provide the name(s) and address(es) of all such persons and entities regardless of whether the petitioner has a direct or indirect contractual relationship with them, and regardless of whether such person or entity is located inside or outside the United States or is a governmental or quasi-governmental entity. If the petitioner used a recruiter prior to submitting the Form I–129, but did not disclose that information on the petition, or gave false information about the recruiter they used on the Form I–129, USCIS may deny or revoke the petition on the basis that the statements on the petition misrepresented or

[51] USCIS, ''H–2A Temporary Agricultural Workers'' (stating ''USCIS provides expedited processing of Form I–129 for H–2A petitions''), *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers* (last updated Sept. 11, 2024).

[52] Form I–907, ''Request for Premium Processing Service,'' *https://www.uscis.gov/i-907* (last updated June 3, 2024).

[53] DOL, OFLC, ''Foreign Labor Recruiter List,'' *https://www.dol.gov/agencies/eta/foreign-labor/recruiter-list.* This DOL-published list is specific to the H–2B program.

omitted a material fact under existing 8 CFR 214.2(h)(10)(ii) or (11)(iii)(A)(*2*), respectively. In turn, this may trigger a discretionary denial under new 8 CFR 214.2(h)(10)(iv)(B)(2) or new 8 CFR 214.2(h)(10)(iv)(A)(*2*). As new 8 CFR 214.2(h)(10)(iv) already gives USCIS the ability to consider the failure to disclose a used recruiter on an H–2 petition, DHS declines to specifically codify language about a prior recruiter in new 8 CFR 214.2(h)(10)(iv).

With respect to the comments about debarred agents and preparers, DOL currently publishes a list of agents and attorneys who are debarred from the H–2A and H–2B labor certification programs.[54] Also, the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) maintains a List of Currently Disciplined Practitioners who are not authorized to practice before DHS, the Board, and the Immigration Courts.[55] If USCIS discovers that an H–2 petition was filed by or associated with a debarred agent or attorney, depending on the circumstances, USCIS may consider this information in determining the credibility of the overall petition. However, DHS also recognizes that each petition must be adjudicated on its own merits, and in the absence of other factors indicating that the petition is not approvable, an agent or attorney's debarment may not have an impact on the eligibility of the petition, as the agent or attorney's debarment may have nothing to do with the petitioner or the underlying reason for the prior debarment may no longer be at issue. Therefore, DHS declines the commenter's suggestion to codify the prior use of a debarred preparer as a factor for discretionary denial in new 8 CFR 214.2(h)(10)(iv).[56]

Comment: An individual commenter expressed concern that this section would result in the ''debarment'' of employers without a hearing. The commenter added that case law requires hearings for ''debarment.'' The commenter stated that Congress requires a hearing, willfulness, and substantiality, all of which DOL has recognized but this NPRM specifically denies.

Response: DHS disagrees with the commenter's assertion that the provisions in this rule result in ''debarment'' of employers without a hearing. USCIS provides petitioners with an opportunity to challenge the denial of their petitions pursuant to 8 CFR part 103, including the ability to bring their case before USCIS' Administrative Appeals Office (AAO) and request oral argument to present their case. Specifically, USCIS will be using its existing adjudications and appeals processes to satisfy this ''notice and opportunity for a hearing'' requirement. *See* 8 CFR 103.2, 103.3; 88 FR 65040, 65057 (Sept. 20, 2023).[57] Each denial determination in new 8 CFR 214.2(h)(10)(iv) would take place within a nonimmigrant petition adjudication, and as a result would provide ''notice and opportunity for a hearing'' within that informal framework. *See* 8 CFR 103.2, 103.3. To issue a USCIS denial under new 8 CFR 214.2(h)(10)(iv), an Immigration Services Officer (ISO) would generally issue a NOID or RFE to the petitioner, providing up to 12 weeks to file a response. 8 CFR 103.2(b)(8). Upon considering the petitioner's response and any rebuttal evidence, the ISO could deny the petition in a written decision that would explain the specific grounds for the denial. 8 CFR 103.3(a)(1)(i). With respect to mandatory grounds for denial in new 8 CFR 214.2.(h)(10)(iv)(A), the notice would inform the petitioner of their right to appeal, and indicate that the denial is based upon a mandatory ground for denial and that the petitioner's pending and subsequently filed petitions would also be subject to denial based on the same ground, during the applicable period. New 8 CFR 214.2.(h)(10)(iv)(E)(*1*). With respect to the discretionary grounds for denial, the notice would inform the petitioner that the discretionary ground may also apply in the adjudication of any pending or future-filed petitions during the applicable time period. New 8 CFR 214.2.(h)(10)(iv)(E)(*2*). If the petitioner refiles during the discretionary denial period, they will have the opportunity to establish that they have the ability and intent to comply, notwithstanding a prior denial. As with a denial notice issued under new 8 CFR 214.2.(h)(10)(iv)(E)(*1*), a denial notice issued under new 8 CFR 214.2.(h)(10)(iv)(E)(*2*) would also inform the petitioner of the right to appeal the denial, which may include a request for oral argument, pursuant to 8 CFR 103.3.[58] Upon issuance of the decision, the petitioner would have 30 days (plus applicable mailing time) to appeal the denial of the petition to the Administrative Appeals Office (AAO). 8 CFR 103.3(a)(2)(i) and 8 CFR 103.8(b). In support of an appeal, the petitioner may submit a brief, additional evidence, and a request for oral argument before the AAO. *See generally* 8 CFR 103.3.[59] Thus, this final rule provides sufficient procedural safeguards to ensure a fair and reliable proceeding to ensure that a petitioner has notice and opportunity for a hearing.

DHS notes, in response to the comment regarding the statute's use of the term ''notice and opportunity for hearing,'' that INA section 214(c)(14)(A)(ii) does not require, in the event of a denied H–2B petition and/or appeal of a denied H–2B petition, a formal hearing under 5 U.S.C. 554 or 556. Rather, DHS's existing adjudications and appeals processes, described above, satisfy the ''notice and opportunity for a hearing'' requirement. In this regard, DHS notes that the plain language of INA section 214(c)(14) does not require an ''on the record'' hearing or otherwise indicate that Congress expected an adversarial, trial-type hearing referenced in 5 U.S.C. 554(a) and 556. Statutes calling for a ''hearing,'' a ''public hearing,'' or an ''appeal,'' without using the words ''on the record,'' are implicit delegations to the agency to determine the meaning of those terms, and DHS has determined that ''notice and an opportunity for a hearing'' does not require a hearing on the record.[60]

Finally, with regard to the commenter's statement regarding willfulness and substantiality, as explained in an earlier comment

[54] DOL, ''Program Debarments,'' *https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Debarment_List.pdf.*

[55] EOIR, ''List of Currently Disciplined Practitioners,'' *https://www.justice.gov/eoir/list-of-currently-disciplined-practitioners* (last updated June 13, 2024).

[56] As noted above, however, it remains the responsibility of the employer to continually exercise ongoing efforts to ensure against payment of prohibited fees, and an employer's engaging a recruiter or similar service that has previously collected such fees could be a factor that DHS would consider in determining whether the employer is subject to the discretionary denial provisions.

[57] *See also* Michael Asimow, Admin. Conference of the U.S., ''Federal Administrative Adjudication Outside the Administrative Procedure Act'' (2019) (discussing informal adjudication), *https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf.*

[58] The denial notice would also inform the petitioner of the ability to file a motion under 8 CFR 103.5(a). The filing of a motion would not stay the denial decision. 8 CFR 103.5(a)(1)(iv).

[59] *See* INS Gen. Counsel, GenCo Op. No. 91–23, *Determination of Date of Final Decision in Denied Cases,* 1991 WL 1185134 (Feb. 21, 1991).

[60] *See Dominion Energy Brayton Point, LLC* v. *Johnson,* 443 F.3d 12, 17 (1st Cir. 2006) (finding that the prior court's decision that there is a presumption in the APA for an evidentiary hearing was created because of an absence of congressional intent and that basing a statutory interpretation on a negative finding is ''antithetic to a conclusion that Congress's intent was clear and unambiguous''); *Accrediting Council for Indep. Colleges & Schs.* v. *DeVos,* 303 F. Supp. 3d 77, 110 n.11 (D.D.C. 2018) (concluding that the phrase ''after notice and opportunity for a hearing'' in a statute does not trigger APA requirement for formal adjudication).

response, each of the violations triggering new denial periods in this final rule, as applied to H–2B petitions, stems from a willful failure to comply with program requirements or a willful misrepresentation of material fact. Accordingly, the provisions are consistent with INA section 214(c)(14), as well as INA sections 103(a), 214(a)(1), and 214(c)(1).

b. Discretionary and Mandatory Denials Related to Other Agencies' Determinations

Comment: Several commenters expressed concerns with DHS's legal authority to deny an H–2 petition based on the findings of another agency. For example, a couple of trade associations stated that the proposal to deny a petition based upon the finding of another agency was ''misguided'' and lacked statutory authority. Some commenters suggested that the Department rework the proposed rule to ensure it is not interpreting and enforcing DOL regulations, adding that it would potentially be ''arbitrary and capricious'' of DHS to do so. A trade association expressed concern that USCIS officers are not experts in labor law or regulations and that the analysis required under this section would require these officers to make individual judgments about the underlying decision and merit of a claim, resulting in an interpretation that would be arbitrary and capricious. A different trade association suggested that DHS ensure that its employees are not overreaching and attempting to ''supplant the regulatory authority'' of other government authorities. A professional association similarly expressed concern that ''DHS is also playing enforcer of other agency laws and rules when, in fact, those other agencies should be enforcing their own standards.''

Some commenters said that if another Department, such as DOL, investigates an employer, determines a violation occurred, and imposes a penalty, DHS lacks the legal authority to impose an additional penalty on the employer in the form of what it describes as the discretionary or mandatory bar to approval. A couple of trade associations stated that the proposal to deny petitions of petitioners on the basis that they paid civil money penalties to another agency for a violation lacked a statutory basis, as the Department cannot penalize an employer for a violation that has already been resolved. The commenters added that employers typically pay fines for alleged minor violations because it is cheaper than challenging the violations, but that the proposal would cause employers to potentially face debarment as a result of this practice.

A trade association wrote that in situations where other agencies have determined that debarment is not necessary, the Department should factor in those agencies' decisions when deciding whether to deny a petition. Similarly, another trade association stated that when other agencies have decided a violation does not warrant debarment, DHS ''has no basis to refuse to approve a petition and thereby effectively impose a debarment penalty.''

A research organization expressed opposition to the section, saying it was unreasonable of DHS to second-guess a DOL determination that debarment was not necessary for a violation. The research organization said DOL's labor certification stage, rather than the petition stage, was the correct place to enforce program requirements because it is earlier in the process and DOL is more accustomed to violation evaluations. The organization also urged DHS to extend the deference it has made to its own past determinations to the determinations of other agencies, including DOL. The commenter stated that this provision is ''unnecessary or duplicative of DOL regulations or proposed regulations.''

Several trade associations and a couple of advocacy groups expressed concern with the Department's proposal to deny petitions from employers who have been subject to an administrative action by DOL's WHD or other Federal, State, or local agency that did not require debarment. The commenters reasoned that if an agency's investigation determined that debarment was not necessary, then the Department should not deny an employer's petition, as it would effectively debar them from H–2 programs. Similarly, a trade association stated that DHS should honor the outcome of an investigation and administrative action by WHD. The commenter added that the provision allowing for an additional investigation following WHD's initial actions would create unnecessary expenses for employers.

Response: DHS disagrees with commenters' claims that it lacks statutory authority to consider findings of violations made by other agencies when determining whether to deny an H–2 petition. DHS also disagrees with the comments about it supplanting other agencies' authority, seeking to enforce or interpret other agencies' laws, and purporting to be an expert in other agencies' laws. As discussed in the proposed rule, as well as elsewhere in this final rule, DHS has broad authority to deny petitions requesting H–2 workers pursuant to its general authority under INA secs. 103(a)(1) and (3), and 214(a)(1) and (c)(1), as well as its specific authority under INA sec. 214(c)(14)(A)(ii). *See* 88 FR 65040, 65056 (Sept. 20, 2023). Neither the general nor the specific authority Congress delegated to DHS to administer immigration laws and approve or deny status to an H–2 worker upon petition by the importing employer, including authority to establish the information required on the petition, preclude DHS, or limit its authority, from denying H–2 petitions based on the final determinations of serious violations made by DOL or other agencies. As discussed in response to public comments in part IV.C.1, where the facts warrant, DHS has the authority to deny H–2 petitions in the manner provided in this rule. Implicit in these delegations is the obligation that DHS ensure the integrity of H–2 programs.

In carrying out its authority and responsibility to promulgate regulations under the above-referenced statutory provisions, DHS has determined that there are instances where the violations are so severe or egregious, and so related to the question whether the petitioner has the ability and intent to comply with the H–2 program requirements so as to preclude approval of a petition for a specific period. Accordingly, reading DHS' statutory authorities as including the authority to promulgate regulatory provisions mandating the denial of H–2 petitions based on final determinations of egregious violations made by DOL, other agencies, as well as U.S. courts in the case of criminal convictions, is the best reading of DHS's broad statutory authority and responsibility to administer and ensure the integrity of the H–2 program. Similarly, the statute is best understood as authorizing DHS to consider final determinations of lesser violations on a discretionary basis, along with all aggravating or mitigating factors, relating to whether a petitioner has the intent and ability to comply with the H–2 program requirements. These comments seem to be based on a misunderstanding of the nature and purpose of DHS's consideration of other agencies' findings. In considering violations found by other agencies, DHS is not re-adjudicating the merits of those findings. Rather, DHS's analysis is limited to whether those violations, along with all relevant factors, indicate to DHS that the petitioner is unwilling or unable to comply with the

requirements of the H–2A or H–2B program, which is squarely within the scope of DHS's authority.

DHS is not proposing to ''second-guess'' the determination of the other agencies. Rather, DHS is deferring to their expertise to determine if a violation under their authority has occurred. If another agency or a court has determined that one or more of the violations listed in new 8 CFR 214.2(h)(10)(iv)(B) has occurred, USCIS will then consider that finding of violation in relation to USCIS' authority in the H–2 program to determine whether, in USCIS' discretion, the violation is significant enough and so related to the H–2 program that it undermines the petitioner's claim of intent and ability to comply with H–2 program requirements. USCIS may also consider the violation in assessing the overall credibility of the petitioner's statements in the petition. Although another agency such as DOL may investigate a violation and determine that that specific violation does not warrant debarment, USCIS may still consider the violation in the larger context of the petitioner's recent actions. Further, USCIS' focus is not just on how the violation relates to the petitioner's claim of intent and ability to comply with H–2 program requirements but also encompasses other information that could not be or was not considered in the other agency's proceedings, such as prior misrepresentations in the H–2 petition context or lack of corrective action. As is made clear by the regulatory text at new 8 CFR 214.2(h)(10)(iv)(C), USCIS will look at the totality of the petitioner's circumstances, not just the facts concerning a violation in isolation. While USCIS officers will evaluate whether the petitioner, more likely than not, will comply with H–2 requirements, USCIS officers will not revisit the merits of the underlying final administrative or judicial determination against the petitioner.

Similarly, USCIS would not revisit or re-adjudicate a final determination by another agency or a court that one or more violations listed under new 8 CFR 214.2(h)(10)(iv)(A)(*1*) or (*3*) had occurred. Rather, USCIS would determine whether the final determination was made against the petitioner or its successor in interest, and whether it was made during the relevant period. As explained in the NPRM, ''[t]he violation findings set forth in proposed 8 CFR 214.2(h)(10)(iv)(A) are, by nature, so egregious and directly connected to the H–2 programs that they warrant mandatory denial.'' 88 FR 65040, 65057 (Sept. 20, 2023).

Comment: Some commenters expressed procedural concerns with giving USCIS the ability to issue a discretionary denial based on the findings of another agency. A commenter said the section fails to provide a method for adequate due process, including for petitioners to offer evidence about the claim. Another trade association expressed concern that by barring petitioners or successors in interests from the program as a result of a violation adjudicated by other agencies, the proposal would ignore due process mechanisms set in place to protect regulated entities.

A professional association said that giving USCIS ''discretion to deny an employer from filing an H–2 petition based on the findings of another agency makes it almost impossible for employers to defend themselves'' and is violative of employers' due process rights. The commenter further stated that the ability of USCIS to issue a discretionary denial when USCIS had not been party to the proceedings finding violations is arbitrary and unfair. Moreover, the commenter said that the proposed rule does not include a provision allowing employers to make corrections for future petitions after a denial or debarment, thus denying the employer its right to ''establish its intention or ability to comply'' with program requirements under proposed 8 CFR 214.2(h)(10)(iv)(B). The commenter concluded that USCIS should not be able to issue a discretionary denial under 8 CFR 214.2(h)(10)(iv)(C), but if DHS insists on maintaining the language in the final rule, USCIS should consider ''all relevant factors'' when making determinations and have a thorough review process.

Response: DHS disagrees with these comments. Again, it appears that the commenters misunderstand the nature and purpose of USCIS' consideration of other agencies' findings. Within the context of the H–2 petition adjudication, there is no need for USCIS to provide the petitioner with an opportunity to offer evidence to dispute or ''defend themselves'' against the merits of the underlying violation because USCIS will not re-adjudicate the underlying violation. It is reasonable to assume that, if the petitioner had wanted to dispute or defend themselves against the merits of the underlying violation, they would have done so during the proceedings leading to the final determination of the violation and would not raise these matters for the first time during the H–2 petition process. It is also reasonable to assume that the other agency afforded the petitioner adequate due process during the proceedings leading to the final determination of the violation and that the petitioner would have raised any such matters during those prior proceedings before the relevant administrative or judicial entity issued its final determination.

USCIS will comply with all procedural safeguards outlined in 8 CFR 103.2(b), including generally providing the petitioner an opportunity to respond to derogatory information pursuant to 8 CFR 103.2(b)(16)(i). Thus, before denying a petition under the new mandatory or discretionary ground at new 8 CFR 214.2(h)(10)(iv), USCIS generally will first issue a request for evidence or NOID the petition and provide an opportunity for the petitioner to respond. Further, upon a determination that one of the mandatory or discretionary grounds at new 8 CFR 214.2(h)(10)(iv) warranted a denial of the petition, USCIS will issue a denial notice informing the petitioner of the right to appeal the denial to USCIS' AAO, including the ability to request an oral argument. *See* new 8 CFR 214.2(h)(10)(iv)(E)(*1*)–(*2*). The commenters did not explain what part of these procedures they believe will violate their due process rights.

Also, the commenters did not explain what they meant by ''including a provision allowing employers to make corrections for future petitions after a denial or debarment'' for purposes of the new discretionary bar. If a petitioner took corrective actions subsequent to a denial under new 8 CFR 214.2(h)(10)(iv)(B), that petitioner may file a new H–2 petition requesting USCIS to consider those corrective actions as positive factors that demonstrate its intent and ability to comply with H–2 program requirements. Under new 8 CFR 214.2(h)(10)(iv)(B)(*7*)–(*8*), USCIS specifically factors in whether the petitioner has made ''timely compliance with all penalties and remedies ordered under the final determination(s), decision(s), or conviction(s)'' and ''other corrective actions taken by the petitioner or its successor in interest to cure its violation(s) or prevent future violations.'' DHS reaffirms that, under new 8 CFR 214.2(h)(10)(iv)(B), USCIS will consider all relevant factors and have a thorough review process when making determinations. Further, new 8 CFR 214.2(h)(10)(iv)(E)(*2*) specifies that, with respect to denials under the discretionary ground, the denial notice will indicate that the discretionary ground of denial ''may also apply in the adjudication of any other pending or

future H–2 petition filed by the petitioner or a successor in interest during the applicable time period.'' New 8 CFR 214.2(h)(10)(iv)(E)(*2*) does not, however, state that the discretionary ground of denial ''will'' apply to any other pending or future H–2 petitions filed by the petitioner or a successor in interest during the applicable time period.

Comment: Some commenters expressed concern that the proposal does not include details of how violations adjudicated by other agencies would be communicated to or verified by the Department.

Response: Revisions to the Form I–129 associated with this final rule require the petitioner to answer questions regarding serious labor law violations or other violations. If the petitioner answers ''yes'' to these questions, they must submit a complete copy of the final administrative or judicial determination with the Form I–129. Once USCIS reviews a copy of the final administrative or judicial determination, USCIS will rely on those findings and will not re-adjudicate such final determination.

Note that in some instances, such as a DOL debarment or an INA sec. 274(a) violation, DOL or other Federal agencies will provide documentation of the violation directly to USCIS. In other instances, USCIS may come across information from another source (for example, open sources like a press release or a newspaper article, a tip submitted to the ICE online tip form, or an administrative site visit information) suggesting the petitioner was found to have committed a relevant violation. In those cases, USCIS may request evidence of the final administrative or judicial determination (for example, a certified court disposition) from the petitioner if it has not already been submitted with the Form I–129. In all cases, however, it remains the petitioner's burden to truthfully answer all the questions on Form I–129 and submit all required evidence. By signing the Form I–129, the petitioner (and any employer and joint employer, as applicable) certifies, under penalty of perjury, that it has reviewed the petition and that all the information contained on the petition, and in the supporting documents, is complete, true, and correct.

Comment: Some commenters expressed concern that imposing the mandatory or discretionary bar based upon a debarment action that is not final and the employer did not have an opportunity to appeal is a denial of due process. Without providing specific examples, the commenter claimed to be aware of ''several recent cases'' where DOL initiated a process of debarment, and where USCIS refused to approve an employer's petition despite the DOL adjudication not being finalized.

Response: The proposed rule preamble and regulatory text make clear that the mandatory grounds for denial at 8 CFR 214.2(h)(10)(iv)(A) are applied only to determinations or findings that are final. Specifically, each violation listed in 8 CFR 214.2(h)(10)(iv)(A), as proposed and finalized, includes the word ''final'' when discussing the nature of the findings that will trigger the mandatory ground for denial.[61] Additionally, DHS's intent was to propose that all of the discretionary triggering events would also be final determinations. However, based on the comments received, the regulatory text could be made clearer in this regard. As such, DHS is adding the word ''final'' to new 8 CFR 214.2(h)(10)(iv)(B)(*2*) so that it is clear that all violations listed under 8 CFR 214.2(h)(10)(iv)(B) refer to a final determination.[62] Regarding the commenter's unsubstantiated claim of the impact of pending debarment under the current regulations, DHS cannot respond because the commenter did not provide any specific information about this claim. However, as noted above, the mandatory and discretionary denial provisions under the new regulations are triggered only by a final determination from DOL to debar a petitioner.

Comment: A few trade associations requested clarification of the interplay between new 8 CFR 214.2(h)(10)(iv) and 8 CFR 214.1(k). Specifically, these commenters requested DHS to clarify whether 8 CFR 214.1(k) would apply, or if new 8 CFR 214.2(h)(10)(iv) would result in a ''one-time denial or revocation.''

Response: As stated in the NPRM, DHS is retaining the provision at 8 CFR 214.1(k) and believes the addition of new 8 CFR 214.2(h)(10)(iv) will complement that provision. DHS is unclear about the commenters' reference to a ''one-time denial or revocation'' under new 8 CFR 214.2(h)(10)(iv) because the new provision addressing H–2 petition denial during debarment, specifically 8 CFR 214.2(h)(10)(iv)(A)(*1*), does not indicate a ''one-time denial or revocation,'' but rather is a prohibition on petition approval during the debarment period. In so far as the commenters are concerned about the possible overlap between 8 CFR 214.1(k) and new 8 CFR 214.2(h)(10)(iv)(A)(*1*), the new provision at 8 CFR 214.2(h)(10)(iv)(A)(*1*) provides clarity on how USCIS will exercise its ability to deny H–2 petitions filed by petitioners that are debarred from the H–2 programs. Specifically, while 8 CFR 214.1(k) provides that USCIS ''may'' deny petitions for workers in the H (except for H–1B1), L, O and P–1 nonimmigrant classifications during the period of debarment (for a period of 1 to 5 years) upon DOL debarment under 20 CFR 655, new 8 CFR 214.2(h)(10)(iv)(A)(*1*) clarifies that USCIS ''will'' deny H–2 petitions filed or pending during the period of debarment under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503 as specified by DOL, or during a period of debarment specified by the Governor of Guam. New 8 CFR 214.2(h)(10)(iv)(A)(*1*) will only apply to H–2 petitions filed on or after the effective date of this rule, with a debarment period beginning on or after the effective date of this rule. If new 8 CFR 214.2(h)(10)(iv)(A)(*1*) does not apply, USCIS may still apply 8 CFR 214.1(k) to deny H–2 petitions filed by petitioners subject to DOL debarment.[63]

c. Comments Specific to Mandatory Denials Under 8 CFR 214.2(h)(10)(iv)(A)

Comment: A professional association said that involving WHD determinations in DHS decisions would be an overstep of the boundaries between agencies, and suggested DHS only deny employers based on what it discovers in its own investigations.

Response: DHS declines the suggestion to limit the scope of the new mandatory grounds for denial to only violations that DHS discovers in its own investigations. Such a suggestion would be unnecessarily restrictive compared to what DHS can already do. For example, under current 8 CFR 214.1(k), USCIS may already deny H–2 petitions for a period of at least 1-year but not more than 5 years upon a finding of debarment by DOL. Moreover, it is contrary to the statutory and regulatory scheme, which specifically contemplates DOL's role in assisting

[61] As explained in the NPRM, a ''final'' USCIS decision means that there is no pending administrative appeal or the time for filing a timely administrative appeal has elapsed. 88 FR 65040, 65058 (Sept. 20, 2023).

[62] As proposed and finalized, 8 CFR 214.2(h)(10)(iii)(B)(*1*) and (*3*) already contains the word ''final.''

[63] For instance, H–2 petitions filed prior to the effective date of this rule, or with a debarment period beginning prior to the effective date, may still be denied under 8 CFR 214.1(k). In addition, USCIS may deny an H–2 petition under 214.1(k) when the petitioner has been debarred by DOL from a non-H–2 program, whereas new 8 CFR 214.2(h)(10)(iii)(A)(1) does not extend to the denial of an H–2 petition in such a case.

DHS in determining the approvability of H–2 petitions.[64]

d. Comments Specific to Discretionary Denials Under 8 CFR 214.2(h)(10)(iv)(B)

Comment: Several commenters opposed proposed 8 CFR 214.2(h)(10)(iv)(B) on the basis that the consequences of this provision may not be commensurate with violations that are ''minor,'' ''minimal,'' ''technical,'' ''trivial,'' ''innocent,'' or otherwise insignificant in nature. For example, a trade association stated that the provision was overbroad, increases the impact of determinations by other agencies, and creates a situation where employers could lose access to the H–2 program based on ''minor employment law violations that have no impact on the health or safety of workers.'' Other commenters expressed that H–2 employers should not be effectively debarred for minor violations and were concerned with the perceived lack of guardrails in the proposed rule to ensure that citations for ''minor'' infractions would not result in DHS denying or revoking a petition under its discretionary authority.

A joint submission expressed concern that, despite the proposed rule's assertion that DHS would not exercise its authority for ''de minimis'' violations, its discretionary authority would be ''open ended'' and extend to any legal or regulatory violation, regardless of its severity. Discussing the proposed rule's ''intention or ability to comply'' analysis that it said the Department provided as a ''balancing test,'' the commenter said this test does not apply to the ''threshold provision'' that determines whether its discretionary denial is applicable. The commenter provided various examples of violations of ''minimal significance,'' including violations that an employer would not seek to appeal given the cost would exceed the violation penalty itself, but that DHS could use to show a large ''number of violations'' or a ''pattern of violations'' and invoke the section. The commenter stated that as a result, the Department's discretionary denial authority is ''unfair, excessive, and overly punitive.''

Similarly, a union expressed concern that the application of USCIS' discretionary authority might be overbroad and extend to minor violations that might have occurred as a result of administrative errors. The commenter stated that employers might face discretionary denials for violations that ''do not call into question the ability or intention'' of petitioners to comply with H–2 program requirements. An attorney stated that the phrase ''calling compliance into question'' must be removed for vagueness, as any violation, no matter how trivial, could penalize a petitioner under this provision for ''the most innocent act.'' A trade association strongly opposed proposed 8 CFR 214.2(h)(10)(iv)(B) in its entirety but said that, if maintained in the final rule, DHS should clarify and provide examples of violations that would trigger a denial or revocation of a petition under the proposed discretionary authority.

A joint submission urged the Department to ''soften'' the proposed rule's language regarding violations that would trigger a discretionary denial. The commenter suggested the rule include qualifications to limit actions to ''severe or egregious violations involving worker health and safety,'' referencing similarities to other Federal regulations. The commenter concluded that this would provide additional layers of due process protections and prevent employers from being penalized for minor violations while still protecting workers. Other commenters suggested DHS limit the nature of the violations exclusively to violations of USCIS H–2 regulations.

Response: DHS appreciates the commenters' concerns but declines to make changes to the discretionary grounds for denial at new 8 CFR 214.2(h)(10)(iv)(B) based on these comments.[65] DHS maintains that the factors enumerated in 8 CFR 214.2(h)(10)(iv)(C) make it clear that no single factor, standing alone, will be considered sufficient to warrant denial because the analysis includes consideration of all relevant factors, including the number of violations, egregiousness of the violation(s), overall history or pattern of prior violations, and the severity of the penalties imposed, among others. As stated in the NPRM, a single factor, standing alone, will not be outcome determinative, but may be weighted differently depending on the circumstances of each case; such that one factor could be given significant weight in reviewing the totality of the facts presented, even if other listed factors were absent. 88 FR 65040, 65060 (Sept. 20, 2023).

For example, as illustrated in the NPRM, USCIS would likely not consider a single de minimis Occupational Safety and Health Administration (OSHA) violation or a single Department of Transportation (DOT) violation for poor vehicle maintenance that did not result in risk or harm to workers as necessarily relevant to the petitioner's intention or ability to comply with H–2A program requirements. 88 FR 65040, 65059–60 (Sept. 20, 2023). On the other hand, if a petitioner has, for instance, a history of serious OSHA violations for failure to provide workers with personal protective equipment or a history of DOT violations for poor vehicle maintenance and those vehicles were continually used to transport the company's H–2 workers, resulting in the death or injury of (or risk of death or injury to) H–2 workers, then USCIS would likely consider those violations relevant to the petitioner's intention and/or ability to comply with H–2A or H–2B program requirements under proposed 8 CFR 214.2(h)(10)(iv)(B)(*3*). These examples illustrate that new 8 CFR 214.2(h)(10)(iv)(B) reflects a totality-of-the-circumstances consideration in which USCIS will consider all relevant factors.

Some commenters provided specific examples of violations which they characterized as ''minor,'' ''minimal,'' or otherwise of an insignificant nature, implying that these violations should never trigger a discretionary denial under new 8 CFR 214.2(h)(10)(iv)(B). These examples included violations because a petitioner failed to list the company's Federal Employer Identification Number on the worker's pay statement, failure to properly calculate the hours offered in the earnings records, or ''fail[ure] to pay a nickel's worth of backpay.'' However, DHS does not agree that the violations in these examples should always be considered ''minor,'' ''minimal,'' or otherwise of an insignificant nature such that they should never be relevant to the petitioner's intention and/or ability to comply with H–2 program requirements. For instance, a petitioner's failure to properly calculate the hours offered in the earnings records may not be relevant to the petitioner's

[64] *See, e.g.,* INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1) (the question of importing an H–2 worker ''shall be determined by [DHS], after consultation with appropriate agencies of the Government,'' and that for H–2A nonimmigrants, the term '''appropriate agencies of Government' means the Department of Labor and includes the Department of Agriculture''); 8 CFR 214.2(h)(5)(ii) (''The temporary agricultural labor certification process determines whether employment is as an agricultural worker, whether it is open to U.S. workers, if qualified U.S. workers are available, the adverse impact of employment of a qualified alien, and whether employment conditions, including housing, meet applicable requirements''); 8 CFR 214.2(h)(6)(iii)(A) (''Prior to filing a petition with the director to classify an alien as an H–2B worker, the petitioner shall apply for a temporary labor certification with the Secretary of Labor [or the Governor of Guam]'').

[65] Note that DHS did make edits to these provisions to clarify their application based on public comments discussed elsewhere in this final rule.

intention and/or ability to comply with H–2 program requirements if it is an isolated incident and the petitioner immediately took corrective action to correct the mistake. However, it may be relevant if the failure to properly calculate the hours resulted in significant financial loss to that worker and the petitioner refused to take corrective action. Similarly, a single, isolated violation of a petitioner failing to pay ''five cents'' worth of backpay to a worker would likely not be relevant to the petitioner's intention and/or ability to comply with H–2 program requirements, but it may be relevant if this violation is part of a pattern of the petitioner intentionally failing to pay backpay and failing to take any corrective action despite being ordered to do so. These examples demonstrate how the relevance of each violation will depend on the circumstances of each case, making it inadvisable to draw a hard line on which violations would always or never trigger a discretionary analysis under new 8 CFR 214.2(h)(10)(iv)(B).

For the same reason, DHS declines to provide absolute examples of what would or would not trigger the discretionary analysis pursuant to a commenter's suggestions. Providing specific examples of violations is not advisable because USCIS will evaluate each violation together with all the other relevant factors on a case-by-case basis. By including a very broad scope for the types of violation determinations that may lead to analysis under the discretionary denial provision at 8 CFR 214.2(h)(10)(iv)(B) generally and the catch-all provision at 8 CFR 214.2(h)(10)(iv)(B)(*3*) specifically, DHS recognizes that the violations underlying these determinations can vary widely in nature and severity.

DHS declines to adopt a commenter's suggestions to limit the reach of this provision to only ''severe or egregious violations involving worker health and safety.'' As proposed, new 8 CFR 214.2(h)(10)(iv)(C)(*2*) specifically lists ''the egregiousness of the violation(s), including how many workers were affected, and whether it involved a risk to the health or safety of workers'' as one of the relevant factors USCIS will consider.

Finally, DHS declines to limit new 8 CFR 214.2(h)(10)(iv)(B) exclusively to violations of USCIS H–2 regulations. As stated in the NPRM, this provision is consistent with existing DOL regulations requiring H–2 petitioners to comply with all applicable Federal, State, and local laws and regulations, including health and safety laws [66] and recognizes that numerous Federal, State, and local agencies have authority in areas affecting H–2 employers and workers.

Comment: A few commenters suggested that USCIS should revise the discretionary denial provisions so that there is a system of graduated penalties. For example, a commenter suggested that USCIS should ''truncate'' the scope of violations that trigger additional reviews. Other commenters suggested that DHS evaluate alternative consequences that better align with the nature of the violation, including a ''tier system of escalating consequences and fines'' and a ''remediation system.''

Response: The commenters did not provide specific suggestions on how a system of truncated violations, a tier system of escalating consequences and fines, or a remediation system, could work. If the commenters were suggesting that DHS modify proposed 8 CFR 214.2(h)(10)(iv)(B) so that the length of time a petition is denied would vary based on the severity of the violation(s) similar to the approach in current 8 CFR 214.1(k), DHS declines such an approach. New 8 CFR 214.2(h)(10)(iv)(B) gives USCIS the ability to consider the nature of the prior violation(s)—within the context of the petitioner's other actions and all other relevant factors—to determine whether the petitioner has the intent or ability to comply with H–2 program requirements and the petitioner's overall credibility. Since USCIS will consider all relevant factors to determine the petitioner's intent and ability to comply, it does not make sense to truncate the application of new 8 CFR 214.2(h)(10)(iv)(B) based on the severity of the violation. Further, the finalized approach provides more clarity because it specifies exactly how long the petitioner's petitions could potentially be denied (''during the pendency of the petition or within 3 years prior to filing the petition'') if USCIS determines that the petitioner has not established its intent or ability to comply with H–2 program requirements, as opposed to leaving the petitioner unsure of how long they could potentially be denied under new 8 CFR 214.2(h)(10)(iv)(B).

Comment: A few trade associations expressed concern with the language of 8 CFR 214.2(h)(10)(iv)(B), reasoning it would result in petitioners ''being penalized for the same violation twice (equating to double jeopardy)—or more, if the petition denial is repeated in multiple years.''

Response: In light of these comments, DHS is making the following regulatory changes to clarify that, under the following facts, USCIS will not deny certain petitions for the same underlying violation(s), recognizing that such a denial would be unduly burdensome to the petitioner. Specifically, new 8 CFR 214.2(h)(10)(iv)(F) states that, if USCIS has previously determined that a petitioner (or the preceding entity, if the petitioner is a successor in interest) has established its intention and ability to comply with H–2A or H–2B program requirements in the course of adjudicating a petition involving violation determinations under paragraph (h)(10)(iv)(B), USCIS will not seek to deny a subsequently filed petition under paragraph (h)(10)(iv)(B) of this section based on the same violation(s), unless USCIS becomes aware of a new material fact (for example, a previously undiscovered violation(s) or new violations that occurred during the applicable time period), or if USCIS finds that its previous determination was based on a material error of law. In cases where USCIS becomes aware of a new material fact or determines its previous determination was based on a material error of law, petitioners will generally have the opportunity to challenge an intended denial.

e. Final Determinations Against Individuals Under 8 CFR 214.2(h)(10)(iv)(D)

Comment: A union expressed support for proposed 8 CFR 214.2(h)(10)(iv)(D) which specifies when USCIS may treat a criminal conviction or final administrative or judicial determination against an individual as a conviction or final administrative or judicial determination against the petitioner or successor in interest, reasoning it would strengthen accountability for employers who try to shield themselves from penalties by ''hiding behind'' recruiters and other agents who violate the law. The commenter added that because H–2 workers' status is tied to their employment with a particular employer, they are economically dependent on their employers and ''view situations from that vulnerable perspective.'' The commenter stated that as a result, the provision to consider the perspective of an employee under proposed 8 CFR 214.2(h)(10)(iv)(D)(*2*) ''appropriately takes that reality into consideration'' when assessing whether an employee is acting on behalf of its petitioning entity.

Response: DHS appreciates the comment that accurately reflects the provision's goals of strengthening

[66] 20 CFR 655.20(z), 20 CFR 655.135(e).

accountability for employers and acknowledging an H–2 beneficiary's vulnerability to exploitation from their employer or persons allegedly acting on the employer's behalf.

Comment: A couple of trade associations stated that DHS should ''carefully weigh whether the Due Process considerations'' of accused petitioners are ''adequately protected'' by proposed 8 CFR 214.2(h)(10)(iv)(D). A joint submission expressed concern that the proposed rule did not adequately consider ''the balance of the interests'' in both attributing the misconduct of individuals to the petitioner and increasing the penalties for misconduct. The commenter concluded that the provision is an overreach and suggested that DHS provide ''additional procedural protections'' for petitioners and provide them with a ''greater degree of leniency to the extent that they have taken steps to remedy the violation(s) and prevent them from occurring in the future.''

Response: DHS disagrees with the commenters. It is not reasonable to allow a petitioner to avoid liability for the actions of an individual who is acting on behalf of that petitioner, as a petitioner could then knowingly engage in unlawful activity simply by instructing another individual to perform the unlawful activity on their behalf. Further, it is reasonable to expect that an employer will monitor the activities of its employees whom the employer has empowered to act on its behalf.

It is not entirely clear what the commenters meant by their vague references to ''additional procedural protections'' or ''Due Process considerations.'' Regardless, DHS reiterates that USCIS will comply with all procedural safeguards outlined in 8 CFR 103.2(b), including generally providing the petitioner an opportunity to respond to derogatory information pursuant to 8 CFR 103.2(b)(16)(i). Thus, before denying a petition under the new mandatory or discretionary ground at new 8 CFR 214.2(h)(10)(iv), USCIS generally will first issue a request for evidence or NOID the petition and provide an opportunity for the petitioner to respond. For example, in response to the request for evidence or NOID, the petitioner will have the opportunity to demonstrate that the underlying conviction was against an individual who was not acting on behalf of the petitioner, or if the conviction was against an employee of the petitioning entity, that a reasonable person in the H–2A or H–2B worker's position would not believe the individual was acting on behalf of the petitioning entity.

Comment: Referencing proposed 8 CFR 214.2(h)(10)(iv)(D)(*2*), a professional association expressed support for actions that attempt to ensure accountability among employers but stated that a ''reasonable person'' standard should not be applied with respect to an individual who an H–2 worker believes is acting on behalf of the petitioning entity. The commenter instead suggested that USCIS ''rely on whether an oral or written agreement was entered into.'' Another commenter, a joint submission, urged DHS to ''afford petitioners a greater degree of leniency to the extent that they have taken steps to remedy the violation(s) and prevent them from occurring in the future'' and asserted that the ''reasonable person standard'' safeguard is inadequate for reasons such as the high rate of fraud and impersonation of employers via the internet and social media.

Response: The provision at 8 CFR 214.2(h)(10)(iv)(D) allows a criminal conviction or final administrative or judicial determination against an individual to be considered a conviction or final determination against the petitioner in some circumstances. First, under 8 CFR 214.2(h)(10)(iv)(D)(*1*) this can occur when an individual (such as the petitioner's owner, employee or, a contractor) was in fact acting on the petitioner's behalf when engaging in conduct that resulted in the conviction or final administrative determination. In addition, under the provision referenced by the commenters, 8 CFR 214.2(h)(10)(iv)(D)(*2*), a conviction or final determination against an individual can be considered a conviction or final determination against the petitioner for the purposes of discretionary denial when the individual was the petitioner's employee and a reasonable person in the H–2 worker's position would believe the individual was acting on the petitioner's behalf.

It is not entirely clear what is meant by the commenter's suggestion that, instead of a reasonable person standard, liability under 8 CFR 214.2(h)(10)(iv)(D)(*2*) should depend on ''whether an oral or written agreement was entered into.'' To the extent that the commenter is suggesting USCIS should rely on whether there is an oral or written employment agreement between the petitioner and the individual, DHS notes that the provision only applies to the petitioner's employees, who generally would have entered into an oral or written employment agreement with the petitioner.

If, on the other hand, the commenter is suggesting that the existence of a written or oral contract prohibiting the violation-related conduct alone should in all cases be sufficient for the petitioner to avoid liability for its employee's actions, DHS disagrees and believes it is appropriate to consider the relevant facts and circumstances on a case-by-case basis. As noted in the preamble to the NPRM, because liability for this population will be limited to the discretionary denial provision, petitioners will have an opportunity to provide information regarding the circumstances of the employee's actions, and USCIS will consider all relevant factors in determining whether the petitioner had established its intention and ability to comply with H–2 program requirements. 88 FR 65040, 65061 (Sept. 20, 2023).

With regard to the suggestions in the joint submission comment, DHS agrees that steps taken by the petitioner to remedy the violations and prevent them from occurring in the future are important and relevant considerations, and notes that such steps will be considered in determining whether a denial is warranted. *See* 8 CFR 214.2(h)(10)(iv)(C)(*8*). DHS disagrees, however, with the suggestion that the ''reasonable person standard'' in 8 CFR 214.2(h)(10)(iv)(D)(*2*) is inadequate to safeguard against fraud and impersonation of employers via the internet and social media. Even if an H–2 worker reasonably believed that the individual engaging in fraud or impersonation was acting on behalf of the employer, the petitioner could not be held accountable under 8 CFR 214.2(h)(10)(iv)(D)(*2*) unless the individual was its employee in which case, as discussed above, all relevant circumstances will be considered.

Comment: A professional association suggested treating a conviction or determination of an individual as a conviction or determination against a petitioner only in ''the most egregious circumstances.'' The commenter questioned the Department's rationale that employers would be knowledgeable of the actions of all individuals in its recruitment chain, calling it ''aspirational but also not realistic.'' Similarly, a few trade associations stated that in many cases petitioners may not have knowledge of another party's behavior, particularly in the case of contractors. The commenters also urged the Department to clarify whether criminal convictions or final administrative or judicial determinations must be related to labor violations, H–2-related job duties, or corresponding employees. Finally, these

commenters suggested the Department develop alternative approaches to denial and revocation that include corrective action but indicated that, if the provision is retained, they support the use of reasonable person analysis, an opportunity to provide evidence prior to determination, and opportunity to appeal to a neutral body in order to prevent unfounded denials.

Response: As noted above, 8 CFR 214.2(h)(10)(iv)(D)(*1*) allows convictions and final determinations against some non-employees (for example contractors and others) to be treated as convictions and final determinations against the petitioner, but only to the extent that the individual is acting on the petitioner's behalf. DHS believes it is both realistic and appropriate to expect petitioners to have knowledge of, and a degree of control over, third party individuals' actions taken on their behalf.

DHS appreciates the commenters' request for clarity regarding whether the convictions and final determinations covered by 8 CFR 214.2(h)(10)(iv)(D) must relate to labor violations, H–2 employment, and H–2 workers. First, DHS notes that the provision only applies to certain final determinations and convictions that are relevant to petitioner's compliance with H–2 program requirements as enumerated in 8 CFR 214.2(h)(10)(iv)(A) and (B). DHS also emphasizes that, because 8 CFR 214.2(h)(10)(iv)(D)(*1*) only applies to an individual who is ''acting on behalf of the petitioning entity,'' it would not apply to a conviction or final determination for actions the individual took on behalf of a different employer, or for conduct that is otherwise unrelated to the individual's work on behalf of the petitioner. Finally, as discussed above, the provision at 8 CFR 214.2(h)(10)(iv)(D)(*2*) applies only to an employee of the petitioner who a reasonable person in the H–2 worker's position would believe is acting on the petitioner's behalf, and in such cases, petitioners will have an opportunity to provide information regarding the circumstances of the employee's action. USCIS will consider all relevant factors—including corrective and preventative measures the petitioner has taken—in determining whether the petitioner has established its intention and ability to comply with H–2 program requirements. As with all denials under 8 CFR 214.2(h)(10)(iv), such decisions will be appealable to the USCIS Administrative Appeals Office.

f. 3-Year Timeframe (''Lookback Period'')

Comment: Several commenters discussed the 3-year timeframe for mandatory and discretionary denials based on certain violations. An advocacy group said a 3-year look back period would be sufficient to ensure approval of H–2 petitions would not be detrimental to the rights of workers or the integrity of the program. An advocacy group and a joint submission urged DHS to not reduce the proposed 3-year timeframe.

Response: DHS appreciates these comments and agrees that a 3-year lookback is appropriate for the relevant provisions of 8 CFR 214.2(h)(10)(iv)(A) and (B).

Comment: While expressing opposition to the denial of petitions for certain violations, a couple of trade associations said that if the section was maintained, the Department could not impose penalties until 3 years after the provision became effective and employers received notice. Another commenter stated that denying employers retroactively for conduct that occurred prior to the rule's implementation was unconstitutional due to the retroactivity doctrine.

Response: DHS did not propose to deny petitions in a way that is impermissibly retroactive or without adequate notice. In general, DHS applies its regulations prospectively. DHS is aware that the U.S. Supreme Court has held that ''statutory grants of rulemaking authority will not be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by express terms.'' [67] It is also aware that retroactive rules alter the past legal consequences of past actions.[68] DHS also recognizes that a rule operates retroactively if it takes away or impairs vested rights.[69] In addition, DHS recognizes that if a new rule is ''substantively inconsistent'' with a prior agency practice and attaches new legal consequences to events completed before its enactment, it operates retroactively.[70] However, an agency rule that alters the future effect, not the past legal consequences of an action, or that upsets expectations based on prior law (which may be characterized as secondary retroactivity), is not necessarily impermissibly retroactive.[71]

Here, DHS proposed to, in certain circumstances, alter the future effect of past actions by adding program integrity measures to address certain violations that occurred in the past. As such, the proposed rule might have raised questions regarding secondary retroactivity.[72] Rules that have a secondary retroactive effect can be valid if they are reasonable.[73] As discussed in more detail below, the provisions included in this final rule are reasonable because they ensure that petitioners have adequate notice of consequences of certain conduct while giving DHS the ability to hold program users accountable. Namely, while DHS is uniformly applying the new rules to agency actions that take place on or after the effective date of the final rule, the additional consequences imposed by this rule will in some cases attach to prohibited conduct that occurred before the effective date of this final rule. DHS believes that this approach is reasonable because the conduct covered by these provisions is already prohibited, and as such, petitioners could have no reasonable expectations that such egregious conduct could not subsequently be taken into account in petition adjudications.

While DHS did not specifically address in the NPRM how the provisions relating to the denial or revocation of petitions for prohibited fees, as well as the mandatory and discretionary denials of H–2A and H–2B program violators would apply, DHS is clarifying in this final rule that it will apply certain provisions in a manner that balances the strong interest in enhancing H–2 program integrity and protection of H–2 workers with the interests of petitioners to have adequate notice of new future effects applicable

[67] *Georgetown Univ. Hosp.* v. *Bowen,* 488 U.S. 204, 208 (1988).

[68] *Bowen,* 488 U.S. at 219 (Scalia, J. concurring).

[69] *See Nat'l Mining Ass'n* v. *U.S. Dep't of the Interior,* 177 F.3d 1, 8 (D.C. Cir. 1999) (*National Mining I*) (quoting *Ass'n of Accredited Cosmetology Sch.* v. *Alexander,* 979 F.2d 859, 864 (D.C. Cir. 1992)).

[70] *See Arkema Inc.* v. *EPA,* 618 F.3d (D.C. Cir. 2010) (vacating an EPA rule in part on impermissible retroactivity grounds because the rule attached new legal consequences to events completed before its enactment) (quoting *Nat'l Mining Ass'n* v. *Dep't of Labor,* 292 F.3d 849, 860 (D.C. Cir. 2002)); *see also Mobile Relay Assocs.* v. *FCC,* 457 F.3d 1, 11 (D.C. Cir. 2006) (explaining ''[r]etroactive rules 'alter[ ] the past legal consequences of past actions' '' (quoting *Bowen,* 488 U.S. at 219 (Scalia, J., concurring)).

[71] *Mobile Relay Assocs.* v. *FCC,* 457 F.3d 1, 11 (D.C. Cir. 2006); *see Bowen,* 488 U.S. at 220 (Scalia, J., concurring); *see also Alexander,* 979 F.2d at 864 (''Member schools have no 'vested rights' to future eligibility to participate in the GSL program. Although we do not doubt AACS's submission that the schools expected to be eligible in the future, such an expectation did not constitute vested interest.'').

[72] *Bowen,* 488 U.S. at 220 (Scalia, J., concurring) (''A rule that has unreasonable secondary retroactivity—for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule—may for that reason be 'arbitrary' or 'capricious,' *see* 5 U.S.C. 706, and thus invalid. In reference to such situations, there are to be found in many cases statements to the effect that where a rule has retroactive effects, it may nonetheless be sustained in spite of such retroactivity if it is reasonable.'').

[73] *Bowen,* 488 U.S. at 220 (Scalia, J., concurring).

to certain conduct. Consistent with this discussion, DHS has added language to the applicable regulatory provisions to clarify how they will apply, as discussed in more detail below.

(1) Denial and Revocation of H–2 Petitions for the Collection of Prohibited Fees

DHS is clarifying that USCIS will deny or revoke H–2 petitions filed on or after the effective date of this final rule based on the revised prohibited fees provisions in 8 CFR 214.2(h)(5)(xi)(A) and (h)(6)(i)(B). Petitions filed before the effective date of the final rule will be denied or revoked based on the prohibited fee provisions in effect before this final rule.

(2) The 1- and 3-year Periods of Denial for the Collection of Prohibited Fees and Failure To Reimburse

DHS, under this final rule, will deny additional H–2A and H–2B petitions for a period of 1 year based on denials or revocations that resulted from a violation of prohibited fee provisions contained in this final rule. Under regulations in place before the effective date of this final rule, employers in both H–2A and H–2B programs were prohibited from charging workers certain prohibited fees and are required to reimburse workers when such fees have been charged. If an H–2A or H–2B petition is denied or revoked for violating the provisions in place before the effective date of this final rule, petitioners filing petitions in the same program within 1 year of the denial or revocation must demonstrate to the satisfaction of USCIS that the workers were reimbursed or that the employer made reasonable efforts to locate the workers but has failed to do so. 8 CFR 214.2(h)(5)(xi)(C) and (h)(6)(i)(C). If this obligation is not met, the subsequent petition is denied. The obligation attaches to all subsequent petitions filed during the 1-year period. Under the NPRM and this final rule, a denial that occurs during the 1-year period following a USCIS denial or revocation based on a prohibited fee violation applies across H–2A and H–2B programs and does not allow the petitioner to avoid a denial during the relevant 1-year period simply by the petitioner reimbursing the affected workers or making reasonable efforts to do so.

While petitioners do not necessarily have a right to approval of their petitions, DHS understands that petitioners may not be in a position to remedy or provide reasons for their past actions in a manner that complies with the new regulations (for example, establish by clear and convincing evidence that the petitioner engaged in good faith, ongoing efforts to prevent the collection of such fees) such that they can overcome this ground for denial or revocation and thereby avoid the 1-year denial period following such a decision. As such, without the clarification included in this final rule, the NPRM might have been construed as having proposed the imposition of new future consequences on petitioners for past actions that have already concluded. Therefore, DHS is clarifying that it will apply the expanded 1-year denial provisions based on initial denial or revocation decisions involving prohibited fees that are issued on petitions filed only on or after the effective date of this rule. In other words, DHS will apply this provision prospectively from the effective date of this final rule, not retroactively.

With respect to the 3-year mandatory denial period, the obligation to reimburse is not new and is a requirement under regulations that have been in place since 2008. The period of denial, however, will be longer under this final rule, will eliminate the option to merely demonstrate reasonable efforts to locate a beneficiary, and will explicitly impose obligations on successors in interest with respect to ensuring the integrity of the H–2 program and H–2 worker protections. Therefore, similar to the 1-year denial provision, DHS will apply the 3-year additional denial period to petitioners, including successors in interest, based on initial denial or revocation decisions issued on petitions filed on or after the effective date of this final rule. For petitions denied or revoked under previous regulations, the 1-year denial period in place before the effective date of this final rule will apply.[74]

(3) Mandatory Denial of Petitions Filed by H–2 Petitioners

As noted above, DHS recognizes that denying petitions under the three mandatory denial provisions may result in unforeseen new effects attaching to past conduct. Specifically, for denials based on DOL or GDOL debarment, unlike the existing provision in 8 CFR 214.1(k), the new mandatory denial provision requires rather than permits USCIS to deny petitions on this basis but operates similarly to 8 CFR 214.1(k) in that it is triggered by a DOL debarment even if such debarment takes place while the petition is already pending with USCIS and supported by a valid TLC. Under existing regulations and this final rule, if the debarment of a petitioner prevented the petitioner from obtaining a TLC, USCIS would not be able to approve such petition.

Similarly, DHS recognizes that issuing a mandatory denial of the H–2A or H–2B petition based on prior USCIS decisions finding fraud or misrepresentation, may attach new effects to already prohibited conduct. Under the NPRM and without further clarification, these new effects could have attached without providing the petitioner the ability to overcome this ground based on new facts or evidence that may have occurred since the initial decision. The same is true of denials based on violations of section 274(a) of the Act.

For these reasons, DHS is clarifying how the mandatory denial provisions will apply:

(1) For mandatory denials involving DOL or GDOL debarment, DHS will apply these provisions only to petitions filed on or after the effective date of this final rule and when the final administrative debarment decision is made on or after the effective date of this final rule. For petitions filed before the effective date of the rule involving DOL or GDOL debarment, USCIS may continue to deny under the existing provision at 8 CFR 214.1(k).

(2) For mandatory 3-year denials based on the USCIS denial or revocation of an H–2A or H–2B petition for fraud or material misrepresentation, these provisions will apply only to initial denial or revocation decisions issued on petitions filed on or after the effective date of this rule.

(3) For mandatory denials involving violations of section 274(a), USCIS will deny H–2A or H–2B petitions filed on or after the effective date of the final rule and based on final determinations of violations of section 274(a) of the Act that are made on or after the effective date of this final rule. With respect to determinations of section 274(a) violations made before the effective date of this final rule, DHS will apply the 2-year denial provision in current 8 CFR 214.2(h)(5)(iii)(B).

This approach operates prospectively, and provides petitioners with sufficient notice of the additional consequences of these egregious violations.

[74] The failure to reimburse workers for fees collected prior to the effective date of this final rule may be considered, among the totality of facts presented, with respect to whether to deny such petitions on a discretionary basis under new 8 CFR 214.2(h)(10)(iii) regardless of whether the petition is filed before, on, or after the effective date of this rule.

(4) Discretionary Denial of Petitions Filed by H–2 Petitioners Based on Violation Determinations That Occurred During the Pendency of the Petition or the Previous 3 Years

These new provisions provide for the consideration of certain violations and other relevant factors in adjudicating H–2 petitions. These provisions do not mandate denial. DHS is clarifying that these provisions will apply to H–2A or H–2B petitions that are filed on or after the effective date of this rule based on determinations of past violations that occurred during the pendency of the petition or the previous 3 years, regardless of whether they occurred before, on, or after the effective date of this final rule. This rule provides H–2 program violators with sufficient notice and opportunity to demonstrate their intention and ability to comply with program requirements and obligations. DHS acknowledges the commenters' concern that some employers may have agreed to pay a civil monetary penalty for alleged minor violations because they were unaware at the time of their agreement that this could be a violation potentially leading to a petition denial. However, because the new discretionary provisions do not mandate denial, these petitioners would have the opportunity to explain why they agreed to pay fines which USCIS would then take into consideration, along with all relevant factors including the egregiousness of the violation(s) and the severity or monetary amount of the fines paid, in determining whether the petitioner has the intent and ability to comply with H–2 program requirements and obligations. In exercising its discretion, DHS will consider all of the facts presented and in doing so, will accord appropriate weight to an employer's previous violations and actions based on the nature and severity of such violations and actions.

Comment: A professional association expressed concern with the ''3-year lookback period'' with respect to the proposal for mandatory denials based on certain violations and suggested that DHS should only look at the current year instead of a 3-year lookback period.

Response: DHS will not make any changes based on this comment. Initially, DHS notes that the ''3-year lookback'' period does not apply to all of the grounds for mandatory denial. In the NPRM, DHS proposed new 8 CFR 214.2(h)(10)(iv)(A), under which USCIS would deny an H–2 petition filed by a petitioner, or successor in interest to a petitioner, that has been the subject of one or more of the three actions enumerated in the provision. One such action, under 8 CFR 214.2(h)(10)(iv)(A)(*1*) as proposed, is a final administrative determination by DOL or GDOL debarring a petitioner. However, this mandatory ground for denial applies only during the period of debarment. DHS did not propose a 3-year lookback period for this provision.

Under 8 CFR 214.2(h)(10)(iv)(A)(*2*) as proposed, a petition will be denied where a petitioner has been subject to ''[a] final USCIS denial or revocation decision issued during the pendency of the petition or within 3 years prior to filing the petition that included a finding of fraud or willful misrepresentation of a material fact with respect to a prior H–2A or H–2B petition.'' The 3-year period in this provision is appropriate for the reasons explained in the NPRM: that is, that a 3-year timeframe captures an employer's reasonably recent activity, which is a highly relevant consideration with respect to a petitioner's current intention and ability to comply with program requirements, and is generally sufficient to ensure that approval of an H–2 petition would not be detrimental to the rights of H–2 workers or the integrity of the H–2 program. 88 FR 65040, 65058 (Sept. 20, 2023). The commenter recommends that USCIS ''look at the current year instead of a 3-year lookback period,'' but provides no further explanation as to why limiting review to the ''current year'' would be appropriate or whether the ''current year'' meant the current calendar year or fiscal year. Regardless, DHS declines to adopt this approach. Limiting review to the current year could render this provision largely ineffective, as such a short timeframe may not enable USCIS to consider the eligibility implications of a past H–2 program violation during adjudication of a subsequent petition, as intended. Thus, limiting this review could have little deterrent effect on a petitioner whose petition for a given year was already denied.

There is also a 3-year lookback under 8 CFR 214.2(h)(10)(iv)(A)(*3*) which, as proposed, applies with respect to ''[a] final determination of violation(s) under section 274(a) of the Act during the pendency of the petition or within 3 years prior to filing the petition.'' Again, the commenter did not explain why limiting review to the current year would be appropriate. DHS is similarly concerned that limiting the review period to ''the current year'' with respect to this provision could render it largely ineffective and have little deterrent effect. Further, limiting 8 CFR 214.2(h)(10)(iv)(A)(*3*) to only 1 year would actually be more lenient than current 8 CFR 214.2(h)(5)(iii), which states that a petitioner cannot establish requisite intent for 2 years after a violation of section 274(a) of the Act. DHS maintains that a 3-year period is more appropriate as this period captures an employer's reasonably recent activity and will generally be sufficient to ensure that approval of an H–2 petition will not be detrimental to the rights of H–2 workers, or the integrity of the H–2 program. Therefore, DHS will not make any changes as a result of this comment.

Comment: A couple of advocacy groups, a research organization, and a union stated that while first-time offenders should be subject to a 3-year timeframe under proposed 214.2(h)(10)(iv)(A), repeat offenders should be permanently banned from the H–2 programs.

Response: DHS does not believe that a permanent ''ban'' would be reasonable, even for repeat offenders, as it would fail to account for changes in practice, policies and personnel by an employer which may become less relevant as the underlying violation becomes more remote in time. As discussed in the NPRM and noted above, DHS believes that a 3-year timeframe is appropriate as it captures an employer's reasonably recent activity, which is a highly relevant consideration with respect to a petitioner's current intention and ability to comply with program requirements. Therefore, DHS declines to adopt the suggestion.

Comment: A union supported a mandatory denial of petitions based on a final debarment determination by DOL for violations of H–2 regulations and contractual obligations. The union suggested that DHS modify proposed 8 CFR 214.2(h)(10)(iv)(A)(*1*) to impose a mandatory denial based on a final determination of debarment that was issued by DOL within 5 years of filing a new H–2 petition, rather than only if a petitioner files with DHS ''during the debarment period, or if the debarment occurs during the pendency of the petition.'' The commenter concluded that these revisions would help ensure ''bad actors'' stay out of the H–2 program. Similarly, while discussing the grounds for denial or revocation under proposed 8 CFR 214.2(h)(10)(iv)(A)(2) and (3), the union also suggested that rather than the proposed 3-year timeframe, the Department require a 5-year look-back period for all actions, convictions, and determinations included under the proposed section. The commenter reasoned that this change would further encourage compliance by employers and agents and promote consistency with INA's

statutory 5-year limit on DHS's ability to deny petitions. Another union that supported the mandatory and discretionary denial provisions similarly urged that the look back period for violations be extended from 3 to 5 years.

Response: DHS declines to modify 8 CFR 214.2(h)(10)(iv)(A)(*1*) in this final rule to impose a mandatory denial based on a final determination of debarment that was issued by DOL within 5 years of filing a new H–2 petition. In the final rule, as in the proposed rule, denial by USCIS will be mandatory only ''if the petition is filed during the debarment period, or if the debarment occurs during the pendency of the petition.'' Limiting mandatory denials to the period of debarment is appropriate because it will be consistent with the debarment period imposed by DOL. Beyond the mandatory denials during the period of debarment, USCIS may still consider the debarment under the circumstances described in 8 CFR 214.2(h)(10)(iv)(B) and (C) if it finds that the debarment calls into question a petitioner's or successor's intention and/or ability to comply with H–2 program requirements.

DHS also declines to impose a 5-year lookback period under new 8 CFR 214.2(h)(10)(iv)(A)(*2*) and (*3*). As discussed in the NPRM and noted above, DHS believes that a 3-year timeframe is appropriate as it captures an employer's reasonably recent activity, which is a highly relevant consideration with respect to their current intention and ability to comply with program requirements, while also recognizing that employers may make changes to practice, policies, and personnel over time to remedy deficiencies.

Comment: A couple of advocacy groups and a research organization generally supported proposed 8 CFR 214.2(h)(10)(iv)(B) and suggested that DHS should not limit this provision to a 3-year look-back timeframe. The commenters reasoned that a ''severe labor violation 5 years ago'' could indicate an ongoing ''inability or unwillingness'' to comply with H–2 program requirements, while a ''relatively minor one'' might not. The commenters also stated that the 3-year timeframe should be removed, as recency is already a factor that USCIS would be instructed to consider.

Response: DHS declines to adopt this suggestion. While, as noted by the commenters, ''recency'' is a relevant factor listed in 8 CFR 214.2(h)(10)(iv)(C), DHS recognizes that employers have an interest in knowing that, at some point, a long-ago violation, standing alone, will no longer be a basis for calling into question their ability and intent to comply with H–2 program requirements. Establishing a set timeframe is appropriate because it recognizes the employer's interest in certainty and accounts for changes in practice, policies and personnel by an employer which may become more relevant as the underlying violation becomes more remote in time.

g. Other Comments Related to the Mandatory and Discretionary Denial Provision

Comment: A couple of advocacy groups and a union expressed support for the mandatory and discretionary denial provisions that will apply to petitioners and successors in interest. The advocacy group referenced a comment from its members that it said showed employers commonly sidestepped legal consequences by reorganizing under new corporate entities and continuing abusive employment practices. The commenter stated that by extending the mandatory and discretionary denial provisions to successors in interest, the Department would address these situations.

Response: DHS appreciates these comments and agrees that the provisions at 8 CFR 214.2(h)(10)(iv) should also apply to successors in interest.

Comment: A trade association expressed support for DHS's statement in the proposed rule preamble that USCIS would distinguish between a single or minor violation of OSHA requirements versus a pattern of serious non-compliance. The commenter also expressed support for the relevant factors USCIS stated it would consider in 8 CFR 214.2(h)(10)(iv)(C). However, the commenter suggested that DHS ''reinforce this position by providing detailed guidance following issuance of a final rule,'' reasoning it would benefit petitioners and DHS staff.

Response: As explained above, the provision at 8 CFR 214.2(h)(10)(iv)(B)(*3*), as finalized in this rule, covers ''any applicable employment-related laws or regulations.'' This provision allows USCIS to consider discretionary denial for a wide variety of administrative or judicial determinations that are relevant to a petitioner's intention or ability to comply with H–2 program requirements. DHS believes that this provision is sufficiently clear. However, USCIS may consider providing additional policy guidance related to this provision, similar to the guidance provided in the NPRM and in this final rule, on the uscis.gov website or in the USCIS Policy Manual. Similarly, DHS believes that the provision at 8 CFR 214.2(h)(10)(iv)(C) is clear in that it explains that USCIS will consider ''all relevant factors'' in determining whether a violation calls into question a petitioner's or successor in interest's intention and/or ability to comply with H–2 program requirements. The provision goes on to provide a non-exhaustive list of eight factors that may be considered in making the determination. Again, although this provision provides sufficient clarity and guidance to the regulated public and to USCIS adjudicators, USCIS may consider providing additional guidance on the uscis.gov website or in the USCIS Policy Manual.

Comment: Several commenters generally supported proposed 8 CFR 214.2(h)(10)(iv)(B) and provided suggestions on how to strengthen this provision. For example, an advocacy group expressed support for proposed 8 CFR 214.2(h)(10)(iv)(B), reasoning it would help curb abusive employers' exploitation of the program and level the playing field for ''scrupulous'' employers. However, the commenter suggested the Department strengthen 8 CFR 214.2(h)(10)(iv)(B)(*3*) to include housing-related violations, reasoning that H–2 workers are typically subject to ''noncompliant, unsanitary, and unsafe'' housing. Similarly, an advocacy group said that under 8 CFR 214.2(h)(10)(iv)(B), failure to provide safety training to H–2 workers should be grounds for denial, adding that the first 1 to 2 weeks of employment should be devoted to training that aligns with United States' labor laws for domestic workers. A research organization suggested 8 CFR 214.2(h)(10)(iv)(B)(*3*) be expanded to include ''a number of other violations.''

Response: DHS declines to make changes to 8 CFR 214.2(h)(10)(iv)(B)(*3*) based on these comments. DHS believes the wording of the provision at 8 CFR 214.2(h)(10)(iv)(B)(*3*), as finalized in this rule, is appropriately broad to allow USCIS to consider discretionary denial for a wide variety of administrative or judicial determinations, including those relating to housing, which are relevant to a petitioner's intention or ability to comply with H–2 program requirements. As the provision covers ''any applicable employment-related laws or regulations,'' it is unnecessary to specifically list each category of violation covered.

For instance, with respect to the housing-related violations noted by one commenter, because H–2A employers are required to provide employee housing, the laws and regulations

governing the provision of such housing would constitute ''applicable employment-related laws and regulations,'' and a final determination that an H–2A employer had violated such laws or regulations in its provision of housing to workers could potentially call into question the petitioner's intention or ability to comply with program requirements. In addition, while another commenter's suggestion to institute specific training requirements for workers is outside of the scope of this rulemaking, to the extent that current or future laws or regulations prescribe specific training requirements applicable to H–2 workers, they would likewise be considered ''applicable employment-related laws or regulations'' for the purposes of this provision.

Comment: A research organization and a union suggested that USCIS create ''a list of key labor, employment, wage and hour, civil rights, disability, anti-trafficking, and anti-discrimination laws'' that if an employer violated, would establish evidence that they are unlikely to follow employment and immigration laws and thus, be prohibited from having a petition approved for an H–2 worker. The research organization added that DHS should make denial of petitions based on violations of these laws mandatory if the violations had occurred in the preceding 5 years. The commenters also suggested that a list of violations work best in tandem with a ''front-end screening process'' from DOL. As described by the commenters, this ''front-end screening process'' would require employers to first register with DOL for eligibility to use the program. DOL would then screen the employers' records on compliance with labor and employment laws up front at the TLC stage. However, the commenters concluded that, even absent a new screening process at the DOL level, DHS should, at a minimum, build on 8 CFR 214.2(h)(10)(iv)(B) by creating a list of key violations, which could make significant progress in keeping lawbreaking employers out of the H–2 programs.

Response: DHS declines to create a specific list of additional legal violations or to make a violation on this list a specific ground for mandatory denial if the violation occurred within the preceding 5 years. By including a very broad scope for the types of violation determinations that may lead to discretionary denial provision at 214.2(h)(10)(iv)(B) generally and the catch-all provision at 214.2(h)(10)(iv)(B)(*3*) specifically, DHS recognizes that the violations underlying these determinations can vary widely in nature and severity, and believes it is appropriate to maintain a discretionary analysis that will allow consideration on a case-by-case basis.

Comment: A union urged DHS to create a mechanism for public entities, such as labor unions and advocacy groups, to report employers that have committed violations or might be attempting administrative changes to avoid successor in interest consequences, considering the breadth and scope of H–2 employers and recruiters.

Response: DHS declines to create a separate mechanism for public entities to report suspected immigration benefit fraud and abuse, which would include employer violations and employers undertaking administrative changes solely to avoid successor in interest consequences. Instead, DHS encourages public entities to report such information through the existing ICE Tip Form or other tip forms, as appropriate.[75]

Comment: While expressing support for the mandatory and discretionary denials for certain violations section, an advocacy group urged the Department to create mechanisms for former employees of barred petitioners to connect with alternative H–2 employers, such as a recruitment database. The commenter reasoned that certain H–2 ''sending communities'' have limited numbers of recruiters and employers, which causes workers to decide between an abusive H–2 job or no job at all. The commenter added that the exclusion of an abusive employer from the program might result in a loss of economic opportunities for workers who chose the job out of necessity.

Response: DHS appreciates the commenters' concerns and suggestions but will not be adopting the suggestions as part of this final rule. While DHS appreciates the commenters' concerns about the need to provide workers with alternative non-abusive employers, DHS does not match or otherwise facilitate recruitment between an H–2 worker and a prospective H–2 employer. Creating a recruitment database or other mechanism for matching workers with H–2 employers is outside the scope of this rule. However, DHS may continue to consider these suggestions outside of the regulatory process.

[75] The ICE Tip Form is available online at *https://www.ice.gov/webform/ice-tip-form* (last visited July 29, 2024). Anonymous tips may alternately be reported to ICE via the toll-free ICE Tip Line, (866) 347–2423.

3. Compliance Reviews and Inspections

Comment: Some commenters, including a research organization and a few unions, expressed support for USCIS' investigative authority to ensure employers' compliance with the proposed rule. A couple of unions urged USCIS to use the proposed rule to ensure confidentiality in USCIS interviews and explicitly mandate that USCIS interviews with H–2 employees take place without the employer or their representative present. A union proposed modified language for the discussion of site visits at 8 CFR 214.2(h) to specify that ''[i]nterviews with H–2B workers must be taken in confidence,'' similar to DOL's Davis-Bacon regulations on prevailing wage labor standards investigations. *See* 29 CFR 5.6(a)(3). This commenter concluded that, if an H–2 worker knows that an interview is taken in confidence and that its contents will not be reported back to the employer, the H–2 worker will be empowered to speak more freely about potential violations.

Response: The regulatory text in this rulemaking states that petitioners and employers must agree to allow USCIS to ''interview [ ] the employer's employees and any other individuals possessing pertinent information, which may be conducted in the absence of the employer or the employer's representatives, as a condition for the approval of the petition.'' New 8 CFR 214.2(h)(5)(vi)(A), (h)(6)(i)(F). As such, the regulatory text already states that employee interviews may be conducted without the employer or employer's representative present. DHS declines to add regulatory text mandating that employee interviews take place without the employer or their representative present because of the operational and logistical issues it could present. Additionally, some employees may have a genuine wish to have an employer's representative present and USCIS may grant that request.

DHS declines the suggested revision to the regulatory text to state that interviews of H–2 workers ''must be taken in confidence.'' DHS recognizes that workers providing information to USCIS officers during interviews can place the worker in a precarious position, and that assurances of confidentiality may encourage a worker to speak more freely. DHS anticipates that the expansion of the whistleblower protections in this rule will help counteract the potential negative consequences that workers may face when cooperating with USCIS officers in interviews. To the extent practicable, USCIS seeks to protect the privacy of

workers when using information they have provided to support any adjudicative decision. However, USCIS must also adhere to 8 CFR 103.2(b)(16)(i) which states that for any decision based on derogatory information unknown to the petitioner, the petitioner will be advised of that fact and offered an opportunity to rebut the information. DHS also recognizes that sometimes workers may genuinely prefer to speak with their employer present. In that situation, USCIS may comply with the worker's preference and decline to remove the worker from the site to conduct the interview in confidence.

Comment: A couple of commenters, including a religious organization and a trade association, expressed support for USCIS' clarification of the scope and potential consequences for employers who fail to fully cooperate with USCIS with respect to on-site inspections. These commenters emphasized the importance of employers understanding what is required of them for on-site inspections and the consequences for noncompliance so that they avoid unnecessary penalties. A research organization recommended DHS repeal its October 27, 2021 policy memorandum, *Guidelines for Enforcement Actions in or Near Protected Areas,*[76] so that USCIS can broadly exercise the enforcement actions (including site inspections) proposed in the proposed rule, rather than being limited to certain areas or persons.

Response: DHS agrees with commenters that by providing clear requirements and expectations for inspections, verification, and compliance reviews, and adding transparency to the potential consequences of non-compliance, petitioners will have the information necessary to remain in compliance with the requirements of the H–2 program. Regarding the mentioned policy memorandum, USCIS does not anticipate that the requirements of that memorandum would interfere with the activities of USCIS officers conducting on-site inspections in a way that would limit their ability to interview pertinent individuals. Importantly, USCIS inspections, verifications, and compliance reviews are not enforcement actions, but rather are information gathering actions to ensure that entities remain in compliance with the terms and conditions of the H–2 petition that was filed with USCIS. As noted in the proposed rule, the petitioner will be informed of and given the chance to respond to any information gathered from the site visit.

Comment: A professional association expressed support for the proposed rule's strengthening of USCIS activities such as audits and investigations, but opposed the provision that would allow government access to H–2A housing, calling this intrusive and burdensome. The professional association further stated that USCIS investigations should only include material and information collection related to H–2A program compliance.

Response: DHS appreciates the commenter's concern but will retain the language requiring H–2A petitioners and employers to allow access to sites where workers are or will be housed. This requirement is important to ensure USCIS has access to the workers themselves during the course of compliance review activities. As stated in the preamble of the NPRM, USCIS does not and will not conduct inspections regarding the standard of housing provided, however such inspections may, if in accordance with relevant law, be conducted by other Federal, State, or local agencies. 88 FR 65040, 65061 (Sept. 20, 2023).

Comment: Several individual commenters expressed concern about what standards USCIS would use to define noncooperation during on-site visits. Similarly, some commenters, including a business association, a professional association, and a couple of trade associations, expressed concern with the term ''fully cooperate'' used in the proposed rule at 88 FR 65040, 65061 (Sept. 20, 2023), writing that USCIS is unclear in explaining how it will decide what cooperation during site visits looks like.

Response: As discussed in the proposed rule, DHS's goal is to provide transparency to the compliance review process so that entities and individuals subject to those processes understand that USCIS' inability to verify pertinent facts, including where such inability is due to entities' or individuals' failure to fully cooperate, may result in denial or revocation of the petition. *Id.* With this rule, DHS is codifying its existing authority and clarifying the scope of inspections and the consequences of a refusal or failure to fully cooperate with these inspections in response to these comments. *See* new 8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F)(*2*). In response to the commenters' request for clarification as to what cooperation during site visits is expected, DHS notes preliminarily that the determination whether a person or entity is ''fully cooperating'' with a DHS inspection will depend on the facts of each case. In general, to ''fully cooperate'' in this context, entities would be expected to comply with the scope of the reviews and be responsive to investigators, including by: granting access to the premises, making a representative of the petitioner or employer available for questions, submitting or allowing review of pertinent records, providing access to workers and allowing interviews with such employees to take place in the absence of the employer or employer's representative and at a location mutually agreed to by the employee and USCIS officers, which may or may not be on the employer's property. Full cooperation also generally includes providing access to the sites where labor is performed and to worker housing, if applicable.

As described in the proposed rule, a petitioner or employer failing or refusing to fully cooperate ''could include situations where one or more USCIS officers arrived at a petitioner's worksite, made contact with the petitioner or employer and properly identified themselves to a petitioner's representative, and the petitioner or employer refused to speak to the officers or were refused entry into the premises or refused permission to review HR records pertaining to the beneficiary(ies). Failure or refusal to fully cooperate could also include situations where a petitioner or employer agreed to speak but did not provide the information requested within the time period specified, or did not respond to a written request for information within the time period specified.'' 88 FR 65040, 65061 (Sept. 20, 2023). Importantly, no denial or revocation for USCIS' inability to verify pertinent facts based on non-compliance would occur without the petitioner first being given notice of USCIS finding non-compliance and having a chance to rebut and present information on its own behalf in compliance with 8 CFR 103.2(b)(16).

Comment: Some commenters expressed opposition to the application of investigative authority to any documents or areas that another H–2 regulatory body already inspects and encouraged USCIS to coordinate with other agencies to avoid wasting Department or employer resources on duplicative reviews. Likewise, a joint submission and a professional association suggested USCIS may be overstepping its subject matter expertise and regulatory bounds when it comes to employment matters, noting specifically

[76] Dept. of Homeland Security, ''Guidelines for Enforcement Actions in or Near Protected Areas'' (Oct. 27, 2021), *https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcement-actions-in-near-protected-areas.pdf.*

that DOL and State workforce agencies already exercise the same investigative authority that DHS seeks to codify. Similarly, while commenting on DHS's proposed codification of its authority for on-site inspections, a few commenters, including a professional association and trade associations, remarked that USCIS should ensure it is not overreaching or superseding the regulatory authority of other government entities.

Response: USCIS officers conduct verification and compliance reviews, including on-site verifications, to ensure compliance with the terms and conditions of the H–2 petition filed with USCIS. The focus of these reviews is on information that is needed by USCIS to verify facts related to the adjudication of the petition, such as facts relating to the petitioner's and beneficiary's eligibility and continued compliance with the requirements of the H–2 program. USCIS officers routinely coordinate with others in the Department and with other agencies to reduce duplicative investigations when possible. However, the occurrence of a review by another agency does not absolve the employer of its responsibility to fully cooperate with USCIS verification and compliance reviews, including on-site inspections. It remains the petitioner's burden to demonstrate eligibility for the benefit sought.[77]

DHS recognizes that other agencies may exercise investigative authority pertaining to their respective mandates. However, DHS continues to exercise its own authority pursuant to INA sec. 103(a) and 214, 8 U.S.C. 1103(a) and 1184, HSA sec. 451, 6 U.S.C. 271, and 8 CFR part 103, among other provisions of law,[78] under which USCIS conducts inspections, evaluations, verifications, and compliance reviews, to ensure that a petitioner and beneficiary are eligible for the benefit sought and that all laws have been complied with before and after approval of such benefits. The existing authority to conduct inspections, verifications, and other compliance reviews is vital to the integrity of the immigration system as a whole and to the H–2A and H–2B programs specifically. In codifying its currently exercised authority, DHS will continue to review matters pertinent to H–2A and H–2B petition approval. Although some issues, such as the duties of the offered job, may be applicable to both DHS authority and the authority of another agency, that overlap does not signify DHS ''overstepping'' its authority in reviewing information pertaining to that issue. To the extent that multiple agencies are involved in the administration of the H–2A and H–2B program, DHS and other agencies may each maintain independent authority to ensure that entities and individuals are abiding by the terms and conditions of the H–2A and H–2B programs.

a. Legal Authority for Compliance Reviews and Inspections

Comment: A research organization stated that the proposed on-site inspections by USCIS FDNS are illegal, asserting that there is no authority to authorize USCIS to conduct on-site inspections. The commenter stated that the HSA refers to USCIS' duties as solely immigration-related ''[a]djudications,'' and Congress has never enacted any statute that overturns the prohibition on USCIS engaging in law enforcement, investigations, and intelligence gathering. The commenter went on to state that the HSA expressly prohibits any reorganization of agency functions by the Executive, and the NPRM provides no citation for FDNS's authority to conduct investigations and inspections. Further, the commenter said INA sec. 286(m) provides that Immigration Examinations Fee Account (IEFA) funds are earmarked ''for expenses in providing immigration *adjudication* and naturalization *services,*'' and if USCIS insists on moving forward with FDNS inspections, it should clearly state that those inspections will not be paid for by IEFA funds. The commenter concluded that DHS should follow the HSA, transfer all investigations to ICE—which has express legal authority and capacity to carry out investigative and intelligence-gathering activities, and cease the unlawful diversion of IEFA funds to FDNS.

Response: DHS disagrees with the commenter that it lacks legal authority to conduct on-site inspections through USCIS FDNS. DHS also disagrees that DHS should transfer all investigations to ICE. Finally, DHS disagrees with the assertion that it is unlawfully diverting IEFA funds to FDNS. Specifically, this rulemaking codifies existing authorities exercised by USCIS FDNS in the Code of Federal Regulations, and does not include any changes to the funding structure or sources of FDNS.[79]

In 2004, USCIS established the FDNS in response to a congressional recommendation to establish an organization ''responsible for developing, implementing, directing, and overseeing the joint USCIS–ICE anti-fraud initiative and conducting law enforcement/background checks on every applicant, beneficiary, and petitioner prior to granting immigration benefits.'' [80] FDNS also oversees a strategy to promote a balanced operation that distinguishes USCIS' administrative and adjudicatory authority, responsibility, and jurisdiction from ICE's criminal investigative authority.

The site visits and inspections conducted by FDNS are authorized through multiple legal authorities. The Secretary of Homeland Security is authorized to administer and enforce the immigration laws. INA sec. 103(a)(1), 8 U.S.C. 1103(a)(1). The Secretary may confer this authority to any DHS employee, to the extent permitted by law. INA sec. 103(a)(4), 8 U.S.C. 1103(a)(4); HSA sec. 102(b)(1), 6 U.S.C. 112(b)(1); 8 CFR 2.1.[81] Moreover, under 6 U.S.C. 112(a)(3), all functions of officers, employees, and organizational units of [DHS] are vested in the Secretary. The Secretary of Homeland Security delegated to USCIS the authority to administer the immigration laws, including the authority to investigate civil and criminal violations involving applications or determinations for benefits.[82] Following

[77] *See* INA sec. 291, 8 U.S.C. 1361; *see also* USCIS, Policy Manual, Chapter 4—Burden and Standards of Proof (''The burden of proof to establish eligibility for an immigration benefit always falls solely on the benefit requestor. The burden of proof never shifts to USCIS.''), *https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-4.*

[78] *See, e.g.,* INA secs. 235(d)(3), 287(a)(1), (b); 8 U.S.C. 1225(d)(3), 1357(a)(1), (b).

[79] As noted in the preamble of the USCIS fee rule, DHS interprets 8 U.S.C. 1356(v)(2)(B) as providing supplemental funding to cover activities related to fraud prevention and detection and not prescribing that only those funds may be used for that purpose, and FDNS is funded from both the IEFA and the Fraud Prevention and Detection Account. 89 FR 6194, 6247 (Jan. 31, 2024).

[80] *See* Conference Report to accompany H.R. 4567 [Report 108–774], ''Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending September 30, 2005,'' p. 74 (Oct. 9, 2004), *https://www.gpo.gov/fdsys/pkg/CRPT-108hrpt774/pdf/CRPT-108hrpt774.pdf.*

[81] Pursuant to 8 CFR 2.1, all authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws are vested in the Secretary of Homeland Security. The Secretary of Homeland Security may, in the Secretary's discretion, delegate any such authority or function to any official, officer, or employee of the Department of Homeland Security, including delegation through successive redelegation, or to any employee of the United States to the extent authorized by law. Also, because INA sec. 103(a)(4) refers to ''Service'', *i.e.* Legacy INS, see also 8 CFR 1.2 which defines Service as ''U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and/or U.S. Immigration and Customs Enforcement, as appropriate in the context in which the term appears.''

[82] Delegation to the Bureau of Citizenship and Immigration Services, Department of Homeland

Continued

the dissolution of the Immigration and Naturalization Service (INS) and the creation of DHS on March 1, 2003, authority to ''administer the immigration laws'' was delegated to USCIS.[83]

USCIS was delegated the ''authority to investigate alleged civil and criminal violations of the immigration laws, including but not limited to alleged fraud with respect to applications or determinations within the USCIS, and make recommendations for prosecutions, or other appropriate action when deemed advisable.''[84] USCIS also has the ''authority to interrogate aliens and issue subpoenas, administer oaths, take and consider evidence, and fingerprint and photograph aliens under sections 287(a), (b), and (f) of the INA, 8 U.S.C. 1357(a), (b), and (f), and under 235(d) of the INA, 8 U.S.C. 1225(d).''[85]

USCIS and ICE were granted concurrent authority to investigate immigration benefit fraud.[86] Through written agreement, ICE agreed to take the lead on criminal and other enforcement investigations. USCIS agreed to focus on detecting and combating fraud associated with adjudicating applications and petitions.[87] The Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, granted the Secretary of Homeland Security the authority to administer and enforce provisions of the INA, as amended, INA sec. 101, 8 U.S.C. 1101 *et seq.* The Secretary, in Homeland Security Delegation No. 0150.1, delegated certain authorities to USCIS. FDNS's activities fall squarely within this delegation.

Further, regulations support the FDNS activities that are described in this rule. For example, 8 CFR 1.2, defines ''immigration officer'' to include a broad range of DHS employees including immigration agents, immigration inspector, immigration officer, immigration services officer, investigator, and investigative assistant. As duly appointed immigration officers, FDNS immigration officers may question noncitizens based on the authority delegated by the Secretary of Homeland Security. Furthermore, INA sec. 287(a)(1), 8 U.S.C. 1357(a)(1), provides any officer or employee of the Service with the authority to (pursuant to DHS regulations) without warrant ''interrogate any alien or person believed to be an alien as to his right to be or remain in the United States.'' *See also* 8 CFR 287.5. The regulation at 8 CFR 287.8(b) specifically sets out standards for interrogation and detention not amounting to arrest, wherein immigration officers can question individuals so long as they do not restrain the person they are questioning. The Board of Immigration Appeals has recognized that the reports produced by FDNS based on site visits and field investigations are ''especially important pieces of evidence.''[88] These investigations and reports help ensure that adjudicative decisions are made with confidence by providing information that would otherwise be unavailable to USCIS.

With respect to the assertions that DHS is unlawfully diverting funds to FDNS, DHS also disagrees with such assertions. USCIS' funding authority for FDNS is discussed in detail in the Fee Final Rule where DHS addressed similar comments. 89 FR 6194, 6246–6248 (Jan. 31, 2024); 89 FR 20101 (Apr. 1, 2024).

4. Whistleblower Protection

a. Support for Whistleblower Protections

Comment: Many commenters expressed support for incorporating whistleblower protections in the proposed rule, with some commenters, including some unions, stating that workers would feel safer in reporting abuses or violations without fear of retaliation. A joint submission stated their support for expanding the activities covered under whistleblower protections.

A couple of advocacy groups expressed strong support for the provision, particularly the inclusion of seeking legal services as a protected activity and for considering loss of H–2 status due to an employer's retaliatory action an ''extraordinary circumstance,'' and urged DHS to finalize it as soon as possible. An advocacy group also expressed support for expanding the definition of protected activities, even if it would result in the language for H–2 differing from the H–1B whistleblower provision. An individual commenter expressed support for the implementation of H–2 whistleblower protection in alignment with protections for H–1B workers. The commenter reasoned that such protections would not only give nonimmigrants the ability to voice concerns about wrongdoing, malpractice, or fraud, but they would also hold industries accountable, creating a better environment for H–2 workers. Similarly, a union expressed that allowing H–2 workers the flexibility to call out employers' program violations makes all workers safer.

Response: DHS appreciates the comments about the need for whistleblower protections for H–2 workers. DHS anticipates that these revisions will help H–2 workers feel safer in reporting violations, improving worker conditions for all employees at the location.

Comment: Discussing a series of court cases that emphasized ''the crucial nature of provisions protecting workers against employer reprisals for filing claims and opposing employer violations'' and expansively interpreted the types of conduct protected against retaliation, a joint submission expressed support for the proposed whistleblower provisions and DHS's overall efforts to enhance worker protections as part of the broader changes alongside the DOL's proposed changes to the H–2A program.[89] The commenters stated that ''the total of such systemic change is especially essential'' to protecting vulnerable H–2 workers, many of whom ''are vulnerable to threats of violence or other forms of retaliation against their family members in their home country, as well as to recruiter threats to blacklist them from any future H–2 employment.''

Response: DHS agrees with the commenters that H–2 workers are vulnerable to retaliation and expects that this rule, along with existing DOL

Security Delegation Number 0150.1, Issue Date: 06/05/2003. The Bureau of Citizenship and Immigration Services was the initial name for USCIS following the dissolution of the Immigration and Naturalization Service.

[83] See Delegation 0150.1(II)(H) (June 5, 2003).

[84] See Delegation 0150.1(II)(I) (June 5, 2003).

[85] See Delegation 0150.1(II)(S) (June 5, 2003).

[86] In Section (II)(I) of DHS Delegation Number 0150.1, Delegation to the Bureau of Citizenship and Immigration Services, and in section 2(I) of DHS Delegation Number 7030.2, Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Customs Enforcement, USCIS and ICE received concurrent authority to investigate fraud involving immigration benefits available under the INA. In their respective delegations, USCIS and ICE were further directed by the Secretary of Homeland Security to coordinate the concurrent responsibilities provided under these Delegations. A memorandum of agreement was undertaken to advance the coordination between USCIS and ICE, as authorized by these Delegations. The Secretary of Homeland Security has properly delegated authority to immigration officers, including immigration officers who work for FDNS.

[87] Memorandum of Agreement between USCIS and ICE on the Investigation of Immigration Benefit Fraud, September 25, 2008; *see also* Memorandum of Agreement between USCIS and ICE Regarding the Referral of Immigration Benefit Fraud and Public Safety Cases (Dec. 15, 2020).

[88] *Matter of P. Singh,* 27 I&N Dec. 598, 609 (BIA 2019) (''Detailed reports from on-site visits and field investigations are especially important pieces of evidence that may reveal the presence of fraud.'').

[89] *See* ''Improving Protections for Workers in Temporary Agricultural Employment in the United States,'' 88 FR 63750 (Sept. 15, 2023). DOL subsequently published a corresponding final rule on April 29, 2024. 89 FR 33898.

regulations,[90] will encourage H–2 workers to report violations with less fear of retaliation.

Comment: While expressing support for whistleblower protections in the proposed rule, several commenters, including trade associations and a professional association, urged USCIS to better define terms such as ''retaliatory action'' and ''nondocumentary documentation.'' A couple of the trade association commenters added that employers require these definitions to implement training accordingly. A union recommended DHS include ''charging of illegal recruitment fees'' as an example of a labor dispute for which claims would be protected under the whistleblower protections, as well as ensuring that collective bargaining and other union activities warrant whistleblower protection.

Response: DHS appreciates the general support but declines to adopt the specific suggestions. The comments requesting that DHS define certain terms did not offer suggestions as to what those definitions should be. As explained in the proposed rule, to ensure flexibility, and to track the current approach for H–1B petitions at 8 CFR 214.2(h)(20), DHS did not propose to define ''retaliatory action.'' Nevertheless, DHS offered a non-exclusive list of examples, to include harassment, intimidation, threats, restraint, coercion, blacklisting, intimidating employees to return back wages found due (''kickbacks''), or discrimination, which could dissuade an employee from raising a concern about a possible violation or engaging in other protected activity. In determining what constitutes ''retaliatory action,'' DHS will consider all relevant facts presented, including those vulnerabilities particular to H–2 workers. DHS also notes that it did not use the phrase ''nondocumentary documentation.'' Instead, DHS proposed requiring ''credible documentary evidence . . . indicating that the beneficiary faced retaliatory action from their employer based on a reasonable claim of a violation or potential violation of any applicable program requirements or based on engagement in another protected activity.'' In order to allow flexibility in the types of documentation that may be submitted, DHS did not propose specifying any particular form that a ''claim'' or the ''credible documentary evidence'' must take. DHS recognizes that credible evidence can take many forms, some of which it might not be able to foresee, and anticipates that the flexible credible documentary evidence standard, without further restrictions, will balance the need for evidence with the special challenges vulnerable H–2 workers may face in collecting evidence.

Comment: A union suggested that the reasonableness of a claim of program violations should be considered from the H–2 worker's perspective, similar to the decision in *Stericycle, Inc.,* in which the National Labor Relations Board explained that, in analyzing whether a work rule has a ''reasonable tendency to chill employees from exercising their . . . rights,'' it will ''interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer . . . .''[91] The commenter recommended DHS use similar language to revise 8 CFR 214.2(h)(10)(iv)(D)(*2*).

Response: DHS appreciates this suggestion. While DHS is not bound by NLRB's decision in *Stericycle, Inc.* decision, DHS recognizes the importance of setting a standard that considers the perspective of an employee who is subject to an employer's work rule and economically dependent on the employer. As discussed throughout the proposed rule and this final rule, H–2 workers are a vulnerable population at risk for retaliation against themselves and their family. Accordingly, new 8 CFR 214.2(h)(20) states that ''USCIS will determine the reasonableness of any claim from the perspective of a reasonable person in the H–2A or H–2B worker's position.'' This will be similar to the language proposed and finalized for 8 CFR 214.2(h)(10)(iv)(D)(*2*), as recommended by the commenter.

Comment: A union expressing support for these protections urged DHS to ensure H–2 workers receive training—in a language they understand—on their rights just prior to their departure for the United States. A religious organization expressing support for the proposed whistleblower protections recommended that DHS provide the protections in 8 CFR 214.2(h)(2) to workers in a language they understand.

A union stated that DHS should work alongside other Federal agencies to improve access to and expedite requests for status protections during a whistleblower claim. A joint submission similarly remarked that other agencies with a similar purview, such as DOL, do not have enough time to investigate claims or ensure temporary immigration relief for claimants. Accordingly, the commenter, along with an advocacy group, urged for the proposed policy to be adopted immediately on an interim basis until it is finalized.

An advocacy group cited multiple sources demonstrating the pervasiveness of blacklisting—a form of employer retaliatory action that can make it difficult for H–2 workers to find new positions—in the H–2 program, creating added fear that prevents H–2 workers from coming forward as whistleblowers. The group urged DHS to take further steps to specifically counter blacklisting, including (but not limited to) providing work authorization and parole to any worker who brings a credible report of blacklisting to a labor agency.

Response: DHS appreciates these comments and anticipates that this final rule will adequately address their concerns insofar as the issues are within DHS jurisdiction. DHS agrees that workers should understand their rights. Currently, DOS provides H–2 visa recipients with a Know Your Rights informational pamphlet, sometimes known as a Wilberforce pamphlet.[92] The pamphlet explains that retaliation against workers reporting abuse is unlawful and provides information on programs available to victims of retaliation. The pamphlet is currently available in more than 50 languages, with new translations being added on a continual basis.

DHS also appreciates the interest in interagency efforts to reduce retaliation. DHS notes that DOL recently broadened 20 CFR 655.135(h) to explicitly protect certain activities workers must be able to engage in without fear of intimidation, threats, and other forms of retaliation. 89 FR 33898, 33998–99 (Apr. 29, 2024). DHS anticipates that interagency cooperation is possible without additional revisions to this rule. While DHS agrees with the commenter that protections from retaliation are urgently needed, DHS is finalizing this rule rather than implementing this one aspect of the proposal on an interim basis.

DHS recognizes the harms caused by blacklisting and appreciates the commenters' concerns about this issue. DHS explicitly stated in the preamble to the proposed rule that retaliatory actions include blacklisting and anticipates that the final rule, as drafted, will help address such actions by an employer. DHS will not, in this rule,

[90] *See, e.g.,* 20 CFR 655.135 (H–2A); 29 CFR 501.4 (H–2A); 20 CFR 655.20(n) (H–2B); 29 CFR 503.16(n) (H–2B).

[91] *Stericycle, Inc.,* 372 NLRB 113, 114 (NLRB Aug. 2, 2023).

[92] The English language version of this pamphlet is available at DOS, ''Know Your Rights; National Human Trafficking Hotline,''*https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-ENG-100116.pdf.*

implement further steps, such as providing work authorization and parole to any worker who brings a credible report of blacklisting to a labor agency. DHS did not propose to provide parole or work authorization in these circumstances, and the suggestions exceed the scope of this rulemaking. However, DHS notes that as a matter of prosecutorial discretion, it may defer removal action against individual noncitizens on a case-by-case basis, and that a noncitizen granted such deferred action may, per 8 CFR 274a.12(c)(33), apply for and obtain employment authorization for the period of deferred action if they establish ''an economic necessity for employment.'' [93] This process may, under appropriate circumstances, be applicable to workers who bring credible reports of blacklisting to a labor agency.

Comment: A religious organization supported the proposed whistleblower provision but recommended that DHS simplify, outline, and provide to workers an explanation of this process ''so that the workers are able to submit complaints to DHS regarding retaliation.'' The commenter also urged DHS to include in the whistleblower process the opportunity for certifications (I–918 Supplement B) or declarations (I–914 Supplement B) for U or T visa status.

Response: DHS appreciates the opportunity to clarify what might be a misunderstanding concerning the nature of the whistleblower provision at new 8 CFR 214.2(h)(20)(ii). This provision, as proposed and as finalized, does not create a new process in which an H–2 worker can submit a complaint regarding retaliation directly to DHS. Instead, this new provision allows a petitioner filing an H–2 petition requesting an extension of stay or change of status on behalf of a beneficiary to demonstrate that the beneficiary's loss or failure to maintain H–2A or H–2B status was due to a retaliatory action from their employer. If DHS determines such documentary evidence to be credible, DHS may consider any loss or failure to maintain H–2 status by the beneficiary related to such retaliatory action as an ''extraordinary circumstance'' for purposes of 8 CFR 214.1(c)(4) and 8 CFR 248.1(b), and DHS may grant a discretionary extension of H–2 stay or a change of status to another nonimmigrant classification, as applicable. This provision does not affect the existing processes or requirements for an H–2 beneficiary to apply for certifications for U or T nonimmigrant status.

b. Opposition to Whistleblower Protections

Comment: Multiple commenters, including a joint submission, a professional association, and a State Government, expressed concern that the whistleblower protections as written give H–2 workers too much power and may incentivize workers to make bad faith claims about employer violations. Two commenters expressed concern that the standard was too broad, with one recommending limiting whistleblower protections to ''serious violations involving health and safety,'' while another felt a formal report should be required evidence. Similarly, a State Government remarked that with the proposed whistleblower protections, DHS would eliminate employers' protections.

A business association expressing opposition to the proposed whistleblower standards stated that H–2 workers are not as vulnerable as the proposed standards assume and DHS does not offer any specific evidence that these lowered standards would alleviate any vulnerability. A professional association questioned DHS's authority to decide protected activities for whistleblowers.

A couple of commenters, including a joint submission and an association of State Governments, urged DHS to clarify how the whistleblower provision would be enforced or how claims would be investigated. The association of State Governments expressed concern that the change in protections may be costly to employers and that employers may not receive due process protections.

Response: DHS appreciates the commenters' concerns about the broadness of the standard and the potential for bad faith claims of violations but declines to make changes in response to these comments. First, the ''credible documentary evidence'' standard should decrease any potential for frivolous or bad faith claims. Second, DHS does not anticipate that the new whistleblower protections would significantly incentivize beneficiaries to make false claims of retaliation. New 8 CFR 214.2(h)(20)(ii) does not create a new process for H–2 beneficiaries to directly notify DHS of a violation of potential violation of their rights. Instead, new 8 CFR 214.2(h)(20)(ii) will only apply when a petitioner files an H–2 petition requesting an extension of stay or change of status on behalf of an H–2 beneficiary. An employer seeking to extend the stay of their own employee is unlikely to admit their own wrongdoing. Assuming a different employer was willing to advance a bad faith claim, DHS anticipates that the ''credible documentary evidence'' standard should decrease that risk.

Third, DHS emphasizes that these provisions are not intended to penalize employers. Instead, they are designed to better enable an employee who has a reasonable claim of retaliation to extend their stay or change status. A grant of the request for an extension of stay or change status for an H–2 worker under new 8 CFR 214.2(h)(20)(ii) based on a claim of retaliation by a specific employer will not, for example, trigger a discretionary or mandatory ground for denial of a petition filed by that employer. Only in cases where the claim leads to a separate proceeding that confirms an employer violation, with adequate notice and an opportunity to respond, would the employer face any adverse consequences. Because adjudications of the extension of stay or change of status requests are not punitive to a prior employer, DHS declines to elaborate further on how these extensions of stay or change of status requests will be adjudicated and does not believe that this provision raises due process concerns for employers. For the same reason, given that the adjudication of these requests does not, by itself, penalize an employer, DHS concludes there is no need to limit the types of whistleblower claims that can support an extension of stay or change of status request to formal reports or serious violations involving health and safety.

E. Worker Flexibilities

1. Grace Periods/Admission Periods

a. General Support for Revisions to Grace Periods

Comment: Some commenters, including an advocacy group, a business association, and a joint submission, generally supported the proposed changes to grace periods. A professional association supported the proposed worker flexibilities granting grace periods to H–2 workers, especially H–2B workers. An advocacy group said the proposals to grant workers greater flexibility in the form of grace periods and extended periods of admission are important steps towards realizing mobility between H–2 employers and alleviating the harms caused by the H–2 program's structure. A business organization stated that its members welcomed the proposed grace periods as

[93] USCIS, ''DHS Support of the Enforcement of Labor and Employment Laws,'' *https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/dhs-support-of-the-enforcement-of-labor-and-employment-laws* (last updated Apr. 11, 2024).

the increased flexibility in these grace periods will help them meet their workforce needs. The commenter noted that the grace periods will help workers settle, which alleviates stress for both the employer and employee, and will help companies seeking to hire additional workers. Some commenters generally supported the proposed pre- and post-validity grace periods (further discussed below) without providing specific rationale.

Response: DHS appreciates these commenters' feedback on the benefits of the new grace periods, which will improve worker mobility and protections as well as benefit employers. DHS will finalize the grace periods without change from the NPRM.

b. Harmonization of H–2 Grace Periods

Comment: Multiple commenters, mostly trade associations and a business association, appreciated the harmonization of pre- and post-validity grace periods between the H–2A and H–2B programs, with commenters saying it would provide workers and employers with needed flexibilities to minimize challenges associated with transferring workers to a new contract. A joint submission said the proposed pre- and post-validity periods would be a desirable change that improves worker mobility and reduces the burden on both workers and employers.

A couple of trade associations said that aligning these periods among both programs would help reduce potential confusion in understanding the Department's ''already overly complicated'' regulatory structure governing the H–2A and H–2B programs. A joint submission similarly said the harmonization makes the two programs more efficient and provides uniformity in standards for affected employers and employees. An advocacy group said the alignment would improve certainty and predictability for H–2 workers and is a step towards improving H–2B workers' ability to seek legal support if needed. An advocacy group wrote that ensuring that pre- and post-employment admissions periods align for H–2A and H–2B workers would make it easier for advocates to inform workers about their rights and would improve certainty and predictability for workers. Some commenters, including several business associations, said the harmonization also allows sufficient time for successive petitions to be filed and timely processed by USCIS prior to the next contract start date.

Response: DHS appreciates the commenters' feedback on the benefits of harmonizing the length of the pre- and post-validity grace periods for H–2A and H–2B workers and will finalize these grace periods without change.

Comment: Without elaborating, a religious organization invited DHS to consider expanding the grace period for H–2 beneficiaries to be consistent with the grace period afforded to H–1B workers, stating that many of the proposed changes incorporate other H–1B protections to the H–2 programs.

Response: The length of the new grace periods for H–2 workers finalized in this rule will be the same as, and in some cases longer than, the grace periods afforded to H–1B workers. Specifically, H–2A, H–2B, and H–1B workers will have a pre-validity grace period of up to 10 days. New 8 CFR 214.2(h)(5)(viii)(B); 8 CFR 214.2(h)(6)(vii); 8 CFR 214.1(l). H–2A and H–2B workers will have a post-validity grace period of up to 30 days, while H–1B workers have a post-validity grace period of up to 10 days. New 8 CFR 214.2(h)(5)(viii)(B); 8 CFR 214.2(h)(6)(vii); 8 CFR 214.1(l). H–2A, H–2B, and H–1B workers will have a grace period for cessation of employment of up to 60 days. 8 CFR 214.2(h)(13)(i)(C); 8 CFR 214.1(l). H–2A and H–2B workers will have a grace period of up to 60 days upon the revocation of the employer's petition, but H–1B workers have no such grace period. New 8 CFR 214.2(h)(11). These different grace periods take into consideration the special vulnerabilities of H–2 workers.

c. Post-Validity Grace Period of Up to 30 Days Following Expiration of the Petition

Comment: Some commenters specifically supported the proposed expansion of the grace period from 10 to 30 days following the expiration of the petition for H–2B workers, with most stating that it would likely alleviate some of the pressure employers feel due to the statutory cap when timing the filing of subsequent petitions against the expiration of a previous contract. The commenters added that the expansion would provide H–2B workers the time and flexibility to find continued subsequent employment without risk. A business association, examining the grace period in combination with the enhanced portability provisions, wrote that employers are confident that the ability of H–2 workers to find subsequent employment would inure direct benefits to their companies. The commenter said this would help H–2B employers avert cap-related issues, as these individuals have already been subject to the cap and would not be subject to the cap if they transfer from one company to another in the same fiscal year.

A professional association similarly stated that, with the unpredictability of DOL processing times and the unavailability of additional visa numbers, this proposed grace period gives workers the opportunity and the time needed to find alternative H–2 employment from within the United States without having to potentially leave the United States and, if applicable, then subject themselves to the annual H–2B cap. The commenter also said that employers benefit, as this grace period will make it easier for them to transfer workers to their employ within the United States because the workers will remain in status for up to 30 days after the expiration of their program end date.

An advocacy group stated that, without this post-contract admission period, it would be ''near impossible'' for H–2 workers to take advantage of the proposed rule's portability provisions, as workers seeking to use these flexibilities may need time to look for another job, or the start date of the new job may not align precisely with the end date of their existing job. The commenter went on to state that a 30-day post-contract grace period would give workers returning to their countries of origin after the end of their H–2 contract period time to prepare for their departure. In addition, the commenter said the 30-day period would allow H–2 workers to address any violations of their rights by seeking legal assistance after they have finished employment, during regular business hours, and within the United States. A joint submission in support of the proposal stated that, where a worker seeks additional H–2 employment or where a worker seeks to pursue complaints relating to their employment, the current 10-day period of authorized presence is ''grossly inadequate.''

Response: As noted in the NPRM and by commenters, the extension of the post-validity grace period will benefit both H–2 workers and employers by facilitating the use of the new portability provision. It will also give workers more time to prepare for departure or applying for an extension of stay based on a subsequent offer of employment. As also noted by commenters, the extension of this grace period may also provide workers more time to address any violations of their rights and pursue complaints relating to their employment.

Comment: A research organization stated that this 30-day grace period should be lengthened to at least 60 days to ensure that workers do not find

themselves out of status when they cannot find an additional employer within such a short period.

Response: DHS declines to extend the length of the new post-validity grace period from up to 30 days to at least 60 days. Workers who complete their contracted employment should know in advance when their status ended and should have sufficient time to prepare for departure or make other arrangements within the 30-day grace period finalized in this rule, compared to H–2 workers who unexpectedly find themselves out of employment and would be eligible, under this final rule, for a longer grace period of up to 60 days.

Comment: A trade association stated that, with the change of work authorization starting at the filing of the extension with USCIS, ''extending the grace period to 60 days after the authorized work period is not necessary.'' The commenter said this extension may cause issues with workers who do not have access to housing or give ''bad player'' employers the opportunity to continue employment without the proper work authorization. The commenter said changing the policy that work can start when USCIS receives the petition would already increase the worker's ability to find employment by several additional days and should give employees appropriate time to find new employment.

Response: Assuming this commenter is referring to the post-validity grace period at new 8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(6)(vii)(A) providing for a grace period of up to 30 days (rather than 60 days) following the expiration of the H–2B petition, DHS declines to eliminate or shorten this grace period as proposed. As acknowledged by other commenters, the extension of the post-validity grace period to 30 days for all H–2 workers provides valuable benefits not only for H–2 workers, but also for H–2 employers by likely alleviating some of the pressure employers feel due to the statutory cap when timing the filing of subsequent petitions against the expiration of a previous contract.

d. Support for 60-Day Grace Period Following Cessation of Employment

Comment: Multiple commenters including a group of Federal elected officials, a union, and a professional association supported the proposal to provide a new 60-day grace period following cessation of H–2 employment if the worker was terminated, has resigned, or otherwise ceased employment prior to the end date of their authorized validity period. Some of these commenters said this grace period is essential to allowing H–2 workers sufficient time to respond to the unexpected loss of employment by seeking new H–2 employment, exploring their legal options, or organizing their departure from the United States. A joint submission said that this new provision would improve worker mobility and reduce the administrative burden on workers and employers. A professional association stated that in situations usually outside of the worker's control, the H–2 worker should be allowed to seek new employment. A union in support of this provision stated that, without time to search for and secure new employment, visa portability would not be practically accessible for H–2 workers. The aforementioned union and professional association, said the proposal is consistent with the benefits offered by other nonimmigrant classifications.

Multiple commenters, including a couple of unions, a joint submission, and an advocacy group, supported the proposed grace period because it would enhance worker autonomy, flexibility, and mobility to leave unfair, unsafe, or abusive employment conditions and apply for alternative employment without the risk of losing their visa. A group of Federal elected officials stated that guest workers have a well-founded fear of retaliation from employers that often prevents them from speaking out and advocating for better working conditions, and it is extremely challenging for workers to change employers, even when employers break the law. Likewise, an advocacy group said this grace period is especially critical when workers are terminated from employment in retaliation for exercising their rights and will lessen the power of bad-faith employers to leverage the immigration system as a tool of retaliation. The commenter stated that the proposed rule complements existing anti-retaliation provisions in DOL regulations governing the H–2 programs, and in Federal and State law. The commenter also welcomed DHS's application of this flexibility to any termination rather than attempting to limit it to retaliatory firings, as determining whether a termination constitutes retaliation often requires a fact-intensive and time-consuming legal inquiry. The commenter went on to say that workers need the 60-day post-employment grace period to assess any potential violations of their rights and take legal action if necessary.

A couple of trade associations supported the specification that workers would not accrue any period of unlawful presence solely based on cessation of employment. These commenters also agreed with the proposal that workers would not have to notify DHS or USCIS to take advantage of the new grace period. The commenters added that DHS should not consider employer notification to be conclusive evidence regarding a worker's status or trigger the start date of the 60-day grace period, and that when an extension is filed the petitioner should provide information or evidence regarding the cessation of employment to demonstrate status maintenance.

Response: DHS appreciates the commenters' support for this grace period, which is intended to improve worker flexibility, mobility, and protections. DHS confirms that this grace period will apply regardless of the reason for the H–2 worker's termination (subject to the worker's maximum period of stay). DHS further confirms that an employer's notification under 8 CFR 214.2(h)(5)(vi)(B) and 8 CFR 214.2(h)(6)(i)(F) will not be considered conclusive evidence regarding a worker's status.

e. Concerns With the 60-Day Grace Period Following Cessation of Employment

Comment: Multiple commenters, including several trade associations, expressed concern over the 60-day cessation of work grace period as proposed, stating that it could be abused if H–2 workers, in whom employers have invested considerable time and expense resources, immediately quit to spend 60 days, without risk, consequence, or penalty, to look for another H–2 job. Some of these commenters cited data indicating that most H–2 employers do not take advantage of their workforce, nor are they removed from the program, asserting that, while the 60-day grace period might be warranted if the Department revokes a bad-actor H–2 employer's petition, it is not necessary or justified for the majority of H–2 employers. A trade association wrote that the uncertainty associated with this proposal would have a detrimental impact on labor-intensive American agriculture. Another trade association stated that their industry's peak harvest generally lasts 60 to 90 days and that a worker unexpectedly leaving in the last 60 days of the contract would be devastating. Another commenter urged DHS ''to be aware of perverse incentives'' created by this new grace period and to consider how it ''would affect worker behavior, and the economic cost of such impact on

employers should they experience turnover.''

Response: DHS will finalize the grace period for a cessation of employment at 8 CFR 214.2(h)(13)(i)(C) as proposed. Without this new grace period, an already financially vulnerable H–2 worker facing an abusive employment situation or hazardous working conditions must choose between remaining in a bad employment situation or facing the harsh consequences of losing wages, benefits, and legal status from their H–2 employment. As other commenters have noted, some H–2 employers leverage a potential loss of status to coerce workers into continued employment, creating a power imbalance that allows forced labor and trafficking to occur in the H–2 programs. Thus, this grace period of up to 60 days is an important step towards addressing the systemic power imbalance between H–2 workers and their employers by giving H–2 workers a more realistic option of leaving a bad employer.

DHS acknowledges that an H–2 employer, like any employer in a free labor market, risks losing valuable time, resources, and/or manpower when a worker leaves employment. However, the new grace period is not expected to provide a significant ''perverse incentive'' for H–2 workers to cease employment without good cause. DHS does not agree with the commenters that an H–2 worker who ceases employment does so without risk, consequence, or penalty. Whenever a H–2 worker ceases employment, they face several risks and consequences including the loss of wages and benefits that come from that employment, such as housing for H–2A workers and certain H–2B workers. And as other commenters have noted, the ability of H–2 workers to cease employment, especially when faced with a harmful work environment, will help improve equality of wages and working conditions with U.S. workers.

It is important to emphasize that the new grace period will not authorize a beneficiary to lawfully work in the United States, but only ensure that USCIS will not consider a beneficiary to have failed to maintain nonimmigrant status or to have accrued unlawful status ''solely on the basis of a cessation of the employment.'' New 8 CFR 214.2(h)(13)(i)(C). As stated in the NPRM, the limitation that the grace period will apply ''solely on the basis of a cessation of employment'' should mitigate the risk that some workers would try to use this grace period to engage in unauthorized employment or other unlawful behavior. 88 FR 65040, 65065 (Sept. 20, 2023). This aspect of the grace period serves as an important disincentive for H–2 workers to abuse this provision. Considering the risks an H–2 worker incurs when leaving their employer, such as losing wages and other benefits, DHS disagrees that this grace period provides a ''perverse incentive'' for an H–2 worker to start and immediately quit employment unless there was good reason to do so. While DHS cannot completely eliminate all risk that an H–2 worker who might not be deserving would still benefit from the new grace period, for the reasons stated above, DHS maintains that such a situation would likely be rare and that the importance of protecting H–2 workers overall substantially outweighs the risk. *Id.*

f. Requested Changes to Proposed 60-Day Grace Period Following Cessation of Employment

Comment: Several commenters suggested that the proposed grace period following cessation of employment should only apply in certain circumstances, stating that workers can voluntarily quit for a number of reasons unrelated to an abusive or hazardous employment situation. For instance, a joint submission concluded that it would be appropriate to exclude beneficiaries terminated for cause from taking advantage of the 60-day grace period in order to protect subsequent employers from potentially dangerous or problematic behavior (for example, if workers were terminated for committing violent acts, sexual harassment, or other infractions that may pose a risk to the health, safety, and well-being of others). The commenter understood the basis for ''casting a wide net'' but said it is improbable that workers in an abusive or unsafe situation would nonetheless remain employed and also engage in behavior that would lead to their for-cause termination. The commenter said this is particularly the case in light of both DOL's parallel rulemaking that would narrow the scope of permissible circumstances in which workers may be terminated for cause and DHS's ''very lenient'' grace period proposal. A trade association said DHS should consider adding language defining a process by which employers and workers can document workplace claims and the efforts made to resolve the concern. This commenter stated that this provision is needed to provide a pathway for those working for H–2 employers that have taken advantage of their workforce, but added that a clearly defined process to utilize this type of grace period is needed to avoid unnecessary abuse of the provision. A few trade associations stated that there should be an affirmative duty of the H–2 worker to attempt to resolve workplace claims or concerns with the employer prior to quitting since the employer has committed time and expense in exchange for the worker's ability to enter and work in the United States, and that there should be less concern about reprisal if an H–2 worker ceases employment because they would have a 60-day grace period to seek other H–2 employment if they are unable to resolve the dispute with their sponsoring employer. Other trade associations expressed concern that providing a 60-day grace period after an employer has incurred the expense of bringing a worker to the United States could lead to workers arriving and quitting to spend 60 days searching for a higher paying H–2 job elsewhere, stating that there should be associated consequences for the worker who violates their contract instead of a ''reward'' by allowing the worker to stay in the United States to pursue another contract.

A business association urged DHS to consider options to ensure that workers do not take advantage of this grace period in a manner that harms employers and suggested an option of foreclosing an H–2 worker's ability to avail themselves of the 60-day grace period within the first month of their entry into the U.S to help diminish the potential for mischief involving the 60-day grace period. Another commenter asked whether DHS should impose ''a presumption of intent to defraud an employer if the H–2 worker arrives and leaves within a short period of time without trying to resolve any workplace dispute.''

Response: As proposed, the new grace period for cessation of employment will apply regardless of the reason for cessation. DHS declines to create a new discretionary process by which USCIS would determine whether to grant or deny a request for a grace period on a case-by-case basis, such as granting a grace period only when an H–2 worker can document that they made good faith efforts to resolve a workplace claim or that a workplace is hazardous, or denying a grace period when a beneficiary was terminated for cause (for example, if the beneficiary was terminated for committing a violent act, sexual harassment, or other infractions that may pose a risk to the health, safety, and well-being of others). The main reason why DHS did not propose—and now declines to adopt—a discretionary grace period similar to the one under 8 CFR 214.1(l)(2) is to provide more certainty to affected H–2

workers. As stated in the NPRM, giving more certainty of the length of the grace period could help alleviate some fears held by H–2 workers who are facing abusive employment situations, or otherwise wish to change jobs, but are reluctant to leave such employment due to uncertainty surrounding whether they would benefit from a grace period and how long the grace period would be. 88 FR 65040, 65064 (Sept. 20, 2023). Namely, ''termination for cause'' is both a law and fact-specific inquiry and workers may not have sufficient understanding of the concept to know with certainty where USCIS may land on such an inquiry in a subsequent adjudication, and therefore adding this limitation on the use of the grace period would likely create a chilling effect that would undermine the policy objective of this provision.

It would also be impracticable for USCIS to set up a separate process outside petition adjudication for approving grace periods on a case-by-case basis. USCIS would need to create a form for requesting grace periods, as well as a legal framework for determining whether a worker was terminated for cause and allow for the submission of evidence and rebuttal evidence. DHS believes that, even if DHS were inclined to adopt the commenter's suggestion, the regulated public should have an opportunity to comment on any such framework and process, including on the feasibility of workers complying with such a process. More importantly, even if feasible, such an adjudication could take a considerable amount of time, potentially undermining the utility of the grace period for a terminated worker who most likely would not know the outcome of the adjudication until the end or close to the end of the grace period, which as explained above would likely lead to a chilling effect of workers even attempting to use the 60-day grace period. Regarding the commenter's concern about the grace period possibly benefiting workers who were terminated for committing violent acts, sexual harassment, or other infractions that may pose a risk to the health, safety, and well-being of others, DHS believes that state and local judicial systems provide avenues to address such and similar serious criminal and civil infractions, and that limiting the use of the finite 60-day grace periods is therefore not necessary for that purpose. In addition, criminal charges may separately affect a worker's ability to remain in the United States.

DHS declines to adopt the suggested alternative of foreclosing an H–2 worker's ability to avail themselves of the grace period of up to 60 days within the first month of their entry. Similarly, DHS declines to impose ''a presumption of intent to defraud an employer'' if the H–2 worker arrives and leaves within a short period of time without trying to resolve any workplace dispute. As previously explained, the limitation that the grace period would apply ''solely on the basis of a cessation of employment'' and the fact that the H–2 worker would be unable to work during this grace period absent any pending H–2 petition filed on their behalf should mitigate the risk that some workers would try to use this grace period for unlawful purposes. Again, while DHS cannot completely eliminate all risk that an H–2 worker who might not be deserving would still benefit from the new grace period, DHS maintains that such a situation would likely be rare and that the importance of protecting H–2 workers overall substantially outweighs the risk. 88 FR 65040, 65065 (Sept. 20, 2023).

Comment: Several commenters urged DHS to revise the length of the proposed grace period at 8 CFR 214.2(h)(13)(i)(C) to 30 days. A commenter stated that while 60 days is consistent with other nonimmigrant classifications, the H–2 programs are unique which warrants some differences, noting that H–2 programs impose substantial costs on employers compared to other nonimmigrant classifications. The commenter said a 30-day grace period for cessation of employment would reduce the likelihood of worker departure for ''arbitrary or transient'' reasons while accommodating workers who are in an unsafe or abusive employment relationship. The commenter also said a 30-day grace period for cessation would be congruent to the 30 days afforded to workers at the expiration of the petition validity, noting that it makes little sense for workers who successfully complete a period of employment to only have a 30-day grace period while affording workers terminated for cause an extra month. Lastly, the commenter said the unique low and unskilled nature of many H–2 occupations better lends itself to a shorter grace period as employers in labor-intensive industries are more likely than ''white collar'' employers to fill job positions quickly, whereas a 60-day grace period may be more appropriate for highly skilled visa classifications (for example, E–1, E–2, E–3, H–1B, L–1, O–1, and TN) that typically command higher pay and benefits, are subject to less frequent turnover, and are not associated with extensive employer cost obligations.

A couple of business associations similarly stated that the creation of a new separate 60-day grace period adds unnecessary complexity and confusion regarding a beneficiary's legal status and work authorization. The commenters recommended a standard 30-day grace period applicable in all situations for ensuring uniformity and simplicity in understanding and complying with the requirements.

Response: DHS declines to shorten the length of the proposed grace period at 8 CFR 214.2(h)(13)(i)(C) to 30 days. Thirty days likely would not allow sufficient time for a worker to respond to sudden or unexpected changes related to their employment, such as by searching for possible new employment or, if necessary, planning their departure from the United States. A longer period of up to 60 days would better allow affected H–2 workers to seek and secure new H–2 employment, assess any potential violations of their rights and explore legal actions, if necessary, and/or organize their departure from the United States. While DHS agrees that the H–2 program is unique in the sense that these programs impose some cost obligations (such as certain housing and subsistence costs) that not all employers in other nonimmigrant programs are responsible for, DHS does not agree that these differences warrant a shortening of the grace period to 30 days. Instead, because H–2 workers are a particularly vulnerable population, a 30-day grace period likely would not be sufficient for affected workers to respond to sudden or unexpected changes related to their employment. As other commenters have noted, H–2 guest workers are uniquely vulnerable given that they are temporary workers, rely on their employers for basic needs, often have a language barrier, and may live in isolated environments where their access to information and resources is limited, among other factors.

DHS acknowledges that this means an H–2 worker who successfully completes a period of employment will only have a 30-day grace period, while H–2 workers who cease employment before the end of their validity period will have a longer grace period by up to another month. However, this is reasonable as workers who cease employment before the end of their validity period may have such cessation of employment occur unexpectedly and thus would need more time to plan their next steps. Workers who successfully complete their period of employment would know the end date of their employment in advance and would have had more time to plan for their next steps.

g. 60-Day Grace Period Following Revocation of Approved H–2 Petition

Comment: Multiple commenters, including several trade associations, a joint submission, and a professional association, specifically supported the proposal to provide a new 60-day grace period following the revocation of an approved H–2 petition, with most citing a similar rationale as above relating to cessation of employment. Several of these commenters said that this grace period would provide protection and stability in circumstances beyond the petitioner's or worker's control. An advocacy group said H–2 workers do not control the petition or their employers' conduct and cannot prevent laws or violations that might lead to a revocation. For example, the commenter stated that both current and proposed rules call for petition revocation in the event of a determination that an H–2 petitioner or its agent has charged a recruitment fee or other prohibited fee. While supporting these consequences, the commenter said that H–2 workers who lose their jobs because of this would bear the brunt of their employer's violation. The commenter concluded that the proposed grace period would lessen the undue harm that a revoked H–2 petition causes workers.

A professional association agreed with proposed provision 8 CFR 214.2(h)(11)(iv) allowing H–2 beneficiaries to remain in lawful status for 60 days or the end of their H–2B petition, whichever is shorter.

Response: DHS agrees that this new grace period will lessen some of the harm to an H–2 worker who loses their job and H–2 status caused by a revoked H–2 petition.

h. Work Authorization During the 60-Day Grace Periods

Comment: Multiple commenters urged DHS to provide work authorization during the 60-day grace period, stating that not doing so would limit workers' ability to take advantage of the grace period and the flexibility this measure seeks to create. Specifically, several advocacy groups recommended that DHS automatically issue interim work authorization to H–2 workers. These commenters noted the financial situations of most H–2 workers, such as often living paycheck to paycheck, frequently arriving at their United States worksites already deeply indebted, and not having the savings to support the time needed to identify, apply to, and travel to new H–2 job opportunities. One of these commenters detailed a suggested process through which H–2 workers who experience an early cessation of employment for any reason during an H–2 contract period, and who seek interim employment authorization, could directly notify DHS of this cessation of employment and receive a receipt at an address they would specify in their notice. Then, DHS could issue guidance (as it currently does for H–2A employers who are eligible to take advantage of the limited portability provisions) to potential employers of H–2 workers during the grace period stating that the employee's unexpired Form I–94 indicating their H–2 status, combined with the receipt of notification of early cessation of employment, would constitute sufficient proof the worker's employment authorization. DHS would then instruct employers to make any notation necessary on the I–9 to convey the limited 60-day period. The commenter said this process would be consistent with INA sec. 214(c)(1), as well as with DHS's broad authority to define the time periods and conditions of any nonimmigrant's admission to the United States under section 214(a)(1) of the INA. Another advocacy group supported this commenter's proposal. A couple of advocacy groups also stated that to the extent DHS has continued doubts about the appropriateness of providing interim employment authorization to all H–2 workers who experience an unexpected cessation of employment before the end of the contract period, DHS should at a minimum provide interim work authorization to workers who lose their employment due to the revocation of their employer's petition by no fault of the worker, as well as workers who are involved in an ongoing labor dispute with the H–2 employer that is the subject of an investigation by DOL or another relevant agency.

Response: As proposed and now finalized, none of the grace periods would independently authorize the beneficiary to work. As stated in the NPRM at 65065–65066, to the extent that such work authorization is permissible, there are also operational challenges and costs associated with providing work authorization documentation to H–2 workers who have ceased employment. While commenters provided suggestions that could have alleviated some operational challenges, other operational challenges would have remained. For example, setting up a process for beneficiaries to directly notify DHS of a cessation of employment and receive a receipt at an address would still require the agency to set up a new notification process for beneficiaries and mail out a physical receipt notice, all of which takes time and resources which the agency would not recover without imposing a new fee.

DHS acknowledges that not providing work authorization upon cessation of employment makes it difficult for affected H–2 workers to support themselves, thus potentially limiting their ability, as a practical matter, to leave their current employment. DHS notes, however, that the new portability provisions may offer help to affected H–2 workers who wish to begin employment sooner if they find a new petitioning employer. In addition, as previously noted, other forms of relief such as deferred action may be possible depending on the circumstances.

Providing employment authorization to only some, but not all, H–2 workers also would not be feasible. As discussed above, it would not be operationally feasible for USCIS to ''adjudicate'' a grace period within the context of the H–2 petition process. Similarly, it is not operationally feasible for USCIS, using current processes, to determine who would be eligible for interim employment authorization within the limited timeframe of such a grace period; there is no current mechanism in which DHS could provide interim work authorization, or issue such proof of employment authorization, for only some H–2 workers, such as those whose employment was terminated ''by no fault of their own.'' In addition, as noted in the NPRM, DHS determined that the creation of a process whereby, upon cessation of employment, a worker would file, with fee, a request for work authorization for a limited period of 60 days and receive evidence of that work authorization before the 60-day period had elapsed, likely would not be an attractive option for the filer nor operationally feasible for the agency. 88 FR 65040, 65066 (Sept. 20, 2023). Finally, while DHS acknowledges the commenters' legitimate concern, the Department notes that not allowing for interim work authorization during the grace period is consistent with longstanding policy.[94]

i. Requests To Extend the 60-Day Grace Periods

Comment: A couple of advocacy groups said DHS should allow at least

[94] *See, e.g.,* ''Modernizing H–2 Program Requirements, Oversight, and Worker Protections,'' 88 FR 65040, 65065–65066 (Sept. 20, 2023) (''It has long been the policy of DHS that grace periods do not authorize employment.''); ''Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,'' 81 FR 82398, 82439 (Nov. 18, 2016) (''Consistent with longstanding policy, DHS declines to authorize individuals to work during these grace periods.'').

a 90-day grace period for all H–2 workers who experience an unexpected end to their employment, with injured workers granted extensions beyond the initial 90-day period. An advocacy group expounded that H–2 workers need a longer grace period because of the acuteness and prevalence of abusive labor practices in the H–2 programs; their isolated living and working conditions; and their typically lower levels of income, education, and web access. In addition, the commenter said DHS should also provide for situations in which workers may need to remain in the United States for a longer period due to work-related injury or illness. The commenter stated that H–2 workers often are unable to take advantage of their workers' compensation benefits because they are forced to return to their home countries after a workplace injury or illness by retaliatory employers. The commenter noted that 60 days is insufficient for most workers to receive necessary treatment through workers' compensation because medical treatment and associated interactions can be time-consuming. Further, injured workers are unlikely to find new H–2 employment during a 60-day grace period, and therefore will be faced with the unfortunate choice between overstaying or returning home to forfeit medical care and benefits. The commenter suggested that DHS clarify that grace periods and the post-contract admission period may be extended for workers who need to remain in the United States to receive medical treatment related to an injury or illness covered by a workers' compensation claim. Relatedly, the commenter said DHS should also provide for a straightforward parole process for injured workers who have already departed the United States but need to return to seek medical care.

A couple of commenters, including an advocacy group and a research organization, recommended a 120-day grace period following loss of employment. One of these commenters provided similar rationale as above, stating that a 60-day grace period would often be too short for workers to seek care or find new employment, particularly given the geographic, social, and cultural isolation of H–2A workers. A research organization stated that, while it had previously urged that DHS should at least grant H–2 workers the same in-petition 60-day grace period as is granted to H–1B workers, given the ''bureaucratic realities of the H–2 programs,'' 60 days is insufficiently short. The commenter cited data indicating that the median U.S. worker took almost exactly 60 days to find a new job, but those workers could accept any job, not just seasonal jobs from employers willing to undergo the H–2 process. Additionally, the commenter said the H–1B petition DOL process takes only a week, while H–2 DOL processes take much longer. Citing data, the commenter stated that, assuming that an H–2B worker finds a new employer that is not already participating in the H–2B process, it will take over 100 days to complete the steps to join the program. Even in the case of the H–2A process, which takes about a month, the commenter said this month should be added to the median of 60 days it takes to find a new job to begin with.

Response: DHS declines to extend the grace period beyond 60 days. While commenters expressed legitimate concerns about why 60 days may not be sufficient (including TLC delays), DHS must balance these concerns with other concerns about potential abuse of the grace period if it were extended beyond 60 days. Also, the longer the grace period, the more concerns DHS would have with beneficiaries engaging in unlawful employment during the grace period.

DHS also declines to provide a longer grace period for only certain beneficiaries such as those who experienced an ''unexpected'' end to their employment or suffered a work-related injury or illness. As noted above, it would not be operationally feasible for USCIS to ''adjudicate'' a grace period within the context of the H–2 petition process using the current processes and mechanisms, or in a context separate from the H–2 petition process. Absent an adjudication, USCIS would not be able to provide a longer grace period only to certain H–2 beneficiaries. DHS again highlights that H–2 workers involved in labor disputes may request DHS to exercise prosecutorial discretion,[95] which may offer some relief for certain workers who were terminated for an unlawful reason or suffered a work-related injury or illness. Other avenues of relief, such as requesting a change of status to visitor status (B–2), may also be available to H–2 workers who need to receive medical treatment related to a workplace injury or illness.

[95] USCIS, ''DHS Support of the Enforcement of Labor and Employment Laws,'' *https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/dhs-support-of-the-enforcement-of-labor-and-employment-laws* (last updated Apr. 11, 2024).

j. Grace Period at the End of 3-Year Period of Stay

Comment: Multiple trade associations expressed concern that H–2 workers who continue three successive contracts (that is, workers whose final contract within their 3-year authorization ends at the very end of that authorization period) would be left with no time to prepare to leave the country after their third contract expires. These commenters stated that DHS should consider providing an additional minimum grace period, such as 5 days, in those situations to ensure workers do not inadvertently overstay due to waiting for the employer-scheduled transportation or for delayed or canceled flights. The commenters said adding a minimum grace period would benefit H–2 workers and allow them to return to the United States without any unauthorized stay.

A research organization similarly stated that DHS should provide a grace period of at least 10 days at the end of the 3-year period of stay to avoid inadvertent periods where people lose status to give people time to line up their transportation home. The commenter said this would match the NPRM's proposed 10-day grace period to enter the country.

Response: By regulation, an H–2 worker's maximum period of stay is limited to 3 years. *See* 8 CFR 214.2(h)(5)(viii)(C); 8 CFR 214.2(h)(13)(iv)-(v). DHS did not propose to change the maximum period of stay for H–2 workers and will not provide an additional grace period beyond that 3-year limit in this final rule. Further, as new 8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(6)(vii) already provides a post-validity grace period of up to 30 days, it is unclear why the suggested additional 10-day grace period is necessary. It is the petitioner's burden to be aware of when their H–2 workers' status will end and arrange their return transportation accordingly.

k. Employer Obligations During Grace Periods

Comment: Several trade associations that were generally supportive of the proposed grace periods requested that DHS consider and provide clarity surrounding the obligations of parties during the grace periods, specifically whether an H–2 employer is required to provide housing and meals during those periods of time. These commenters opposed requiring a petitioner to provide housing and meals for a worker who is no longer employed, regardless of the circumstances of the end of

employment. The commenters also noted the impact of and asked DHS to clarify the situation when the worker quits mid-contract, and an employer may need to seek an emergency labor certification to hire new workers and have housing available for them. The commenters said DHS should evaluate and plan for how a worker who ceases to be employed has access to resources such as housing and food without placing those obligations on an employer following the abandonment, termination, revocation, or expiration of a petition period.

A research organization stated that DHS should clarify that all employer obligations toward the worker end when the worker exercises their rights to use the in-petition grace period, and DHS or the worker or both should be required to notify the employer that they have exercised the right to use the grace period. The commenter said employers should not be forced to provide housing, pay, food, and other benefits when a worker is no longer employed for them.

Response: H–2 employers must abide by applicable DOL regulations concerning their obligations to provide housing, pay, food, and other benefits when a worker's employment has terminated as described in DOL regulations.[96] DHS is not imposing any new obligations on an H–2 employer by virtue of providing these new grace periods or extending existing ones.

Comment: Several advocacy groups suggested that, in addition to granting H–2 workers work authorization during the grace period, DHS should also ''clarify that otherwise eligible workers can qualify for unemployment benefits during the grace period.''

Response: DHS declines to provide the requested clarification, as DHS does not adjudicate or otherwise regulate eligibility for unemployment benefits for H–2 nonimmigrants.

l. Restriction on Multiple Grace Periods During a Single Period of Admission

Comment: A few commenters including advocacy groups said that DHS should remove the restriction on multiple grace periods during a single period of admission, which would leave at-risk workers with no grace period in which they could leave a second abusive job. Specifically, the commenters said DHS should clarify H–2 workers' access to a 60-day (or 120-day) grace period in case of a second unforeseen cessation of employment. Commenters said workers need access to multiple grace periods during a single period of admission if they have multiple employers due to the widespread nature of violations in H–2 industries, which DHS itself acknowledges. The commenters said workers who have previously changed employers would experience the same risks of labor abuse that are endemic to the H–2 program as workers who have not changed employers, and they should be able to access the same grace period.

Response: DHS believes the commenters' concerns may be based on a misunderstanding of the phrase ''once during each authorized period of admission,'' as used in the NPRM and retained in this final rule at new 8 CFR 214.2(h)(13)(i)(C). DHS appreciates the opportunity to clarify this point.

As noted in the NPRM, the phrase ''authorized period of admission'' refers to the time period noted on a worker's I–94, which will normally have an end date 30 days after the end of the corresponding petition's validity period to account for the 30-day grace period at 8 CFR 214.2(h)(5)(viii)(B) or 8 CFR 214.2(h)(6)(vii). In the scenario described by the commenters, in which a worker is the beneficiary granted an extension of stay based on a petition by a new employer, the worker will have been granted a new ''authorized period of admission'' (and therefore, a new I–94) based on the approval of the new employer's petition.[97] Notably, 8 CFR 214.2(h)(13)(i)(C) allows a 60-day grace period for a cessation of employment ''once during *each* authorized period of admission'' (emphasis added). Accordingly, notwithstanding a worker's prior use of the 60-day grace period for cessation of employment in connection with a prior petition, such a worker would not be considered to have failed to maintain nonimmigrant status, and would not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)), solely on the basis of a cessation of the new employment for 60 days or until the end of the new authorization period, whichever is shorter.

2. Transportation Costs for Revoked H–2 Petitions

Comment: A few commenters expressed support for the proposed provision requiring H–2A employers to pay for the beneficiary's reasonable costs of return transportation in the event of petition revocation. A professional association elaborated that this provision is consistent with other nonimmigrant visa categories, including H–1B, O, and P, and that it ensures the worker has the means to return to their home country upon separation from employment. Another professional association remarked that this requirement would create uniformity between H–2A and H–2B and is fair and efficient. Conversely, a professional association and a trade association stated that the proposed provision is redundant with other existing regulations that are already in place.

A trade association and a few other commenters commented that they have no concerns regarding the proposed provision. A joint submission remarked that they have no objections to the proposed provision since the Department is making a conforming change and is not changing the underlying substantive requirements. The joint submission further commented that the proposed provision does not alter existing program obligations under applicable DOL regulations.

Response: DHS appreciates the support and confirmation that these revisions do not represent a change in an employer's obligation and conform with other nonimmigrant classifications. DHS is not making any additional revisions based on these comments.

3. Portability and Extension of Stay Petitions

a. Positive Impacts on Employers, Workers, Program Operability, and the Economy

Comment: A professional association stated that the proposed portability provisions were ''sound'' from both employers' and H–2B workers' perspectives. While expressing support for the proposal to allow workers to begin employment upon the filing of a nonfrivolous petition, a trade association stated that the proposal would provide employers with the ability to employ workers in a timely manner, and provide beneficiaries with expanded job opportunities. A joint submission and a trade association also expressed support for the portability provisions, reasoning that permitting workers to begin employment in the same classification upon receipt of the non-frivolous petition would help avoid gaps in employment and potential hardships to workers, and allow workers to capitalize on their presence in the United States to earn income rather than waiting for a petition to be finalized. The commenters also stated that the provisions would benefit employers because employers seeking to

[96] *See generally,* 20 CFR 655.20(j)(ii), 20 CFR 655.122(h)(2).

[97] When a Form I–129 petition with a request for extension is approved, the Form I–797 approval notice includes a Form I–94. The approval notice instructs the petitioner that the lower portion of the notice, including the Form I–94, should be provided to the beneficiary(ies).

employ transferred workers would have access to workers, and have already demonstrated that they have a temporary need for labor or services. Similarly, a trade association expressed support for the portability provisions, reasoning that current timelines frustrate both workers seeking employment and employers who need workers, but that the proposed provisions would allow workers to immediately help employers that are in need of assistance. A professional association expressed support for making permanent the portability provisions that were in place during the COVID–19 pandemic, reasoning it would allow employers to fully staff their workforce when the petition was valid rather than having the workers remain idle until petitions were approved.

A joint submission added that the provisions would positively impact the U.S. economy since workers pay taxes and purchase goods and services, which would be lost if workers faced employment gaps. An advocacy group expressed support for the portability provisions, reasoning it would give workers the flexibility they desire while benefiting U.S. regions with varied agriculture profiles.

A couple of advocacy groups expressed support for the proposed portability provisions on the grounds that they would curtail the coercive power employers have over H–2 workers. Discussing abuse faced by H–2 workers, the commenters said that some H–2 employers leverage a loss of status to coerce workers into continued employment, creating a power imbalance that allows forced labor and trafficking to proliferate in the H–2 programs. The commenter stated that permanent portability would help address trafficking, violations, and other abuses in the H–2 program. Similarly, a union and an advocacy group expressing support for the proposal stated that visa status is at the center of the power imbalance between employers and workers that enables exploitation within the H–2 program, and the portability provisions would help restore a balanced relationship between workers and employers. A group of Federal elected officials stated that workers' dependency on their employers to live and work in the United States creates a ''well-founded fear of retaliation'' that prevents workers from speaking out against abuse and advocating for better working conditions. The commenter stated that under DHS's current rules, it is ''extremely'' challenging for workers to change employers, even when the employers break the law, which the proposed rule would ameliorate. A joint submission also stated that existing procedures fail to allow H–2 workers to pursue alternative employment free from employer control and retaliation.

A research organization expressed support for the portability provisions, reasoning that the ability to change employers was a basic freedom, that it was important for human and labor rights, and that it would empower workers. A couple of advocacy groups and a joint submission also expressed support for the proposal, reasoning that workers who face abusive conditions or are unjustly fired would have a greater chance of finding alternative employment. A religious organization stated the proposed provisions would provide stronger protections for workers to switch employers. A union expressed support for the portability provisions' goal to empower and prevent hardships to workers.

A trade association expressed support for the portability provisions, reasoning it would establish a consistent policy between H–2A and H–2B program regulations and help remove confusion in the complexity of the regulations governing the H–2 programs. A trade association expressed support for the portability provisions, reasoning it would establish a consistent policy between H–2A and H–2B program regulations and help remove confusion in the complexity of the regulations governing the H–2 programs.

Response: DHS agrees with the commenters about the intended benefits of portability, including empowering H–2 workers and providing H–2 employers with the ability to employ workers in a timely manner.

b. Negative Impacts on Employers and Program Operability

Comment: A few trade associations expressed support for the flexibility that the changes to the proposed extension of stay petition and E-Verify requirements created, but said that the language of the proposal was too broad when coupled with the other sections in the rule, such as the section on grace periods. The commenters expressed concern that workers would be encouraged to violate the terms of their contracts with employers. The commenters also discussed the ''significant'' financial investments employers make prior to hiring H–2 workers. A trade association added that in exchange for these investments, employers require a level of certainty that workers are to remain employed with them for the life of their contract. This commenter and another trade association said that the proposed rule could cause economic harm to employers by allowing workers to abandon their employers and leave them in situations where they do not have enough workers to perform their harvest. A few trade associations recommended that in instances where a worker voluntarily abandons their job for reasons not related to a hazardous work environment, there should be consequences for workers who violate their contracts. A trade association recommended that DHS require that workers attempt to resolve workplace claims and concerns with employers before quitting a contract, and that it only provide workers the ability to port to a new contract when either the contract had been revoked, the employer is found to have violated the contract, the worker provides evidence of a hazardous workplace, or the worker completes their previous contract. A couple of trade associations also suggested that the Department could consider a requirement that a worker report to the Department that they are voluntarily abandoning employment as a mechanism to ensure the worker also meets their contractual obligations. The trade associations added that such a notification would serve as a consequence for a worker who violates their contract, and assist in tracking grace period timelines and lawful presence.

Similarly, a trade association added that while employees may voluntarily abandon employment for a variety of reasons, allowing workers to leave their primary employer for economic or social reasons would be detrimental to the program. The commenter urged the Department to develop ''more rigid'' language surrounding the conditions under which an employee may exercise the portability provisions in cases of voluntary abandonment. The commenter also suggested the Department develop a ''review and qualifications system using a series of escalation and opportunities for corrective actions'' to be enacted prior to permitting an employee to voluntarily abandon their primary employer. The commenter added that this system should be open to public comment prior to the Department moving forward with the portability provisions.

An attorney expressed opposition to the portability provisions, reasoning that the provisions would set up a bidding war to employ workers, where the initial employer is subject to ''poaching'' attempts by other employers who are able to pay higher wages and did not incur travel costs for the employee.

Response: DHS will not make changes to the portability provision. While DHS appreciates the commenters' concerns regarding the negative impacts on an employer when an H–2 employee ports to another employer, DHS does not agree that these concerns justify requiring an H–2 worker to stay with that employer for the life of their contract or imposing other limitations on an H–2 worker's ability to change employers. Nor does DHS agree that these concerns justify requiring workers to report to DHS when they leave employment as a mechanism to ensure that workers meet contractual obligations. As other commenters have noted, worker mobility is important to improving the ability of workers to leave an abusive employer without fearing retaliation. Worker portability helps to correct the power imbalance that has led to abusive employment practices within the H–2 programs as a result of a petitioning employer's control over the employee's legal status.

Implementing a ''review and qualifications system using a series of escalation and opportunities for corrective actions'' or another similar process prior to permitting an employee to port, as suggested by commenters, would be counter to the central aims of the portability policy. Such a mechanism would potentially require a lengthy, fact-intensive adjudication that would delay an H–2 worker from leaving an abusive or hazardous employment situation, undermining the benefit of the portability provision in the first place.

DHS declines to exclude from portability H–2 workers who voluntarily left their petitioning employer for economic or social reasons, as suggested by another commenter. Portability provides benefits even for workers not in an abusive employment situation. As other commenters have noted, the ability for H–2 workers to change workers for economic reasons may incentivize employers to offer better wages and working conditions in order to retain their H–2 workers, which in turn would raise labor standards for these workers as well as U.S. workers. Portability also benefits employers that have already demonstrated that they have a temporary need for workers to hire H–2 workers more quickly and avoid gaps in employment. For petitioners seeking workers under the cap-subject H–2B classification, this would also serve as an alternative for those who have not been able to find U.S. workers and have not been able to obtain H–2B workers subject to the statutory numerical limitations. 88 FR 65040, 65068 (Sept. 20, 2023). Although portability could create instability or increase costs for some employers that lose or risk losing H–2 workers porting to another employer, this is not unlike the situation that any employer in the labor market may face or situations when an employer files an H–2 petition for another employer's workers in the same classification, but just has to wait until the petition is approved before such workers can start working. Further, some of these costs may be offset by the benefits and savings to employers of being able to have replacement workers start work more quickly to avoid loss of income due to lack of workers, and potentially averting some cap-related issues in the H–2B program.

c. Mixed Comments on Portability Provision

Comment: While suggesting an ''at-will'' visa that allows employees to move between employers without contractual commitments, an association of State Governments stated that the portability provisions in the proposed rule aim to create a similar dynamic. As such, the commenter expressed support for the portability provisions. The commenter reasoned that if the portability allowance permitted employees to immediately begin new employment, the changes to portability would allow employers to fill labor gaps, which is the purpose of an employer petitioning to receive H–2 employees in the first place. The commenter stated that this would impact the overall success of the program. However, they also noted that it could create instability and uncertainty for some employers, and expressed concern that the ability for employees to leave in the middle of a harvest could result in losses for employers. The commenter requested clarity on the ''immediate'' effectiveness of portability without consideration for the approval of the petition, except in cases of ''blatant misuse or the program or abuse of an agricultural employee by the petitioner.''

Response: Under new 8 CFR 214.2(h)(2)(i)(I), an eligible H–2 nonimmigrant on whose behalf a nonfrivolous H–2A or H–2B petition is filed requesting the same classification that the nonimmigrant noncitizen currently holds is authorized to start new employment upon the proper filing of the petition, or as of the requested start date, whichever is later. The eligible H–2 nonimmigrant does not need to wait until the approval of the portability petition to start working, and the H–2 nonimmigrant is authorized to work pursuant to the portability petition until the adjudication or withdrawal of such petition. During the pendency of the petition, the H–2 nonimmigrant will not be considered to have been in a period of unauthorized stay or employed in the United States without authorization solely on the basis of employment pursuant to the portability petition, even if such petition is subsequently denied or withdrawn.

A portability petition must be properly filed and non-frivolous. While these standards are intended to prevent a petitioner that is misusing the program or abusing their workers from taking advantage of portability provisions, DHS recognizes that these determinations will not be made until USCIS has adjudicated the petition, meaning that an H–2 worker may have worked under the portability petition even if it is ultimately denied as frivolous. However, other provisions being finalized in this rule, such as the strengthened site visit provisions and the new mandatory or discretionary denial provisions, are intended to address the concern of ''blatant misuse or the program or abuse of an agricultural employee by the petitioner'' including the types of potential abuses noted by the commenters.

d. Portability and the H–2B Cap

Comment: A professional association said that the portability provisions would provide employers with ''significant cap relief,'' reasoning that an H–2B worker could ''seek employment, remain longer, and not count towards'' toward the H–2B statutory cap. The commenter added this was a ''win-win'' for employers and employees. Similarly, a couple of trade associations and advocacy groups stated that the portability provisions appeared to be helpful in providing cap relief to a ''vastly oversubscribed'' H–2B program, but expressed concern that an employer could be left without a workforce if an employee moves to another employer that is ''capped out.''

Response: Under current practice, which DHS will not change in this final rule, workers in the United States in H–2B status who extend their stay, change employers, or change the terms and conditions of employment generally will not be subject to the cap.[98] Similarly, H–2B workers who have previously been counted against the cap in the same fiscal year that the proposed employment begins generally will not be subject to the cap if the employer names them on the petition and

[98] USCIS, ''Cap Count for H–2B Nonimmigrants,'' *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants* (last updated Mar. 8, 2024).

indicates that they have already been counted.[99] It is therefore not clear what the commenter's concern is regarding an employer that ''could be left without a workforce if an employee moves to another employer that is 'capped out''' because in that scenario, a petition filed by a porting employer seeking an extension of stay for a worker already in the United States in H–2B status generally would not be subject to the cap.

Comment: An advocacy group and a couple of unions stated that the Department must ensure H–2B petitions filed on behalf of transferring employees are subject to the statutory cap, reasoning that portability must not be implemented in a way that allows employers to work around the statutory H–2B cap. The commenters added that if the cap on petitions was already reached in a given fiscal year, the Department could count the positions against the cap in the following fiscal year. A union said that DHS could also deny petitioners if the cap had already been reached. Alternatively, another union suggested employers be instructed to only offer H–2B positions to transferring workers when there are still available positions under the current year's cap. The union further stated that regulatory flexibilities have been used to bypass the statutory cap in the past without increased accountability. Citing the INA's annual cap, the commenter added that if the provisions effectively created cap-exempt H–2B positions, it would result in a violation of congressional intent.

Similarly, while expressing support for the portability provisions, a research organization stated that they must not be implemented in a way that enables employers to circumvent the H–2B program cap. The commenter expressed concern that the NPRM did not consider the impact of the portability provisions on the growth and size of the program and that it did not put in place safeguards to ensure employers do not circumvent the H–2B cap. The commenter said that because the proposed portability provisions would allow employers to evade the statutory cap limit, the ''true size'' of the H–2B program would increase to three times the size of the total cap, which would be inconsistent with congressional intent. The commenter stated that as a result, the Department must subject workers who are continuing employment, either by transferring employers or extending their employment with the same employer, to the H–2B annual cap. The commenter concluded that the simplest way to implement this requirement is to count an approved continuing petition against the annual cap for the following fiscal year. The advocacy group and a union added that keeping the program closer to the size that Congress originally intended would incentivize employers to improve pay and working opportunities, so employees do not leave for better opportunities.

Response: This rulemaking does not make any changes to DHS's long-standing method of counting the H–2B cap, and DHS will not make changes to its cap counting methodology. DHS will continue its longstanding practice of not counting against the statutory cap any petition seeking to extend the stay of an H–2B worker in the United States in H–2B status who has already been counted against the cap, which includes portability petitions. This longstanding practice is codified at 8 CFR 214.2(h)(8)(ii)(A) (''Requests for petition extension or extension of an alien's stay shall not be counted for the purpose of the numerical limit'') and is also articulated on USCIS' ''Cap Count for H–2B Nonimmigrants'' website.[100]

DHS does not agree with the commenters that its cap counting methodology is inconsistent with congressional intent. Pursuant to INA sec. 214(g)(1), ''[T]he total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year . . . under section 101(a)(15)(H)(ii)(b) of this Act may not exceed 66,000.'' An individual would be considered to have been ''otherwise provided'' H–2B nonimmigrant status upon admission into the United States without a visa or through change of status to H–2B while already in the United States. On the other hand, H–2B workers in the United States seeking an extension of H–2B stay, whether or not with the same employer, will not be counted against the cap because they have already been ''otherwise provided'' such H–2B status, either at the time of their admission to this country or in conjunction with their current H–2B grant of status. Further, since the beneficiaries of a porting petition requesting an extension of their H–2B stay are already in H–2B status, they are not changing their status from another nonimmigrant classification. Thus, H–2B workers seeking an extension of H–2B stay are not counted against the cap consistent with INA sec. 214(g)(1).

These longstanding H–2B cap procedures have been codified at 8 CFR 214.2(h)(8)(ii) for over two decades.[101] This methodology has also been consistently and clearly documented in numerous reports that USCIS has submitted to Congress.[102] The commenters did not acknowledge USCIS' longstanding cap counting methodology as codified in 8 CFR 214.2(h)(8)(ii) and, other than citing to INA sec. 214(g)(1)(B), did not cite to anything else to support their assertions that USCIS' cap counting methodology with respect to portability petitions and other petitions for extensions of status is inconsistent with congressional intent.

Comment: Several commenters generally supported the permanent portability provision but expressed concerns that an employer that paid transportation and filing fees could be left paying those significant costs and still be unable to find a replacement workforce. These commenters asked whether subsequent employers could be made to reimburse the costs paid by their previous employers.

Response: DHS will not adopt the suggestion to require a subsequent porting employer to reimburse the preceding employer its transportation and petition filing costs. Such a requirement could discourage the use of portability, or even discourage situations that are allowed by long-standing regulations, such as an H–2 nonimmigrant starting work for another employer once USCIS approves a petition that has been filed on their behalf. And while an H–2 employer that paid transportation and filing fees risks losing those costs if the worker leaves, this is not unlike the situation that any

[99] *Id.*

[100] USCIS, ''Cap Count for H–2B Nonimmigrants,'' *https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-for-h-2b-nonimmigrants* (last updated Mar. 8, 2024).

[101] *See, e.g.,* 8 CFR 214.2 version as of January 1, 2002, *https://www.govinfo.gov/content/pkg/CFR-2002-title8-vol1/xml/CFR-2002-title8-vol1-sec214-2.xml.*

[102] *See, e.g.,* USCIS, ''H–2B Usage and Recommendations, Fiscal Year 2016 Report to Congress'' (July 22, 2016), *https://www.dhs.gov/sites/default/files/publications/U.S.%20Citizenship%20and%20Immigration%20Services%20-%20H-2B%20Usage%20and%20Recommendations.pdf;* USCIS, ''Characteristics of H–2B Nonagricultural Temporary Workers: Fiscal Year 2022 Report to Congress Annual Submission'' (Feb. 14, 2023), *https://www.uscis.gov/sites/default/files/document/data/USCIS_H2B_FY22_Characteristics_Report.pdf* (''Generally, a worker whose stay in H–2B status is extended will not be counted against the H–2B cap.''); USCIS, ''USCIS Report to Congress'' (Mar. 20, 2006) *https://www.uscis.gov/sites/default/files/document/data/h-2b-fy2005-petitions-report.pdf* (''[A]liens who are currently in H–2B status and who seek to extend their stay or seek concurrent employment are not counted against the cap.''). *See also* CRS Report R44306, ''The H–2B Visa and the Statutory Cap'' (July 13, 2022) (providing a history of the H–2B annual numerical limitations, including a history of special H–2B cap-related legislation throughout the years).

employer in the labor market may face when a worker leaves and the employer loses costs already paid to hire that worker (for example, recruitment and training costs, relocation expenses, hiring bonuses).

e. Portability Within Same Classification

Comment: A joint submission, an advocacy group, and a trade association expressed support for the Department's proposal to extend portability to workers performing different jobs within the same classification, rather than limiting employment to the initial conditions of their authorization. Similarly, a professional association and a trade association expressed support that portability would be permanent and applied to new work in the same classification with the same or different employer, reasoning it would not limit workers' employment to the initial authorization, allowing the worker to have successive petitions and perform other jobs. A trade association and advocacy group reasoned that requiring beneficiaries to only work in the ''exact same job'' that they were initially approved for would be restrictive and undermine the provisions' goals.

Response: DHS appreciates these commenters' support for allowing H–2 workers to port to different jobs within the same classification.

Comment: An advocacy group suggested that the Department allow H–2 workers to switch between H–2A and H–2B program categories. The commenter noted that although transferring from H–2A status to H–2B status would cause administrative hurdles as the status change would require adherence to the H–2B cap, the commenter reasoned it would significantly improve H–2A worker mobility by allowing them to accept seasonal non-agriculture positions.

Response: While portability is intended to improve worker mobility, DHS will not adopt the suggestion to allow portability for H–2 workers to ''switch between H–2A and H–2B program categories'' and start working merely upon the filing of a portability petition. As proposed, new 8 CFR 214.2(h)(2)(i)(I) specifies that portability, or the ability to work while a petition remains pending, will only apply to new employment (with the same or different employer) in ''the same classification that the nonimmigrant alien currently holds.''

There is an important distinction between a change of status and an extension of stay. A worker in H–2A nonimmigrant status seeking to change to an H–2B employer (for example) would need to change their status, not merely extend their stay. Unlike extensions of stay that fall under DHS regulations at 8 CFR 214.1, changes of status are governed by INA sec. 248, 8 U.S.C. 1258, which, unlike 8 CFR 214.1, specifically authorizes a nonimmigrant to change to any other nonimmigrant classification only if they are ''continuing to maintain that status.'' It is not clear how a nonimmigrant worker seeking to change to another nonimmigrant classification will continue to maintain their current status as required by INA sec. 248 while their change of status petition is pending if they have ported to new employment based on the new petition requesting a different status. Further, porting between H–2A and H–2B nonimmigrant classifications may raise issues related to administration of the H–2B cap if an H–2A worker starts working while the petition seeking to change to H–2B nonimmigrant status, which is subject to numerical limitations under INA sec. 214(g)(1)(B) and (10), is accepted by USCIS and remains pending.

f. Employment Authorization While an Application for a Temporary Labor Certification Is Pending

Comment: Discussing the Department's proposal to consider beneficiaries who are employed in the United States while their petition is pending to be in a period of authorized stay, a joint submission stated that the proposal was necessary to maximize the portability provision and for it to be implemented and function properly. Similarly, a research organization expressed support for the NPRM's proposal to permit an H–2 worker to be employed while their petition is pending, reasoning that it would make it faster to change employers and complement the grace period proposal. However, the research organization suggested that USCIS should further authorize employment while a labor certification application is pending with the DOL. The commenter stated that given the high percentage of H–2 TLC approvals, it was ''sensible'' to allow workers to be employed pending the outcome of their ''initial application,'' adding that it would decrease unlawful employment and make the portability provisions more ''workable.'' The commenter further suggested that the Department exempt workers already in the United States from the labor certification process. The commenter reasoned that because they are already in the United States, they do not have to be ''imported'' and thus should not be subject to the H–2 labor certification statute, and that because they are transferring between employers, they do not increase the total amount of labor market competition.

Response: DHS will not implement the suggestion to authorize employment while a labor certification application is pending with the DOL. Allowing portability to occur upon the filing of an application with a TLC would present integrity and operational issues due to the TLC being adjudicated by another agency. The mere filing of a TLC application does not guarantee that the labor market test with respect to the particular job in question has been satisfied nor does it ensure that the TLC application is non-frivolous and that DOL will approve it. In addition, allowing portability to occur upon the mere filing of an application with a TLC could incentivize frivolous TLC applications. DHS would not be able to determine if the TLC was frivolous, nor would DHS be able to codify a standard for whether a TLC filing is frivolous (or another similar requirement) through this rule, as such a regulation would necessarily have to be done by DOL and would be beyond the scope of this rule and DHS's expertise.

Allowing portability to occur upon the filing of an application with a TLC would also present integrity issues due to the potential for abuse or fraud inherent in allowing employment authorization without proper documentation. Because the TLC does not specifically name a worker, employers would face difficulties in satisfying the employment verification requirements of section 274A of the Act. Also, the mere filing of a TLC does not guarantee that the employer will actually file an H–2 petition based on that TLC. Without a signed and filed petition naming the porting worker accompanied by evidence of the certified TLC, DHS would be unable to identify the porting worker and verify their eligibility. Further, without a petition, DHS and DOL would not have evidence of the petitioner's agreement to employ the porting worker consistent with the requirements of the applicable H–2 program, including the employer's agreement to comply with all the obligations and assurances that serve to protect the porting worker (and U.S. workers). Thus, allowing portability to occur upon the filing of an application with a TLC could also undermine this rule's goal of improving worker protections.

g. Removal of E-Verify Requirement From H–2A Portability

Comment: Several commenters, including trade associations, advocacy groups, and a professional association, expressed support for removing the E-

Verify requirement from H–2A portability. A couple of advocacy groups reasoned that the E-Verify requirement had limited the number of H–2A jobs that qualified for the flexibility offered through permanent portability, with a few trade associations stating that its removal would open up the use of transfer petitions within the H–2A program. A joint submission stated that removing the E-Verify requirement from H–2A portability would provide many benefits, including improving worker flexibility and mobility, helping workers avoid gaps in employment and potential hardship and putting their U.S. presence to productive use rather than forcing them to sit on the sidelines unable to earn an income while the petition is pending. The submission also stated that this would benefit employers that have already demonstrated that they have a temporary labor need for such workers' labor or services (that is, by virtue of having an approved labor certification from DOL), and would benefit the U.S. economy overall, as such workers are earning, purchasing goods and services from local businesses, and paying taxes.

Response: DHS appreciates the commenters' support for the benefits of expanding H–2A portability beyond E-Verify participating employers.

Comment: A couple of commenters expressed support for removing the E-Verify requirement but expressed concern that the increased fee schedule in another DHS rulemaking, ''USCIS Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,'' will ''chill'' the use of the proposal by increasing the cost of filing a named petition. The commenters expressed opposition to the fee increase, stating that it will hamper their ability to take advantage of in-country transfers. Similarly, a trade association expressed opposition to the fee increase, reasoning that the increased fee will negate the benefits of removing the E-Verify requirement.

Response: On January 31, 2024, DHS published a final rule, *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* 88 FR 6194, with an effective date of April 1, 2024. The final fee rule raised the Form I–129 filing fee for H–2A named beneficiaries from $460 to $1090 (or $545 for small employers and nonprofits), and the Form I–129 filing fee for H–2B named beneficiaries from $460 to $1080 (or $540 for small employers and nonprofits).[103] It also raised the Form I–129 filing fee for H–2A unnamed beneficiaries from $460 to $530 (or $460 for small employers and nonprofits), and from $460 to $580 for H–2B unnamed beneficiaries (or $460 for small employers and nonprofits).[104] To the extent that the commenter is suggesting changes to the USCIS Fee Rule, those comments are outside the scope of this rulemaking. In addition, while H–2A and H–2B filers for named beneficiaries (excluding small employers and nonprofits) will pay significantly higher petition filing fees compared to H–2A and H–2B filers for unnamed beneficiaries, DHS is not persuaded that the increased filing fees will significantly negate the benefits of portability for employers. Employers will still benefit from portability in the form of the ability to employ workers earlier since portability petitions are for workers who are already in the United States in H–2 status and will not need to wait for petition approval and visa issuance. By obtaining H–2 workers faster, these employers may avoid financial hardships due to lack of workers to perform time-sensitive labor. Further, the porting employer will benefit by not paying for inbound transportation for the H–2 worker, since those costs will have already been paid by the preceding employer. The commenters did not account for these benefits, nor did they provide data to support the assertion that the increased filing fees will negate these benefits.

Comment: A research organization expressed opposition to DHS's proposal to remove the requirement that H–2A workers can only port to an employer who participates in good standing in E-Verify. The commenter said that the Department's initial goal to incentivize E-Verify's use and reduce unauthorized workers in the agricultural sector was still important. The commenter instead suggested DHS extend the requirement to all employers who petition for workers in the H–2 program, reasoning that E-Verify participation has ''negligible costs and significant benefits to employers.'' The commenter added that E-Verify reduces the risk employers would hire unauthorized workers and provides them with a rebuttable presumption to section 274A of the INA if they do. The commenter also said that E-Verify participation reduces the likelihood that employers engage in misconduct, because employers who misuse E-Verify are subject to ''significant'' criminal and civil liability.

Similarly, a joint submission from former DHS senior officials expressed opposition to the removal of the E-Verify requirement, reasoning that the NPRM was missing a justification for its removal. Referencing statistics associated with the ''speed and accuracy'' of the E-Verify program, the commenters stated that E-Verify is a ''signature enforcement program'' that deters undocumented immigration and serves as a ''key indicator'' that an employer is fairly dealing with its employees. The commenters said that the NPRM does not justify the proposal to remove the requirement and that it does not seek alternatives because the use of E-Verify is contrary to the goals of the Administration and is viewed as a barrier to legal immigration. While stating that there has been an increase in the number of noncitizens arriving at the U.S. border, the commenters expressed concern that ''a tool with a proven track record of effectiveness'' was being eliminated. The commenters added that the removal of the requirements ''illustrates'' the Administration's ''contentment with illegal employment'' in the United States, and concluded that the provision was arbitrary and capricious and that it should be struck from the final rule.

Response: DHS disagrees with the commenters. Permanently making portability available to all H–2 employers is expected to increase worker mobility and employer flexibility; it is not related to alleged ''contentment with illegal employment'' nor to the utility of E-Verify as a general enforcement tool. As stated in the NPRM, DHS remains committed to promoting the use of E-Verify to ensure a legal workforce. 88 FR 65040, 65067 (Sept. 20, 2023). However, DHS no longer believes it is appropriate to restrict the benefit of portability to H–2A workers seeking employment with E-Verify employers, particularly given the need to increase these workers' mobility and the various measures enhancing program integrity that are established in this rulemaking. For instance, other provisions being finalized in this rule will improve program integrity and deter harmful or illegal conduct by petitioners. These provisions include the strengthened site visit authority provisions at new 8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F) and the mandatory and discretionary denial provisions at new 8 CFR 214.2(h)(10). These new provisions are targeted to address a petitioner's misbehavior within the H–2 programs, which a petitioner's E-Verify status may

[103] USCIS, ''Frequently Asked Questions on the USCIS Fee Rule,'' *https://www.uscis.gov/forms/filing-fees/frequently-asked-questions-on-the-uscis-fee-rule* (last visited Apr. 11, 2024). These amounts represent the Form I–129 filing fees and do not include the additional asylum fee, if applicable.

[104] *Id.* These amounts represent the Form I–129 filing fees and do not include the additional asylum fee, if applicable.

or may not reveal. As also noted in the NPRM, this provision is not anticipated to reduce E-Verify enrollment. This is because other incentives or even legal requirements exist for E-Verify participation outside of the H–2 programs.

Regarding the suggestion to expand the E-Verify requirement to all employers who petition for workers in the H–2 program (regardless of whether such employers are requesting the benefit of portability), such an expansion of the E-Verify program within the H–2 programs was not proposed in the NPRM and is beyond the scope of this rule. It would also be inconsistent with this rulemaking's goal of improving worker mobility, particularly as H–2B employers have never before been required to participate in E-Verify program in order to benefit from portability.

For all of the above reasons, DHS declines to make any changes to the proposed portability flexibility for the H–2A and H–2B programs that is permanently implemented in this final rule.

h. Additional Suggestions Related to Portability Provisions

Comment: A few advocacy groups and a union generally supported the portability provisions but noted that, while the portability and grace period provisions represent an improvement over the current status quo, they will not fully achieve their goals unless H–2 workers have better ways of obtaining accurate or real-time information about other available H–2 employment opportunities. These commenters suggested that the Department implement additional measures to ensure that H–2 workers are aware of existing employment opportunities. For example, the commenters suggested DHS:

- Work with DOL to improve the SeasonalJobs.dol.gov platform so that this website would provide accurate, real-time information about available job opportunities;
- Facilitate communication between workers and employers during the recruitment process, the pendency of the petition, and when porting between jobs, either through the enhancement of Seasonal Jobs or another platform, which would be an important step towards a just recruitment model through which workers would be able to connect directly with vetted, legitimate employers through a multilingual and accessible government database of verified job offers;
- Work with State workforce agencies' job services to H–2 workers seeking alternative employment;
- Consider the idea of allowing additional flexibility to match workers with other employers that are in need of staffing support;
- Create a process for H–2A workers in the United States to notify USCIS that they are seeking employment. These workers could be added to a database accessible by prospective H–2A employers for the duration of the worker's visa validity and grace period (although the list should not include any personal identifying information that may be used to retaliate or discriminate against workers, such as name, age, or gender). Such a process could also allow workers to rebut fraudulent abscondment or termination reports filed by their employers;
- Require employers who have not made job offers to domestic or prospective H–2 workers outside of the country to offer employment to an H–2 worker or prospective H–2 worker seeking new employment that qualifies for the position.

Response: DHS will not implement these suggestions in this final rule. While DHS appreciates the commenters' concerns about the need to provide workers with information about available job opportunities in order to improve the utility of the new portability provision, it is beyond DHS's purview to match or otherwise facilitate recruitment between an H–2 worker and a prospective H–2 employer. Working with DOL to enhance its SeasonalJobs.dol.gov platform or working with State workforce agencies is outside the scope of this DHS rule. However, DHS may continue to consider some of these suggestions and other ways to enhance worker mobility outside of the regulatory process.

Comment: Some commenters expressed concerns that true job portability would not be fully realized without a mechanism for H–2 workers to obtain information about a portability petition filed on their behalf. These commenters stated that, currently, an H–2 beneficiary's knowledge of their status depends entirely upon their employer's representations, and that existing procedures leave an H–2 worker vulnerable to unscrupulous employers and labor contractors who withhold or misrepresent petition status information. The commenters further stated that current procedures increase the worker's risk of labor exploitation, abuse, trafficking, blacklisting, or other forms of employer retaliation. These commenters made various recommendations on how DHS could improve the benefits of portability by improving an H–2 worker's access to status information. These commenters recommended DHS:

- Directly notify H–2 workers of their continued lawful status and employment authorization status where an H–2 employer represents that it has filed an I–129 petition identifying them as a beneficiary;
- Provide I–129 petition and other immigration information to H–2 beneficiaries;
- Establish mechanisms for H–2 workers to independently confirm they are the beneficiaries of petitions and receive information about their immigration process;
- Communicate immigration status information through WhatsApp;
- Work with DOL to improve seasonal.jobs to provide H–2 workers with full and accurate information about the terms and conditions of offered H–2 employment and any agents authorized to recruit on behalf of the employer.

Response: DHS appreciates these comments. In the NPRM, DHS stated that it was seeking preliminary public input on ways to provide H–2 and other Form I–129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf as well as other suggestions regarding ways to ensure adequate notification to beneficiaries of actions taken with respect to petitions filed on their behalf. DHS is not making any regulatory changes as a result of the request for preliminary input in this final rule but will seriously consider the input provided by these commenters as it continues to research and consider the feasibility, benefits, and costs of various options separate and apart from this final rule.

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

a. General Support

Comment: A couple of trade associations expressed support for USCIS' elimination of the ''dual intent'' provision. Similarly, several trade associations and an advocacy group expressed support for the proposal to allow H–2 workers to have a ''dual intent'' of being both a noncitizen and an immigrant for purposes of obtaining a Green Card. A trade association expressed support for a ''clearly defined path'' for H–2 workers with a ''dual intent'' of obtaining a Green Card. Similarly, a business association expressed support for the provisions,

reasoning it would ''form the beginning of a 'dual intent' regime.''

Numerous commenters, including advocacy groups, professional associations, and a research organization, expressed support for the proposed rule's clarification that H–2 workers may take steps to become lawful permanent residents while maintaining lawful immigration status. A farming entity regarded proposed 8 CFR 214.2(h)(16)(ii) as ''a significant and much-needed improvement to the current regulations governing H–2A workers'' that recognizes the dynamic nature of immigration intents, aligns with broader policy goals, and promotes both flexibility and fairness in the H–2A program.

Other commenters expressed support for the proposed changes to H–2 workers' ability to seek lawful permanent resident status on the basis that it would be beneficial for employers and H–2 workers. A trade association said that the proposed change would benefit workers who have followed H–2 program requirements and employers who want to offer promotions to those workers. A farming entity wrote that the proposed changes would provide a mechanism for improved stability in struggling rural communities and farms, which face challenges in securing full-time employees and working within the immigration system. Similarly, a trade association said that due to domestic labor shortages, employers' options for permanent agricultural employees are limited. The commenter stated that the proposed rule's clarification would allow employers to promote workers into permanent positions and expand opportunities for worker mobility. Similarly, a union said the changes would increase worker mobility and thus decrease the vulnerabilities faced by H–2 workers. A professional association stated that the proposed changes would allow for more worker flexibility and would help them obtain permanent residence. The commenter stated that while DHS would scrutinize the conversion of the employer's job position from a seasonal need to a permanent need, this conversion would assist employers and workers with ongoing labor needs and stability. Another trade association said the proposed change would allow employers to sponsor employees who have an interest in moving to the United States year-round roles in their business.

A group of Federal elected officials said that the proposed rule would empower H–2 workers to seek permanent residence without fear that they would lose their H–2 program status while they do so. Similarly, a couple of trade associations expressed support that H–2 beneficiaries who seek lawful permanent resident status through a petition related to the permanent labor certification program would not jeopardize their eligibility in the H–2 program in the interim. While expressing support for amending 8 CFR 214.2(h)(16)(ii) to incorporate elements of ''dual intent,'' a professional association said that the proposal reflected the reality that agricultural and nonagricultural employment could be temporary and permanent and that the employer's need should not be ''imputed'' on a worker's intention regarding employment or future permanent status. The commenter stated that because existing regulations allow approval of a permanent labor certification or filing an H–2 petition to be used as a reason to deny a worker's extension of stay, the process deters employers and employees from taking steps toward permanent residence due to fear that future H–2 status could be denied based on the worker's intent. The commenter added that the proposal does not undermine the integrity of the H–2 program because the requirement that employers demonstrate a temporary or seasonal need remains covered by 8 CFR 214.2(h)(5)(iv) and 8 CFR 214.2(h)(6)(ii), respectively.

A few commenters, including a farming entity, an attorney, and an individual commenter, expressed support for the proposed provision based on the necessary contributions of H–2 workers to U.S. businesses and the economy. For example, the individual commenter and the attorney said that under current regulations, workers who support U.S. businesses and the U.S. economy are dissuaded from pursuing lawful permanent residence due to the risk of losing eligibility for H–2 status once the permanent labor certification is certified. A couple of commenters added that the potential loss of nonimmigrant status leaves workers with the ''impossible'' choice between pursuing the long-term goal of U.S. lawful permanent residence and sustaining the immediate need for seasonal income. Such concerns, the commenters concluded, drive potential full-time employees to Canada, harming U.S. businesses that rely on H–2 workers. An attorney and farming entity additionally reasoned that both nonimmigrants and businesses rely on the maintenance of seasonal positions, adding that workers fully intend to abide by the temporary nature of their placement while they wait ''in line'' to pursue permanent residence through the employment-based (EB)-3 category and other worker categories. The farming entity wrote that the proposed provisions would enhance the ability of workers to contribute to the United States while respecting the integrity of the immigration system and would address the ''overly restrictive'' nature of regulations that penalize workers for pursuing a more stable future in the United States. Echoing the above remarks, an individual commenter also expressed support for Section IV.B.4. of the proposed rule (''Effect on an H–2 Petition of Approval of a Permanent Labor Certification, Immigrant Visa Petition, or the Filing of an Application for Adjustment of Status or an Immigrant Visa'') and urged DHS to maintain the proposed language in the final rule.

Response: DHS thanks these commenters and will finalize 8 CFR 214.2(h)(16)(ii) as proposed. As DHS explains further below, the proposal and the finalized regulation do not change the requirements that the H–2 petitioner's need be temporary or seasonal in nature, that an H–2 beneficiary has a foreign residence that he/she has no intention of abandoning, or that the H–2 worker be in this country temporarily to perform labor or services. Rather, 8 CFR 214.2(h)(16)(ii) clarifies that taking certain steps in seeking lawful permanent residence, by itself, will not violate H–2 status.

b. Opposition on the Basis of Legal Authority

Comment: A couple of commenters, including a joint submission from former DHS senior officials and a research organization, opposed the proposed changes to clarify that an H–2 worker may take steps toward becoming a lawful permanent resident while still maintaining lawful nonimmigrant status. These commenters asserted that the proposal will transform the H–2A and H–2B programs into ''dual intent'' visa programs and claimed that the proposed change is *ultra vires,* as it is unlawful for agencies to act in violation of their own regulations or enabling statutory authority. The research organization said that both the H–2A and H–2B visa programs are ''single intent'' visa programs that do not allow beneficiaries to intend to take steps to adjust their status to that of a lawful permanent resident. The commenter asserted that, under the statute, H–2A and H–2B applicants must demonstrate that they are not coming to the United States to reside permanently, as immigrants, but will return home at the end of their authorized period of stay. The

commenter stated that proposed 8 CFR 214.2(h)(16)(i) is inconsistent with statute and must be withdrawn, asserting that if a noncitizen enters the United States on a ''single intent'' visa but nevertheless intends to apply for a Green Card during the workers' time in the United States, this indicates that the noncitizen misrepresented their intention at the time they entered the United States. The commenter concluded that it is both *ultra vires* and inappropriate for the Executive Branch to actively encourage H–2A and H–2B workers to take steps towards adjustment of status in violation of the INA. Stating similar rationale, the joint submission from former DHS senior officials said the Department seeks to undermine unambiguous statutory language that the H–2 programs provide for temporary admission. The commenter said, pursuant to clear statutory construction, admission of an H–2 beneficiary cannot be granted when the beneficiary has an intent to abandon a foreign residence. The commenter indicated the proposed provision conflicts with the proposed regulation and violates the first prong of *Chevron.*[105] As further evidence of the asserted *ultra vires* nature of the proposal, the commenter said Congress specifically provided for dual intent of certain nonimmigrants but did not include H–2 classification. The commenter concluded that this proposed rule seeks to create a pathway for admission as a dual-intended H–2 beneficiary that is contrary to the law, asserting that DHS must withdraw these provisions from the proposed rule.

Response: New 8 CFR 214.2(h)(16)(ii) is consistent with the plain language of section 101(a)(15)(H)(ii)(a) of the INA. This provision does not exempt an H–2 worker from the statutory requirement that the worker have a residence in a foreign country which he or she has no intention of abandoning, nor from the requirement that the worker be coming temporarily to the United States to perform H–2 services or labor. This statutory provision includes the phrase ''having a residence in a foreign country which he has no intention of abandoning.'' Implicit in that phrase is discretion to determine, as a factual matter, whether the noncitizen meets the definition for classification as an H–2A or H–2B nonimmigrant based, in part, on the noncitizen's intent, since the statute does not address how such intent is to be ascertained; for example, by setting out facts or factors the Government is to consider.[106] Given that other sections of the INA delegate authority to the Secretary of Homeland Security to administer immigration laws, promulgate regulations regarding the same, and specifically authorize the Secretary to prescribe regulations for the admission of nonimmigrants,[107] DHS is well within its authority to establish which factors it will consider to ascertain the noncitizen's intent, including whether any of those factors will *de facto* preclude the noncitizen from being classified as an H–2A or H–2B nonimmigrant. Therefore, final 8 CFR 214.2(h)(16)(ii) effectuates the authority Congress delegated to the Secretary to fill in details necessary to carry out the statutory scheme. As finalized, 8 CFR 214.2(h)(16)(ii) simply clarifies that certain H–2 worker's actions seeking lawful permanent resident status will not, standing alone, be the basis for denying an H–2 benefit. This provision is, in fact, consistent with established binding precedent.[108] DHS is not persuaded that taking steps described in new 8 CFR 214.2(h)(16)(ii) to secure lawful permanent resident status necessarily demonstrates that the H–2 worker misrepresented their intent when entering the United States or that the H–2 worker does not intend to abide by the rules applicable to H–2A or H–2B temporary status. An unexpected opportunity can arise after admission.

The fact that DHS is amending 8 CFR 214.2(h)(16)(ii) to revise the language put into place by its 1990 regulations regarding the significance of the approval of a permanent labor certification and the filing of an immigrant petition or adjustment of status application with respect to the noncitizen's H–2 status does not call into question DHS's statutory authority to do so. As stated in the proposed rule, the current regulation conflates the beneficiary's nonimmigrant intent with the nature of the employer's need. 88 FR 65040, 65068 (Sept. 20, 2023). Further, while the agency in previous rulemaking stressed the importance of not allowing petitioners to circumvent the requirement to demonstrate a temporary need by petitioning for permanent status on behalf of the worker even in a different job, DHS continues to maintain, as it did in the NRPM, that such a prohibition is overly broad and that it is important to increase H–2 workers' mobility to the extent legally possible, particularly given the vulnerability of H–2 workers to potential intimidation and threats made on the basis of their nonimmigrant status. 55 FR 2606, 2619 (Jan. 26, 1990).

Significantly, the provision does not create a ''dual-intent'' classification or otherwise encourage H–2 workers to seek lawful permanent resident status. It also does not create a new, direct pathway to lawful permanent residence deriving from H–2 status or otherwise contradict any statutory provisions applicable to the H–2A or H–2B classifications. Rather, it allows an H–2 worker to avail themselves of existing lawful pathways by clarifying that approval of a permanent labor certification, the filing of an immigrant petition for a noncitizen (family sponsored or employment-based), or an application by a noncitizen to seek lawful permanent residence or an immigrant visa, will not, standing alone, be the basis for denying an H–2 petition, a request to extend such a petition, or an application for admission in, change of status to, or extension of stay in H–2 status. DHS is also slightly revising the provision, as proposed in the NPRM, to explicitly include those seeking benefits as an immediate relative or under the diversity visa program, as it was not DHS's intention to exclude

[105] Subsequent to receiving this comment, the Supreme Court in *Loper Bright Enterprises* v. *Raimondo,* 144 S. Ct. 2244 (2024), overruled *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984). In its decision in *Loper Bright,* the Court recognized that in certain cases Congress has given agencies authority to exercise discretion, including by defining certain terms or promulgating rules to fill in details of a statutory scheme.

[106] *See Loper Bright Enters.* v. *Raimondo,* 144 S. Ct. 2244, 2263 (2024) (''In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes 'expressly delegate' to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable.' '') (cleaned up).

[107] As discussed in the Legal Authority section of this final rule's preamble as well as in the proposed rule, under INA sec. 103(a) and (a)(3), 8 U.S.C. 1103(a) and (a)(3), the Secretary has explicit authority to administer and enforce the immigration and naturalization laws and establish regulations necessary to carry out that authority. Furthermore, under INA sec. 214(a)(1), 8 U.S.C. 1184(a)(1), the Secretary has explicit authority to promulgate regulations prescribing the conditions for the admission of nonimmigrants, including explicitly ''to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired . . . , such alien will depart from the United States.'' In addition, INA sec. 214(c), 8 U.S.C. 1184(c), provides the Secretary with explicit authority to prescribe the form and content of a nonimmigrant visa petition, and to determine the eligibility for the H–2 nonimmigrant classifications.

[108] *See Matter of Hosseinpour,* 15 I&N Dec. 191 (BIA 1975) (noting that ''a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with lawful nonimmigrant status [citing cases]'' and holding that ''the filing of an application for adjustment of status is not necessarily inconsistent with the maintenance of lawful nonimmigrant status.'').

those benefits. *See* new 8 CFR 214.2(h)(16)(ii). DHS will consider these actions, together with all other facts presented, in determining whether the H–2 nonimmigrant is maintaining their H–2 status and whether the noncitizen has a residence in a foreign country which he or she has no intention of abandoning. For these reasons, DHS is finalizing this provision with slight revisions relating to immediate family and diversity visa programs described above.

c. Limited Impact of Proposed Provision

Comment: Some of the commenters who are in support of allowing H–2 workers to pursue lawful permanent residence specifically commented on DHS's data, stating that such data show that ''the regulation will have a minimal impact due to the low number of workers who apply for permanent resident status'' and that ''the proposed rule would not expand the underlying eligibility of H–2 workers for lawful permanent resident status.''

A research organization stated that few H–2 workers ever obtain lawful permanent resident status through the EB pathway. The commenter stated that Congress must address this issue, as there are insufficient pathways for workers in low-wage jobs and without advanced degrees to obtain lawful permanent resident status or become naturalized. Referencing statistics associated with employment-based lawful permanent residence, the commenter said that only 1 percent of total approved certifications by employers for employment-based lawful permanent residence were for H–2 workers. The commenter attributed this to DHS's interpretation of nonimmigrant intent, which the commenter stated has deterred employers who would otherwise apply to permanently hire H–2 workers.

Response: Congress has defined various employment-based immigrant classifications. This rule is not the place to address the applicability of those categories to H–2 workers. As noted in the proposed rule, this provision does not expand the underlying eligibility of H–2 workers for lawful permanent resident status and is consistent with longstanding precedent. *See Matter of Hosseinpour,* 15 I&N Dec. 191, 192 (BIA 1975).

d. Temporary Need Requirement

Comment: A trade association expressed support for the proposed rule's clarification that an employer may petition for permanent status on behalf of an H–2 employee while still being able to demonstrate a temporary need. Similarly, a joint submission expressing support for this proposed change stated that it would have no substantive impact on the current temporary need requirements of the H–2 programs and that it would improve the flexibility and mobility of individual beneficiaries. The commenter said that the current framework conflates the beneficiary's intent and the temporary or permanent nature of the employer's need. The commenter concluded that it was in the best interest of the United States and its businesses for the Department to not preclude H–2 status for beneficiaries that are at some point in the lawful permanent residence process and urged the Department to incorporate the provision in the final rule.

Response: DHS appreciates these comments and agrees that a more nuanced approach to actions in pursuit of lawful permanent residence is important for both H–2 workers and employers. As noted in the proposed rule, the requirements that an H–2A or H–2B petitioner must establish temporary need remain covered by the provisions at 8 CFR 214.2(h)(5)(iv) and 8 CFR 214.2(h)(6)(ii), respectively. Removing the language of the prior regulation that mandates stringent consequences for an H–2 worker who takes certain action to obtain lawful permanent resident status creates flexibility for employers to promote H–2 workers.

e. Sponsoring of Lawful Permanent Resident Status by H–2 Employers

Comment: Several commenters, including several trade associations and a few advocacy groups, suggested the Department clarify whether employers can sponsor H–2 workers for permanent positions within their business even if they are the same or similar role that the employer is petitioning for. Some of the commenters reasoned that this was important because some positions are structured the same but while some employees are needed year-round, others are only needed for certain seasonal periods, as they have a reduced need for staff in the off-season. Several trade associations and an advocacy group added that this would allow employers to sponsor H–2 workers more frequently. An advocacy group added that this would provide clarity for workers and employers. Similarly, a business association stated that the proposed changes would provide welcome relief and certainty to H–2 workers and employers if immigrant visa petitions did not preclude workers from obtaining or maintaining H–2 status. However, the commenter also requested that the Department clarify that the employer that files a permanent immigrant visa petition for an H–2 worker could also be that worker's employer on their H–2 visa.

Another trade association suggested that an additional clarification needed to be proposed for public comment that would allow employers to sponsor H–2 workers for permanent positions within their operation regardless of whether the position corresponds to the employment outlined in the H–2 petition.

Response: DHS appreciates the desire for greater clarity but is not proposing or making any change to how it views an employer's temporary need. As noted in the proposed rule, the requirements that an H–2A or H–2B petitioner must establish temporary and/or seasonal need, as applicable, remain covered by the provisions at 8 CFR 214.2(h)(5)(iv) and 8 CFR 214.2(h)(6)(ii), respectively.

f. Other Feedback and Suggestions on the Impact of Seeking Lawful Permanent Resident Status

Comment: A union and a research organization expressed support for the proposed change, reasoning that it would increase the ability of H–2 workers to adjust their status to become lawful permanent residents. However, the commenters urged the Department to clarify that the change would apply to workers seeking permanent residence through both employment-based and family-based petitions.

Response: DHS appreciates the opportunity to clarify that the provision at 8 CFR 214.2(h)(16)(ii) does indeed apply to workers seeking permanent residence through both employment-based and family-based, as well as diversity visa, petitions. The provision at 8 CFR 214.2(h)(16)(ii), as revised in this final rule, clarifies that the fact that an individual has taken certain specified steps toward becoming a permanent resident will not by itself be a basis for denying an H–2 petition, a request to extend an H–2 petition, or an application for admission in, change of status to, or extension of stay in H–2 status, but will instead be considered together with all other facts presented in determining whether the individual is maintaining H–2 status and has a residence in a foreign country which he or she has no intention of abandoning. DHS is making minor revisions to the final rule to include all immigrant petitions, instead of just preference petitions, to avoid inadvertently omitting immediate relative petitions under INA sec. 204(a)(i)(I)(i) or diversity visa petitions filed with DOS. *See* new 8 CFR 214.2(h)(16)(ii). Among the steps covered in the revised provision is ''the filing of an immigrant petition'' on the

individual's behalf. The phrase ''immigrant petition'' in this context refers to any immigrant petition filed under INA secs. 204(a), 8 U.S.C. 1154(a), and 201(b)(2)(A)(i), 8 U.S.C. 1151(b)(2)(A)(i) (''Immediate Relatives''), 203(a), 8 U.S.C. 1153(a) (''Preference allocation for family-sponsored immigrants''), or INA sec. 203(b), 8 U.S.C. 1153(b) (''Preference allocation for employment-based immigrants''), as well as INA sec. 203(c), 8 U.S.C. 1153(c) (''Diversity immigrants''), and thus includes both family-based and employment-based petitions as well as the diversity visa program. Similarly, the provision covers the filing of an application to seek ''lawful permanent residence or an immigrant visa'' without specifying limitations as to the basis for the permanent residence application or the immigrant visa application.

Comment: While expressing support for the proposed change, a research organization stated in the interest of fairness to applicants in other programs, the change should not be limited to the H–2 program and should be codified generally. Similarly, an advocacy group suggested there be no barriers to legal migration and changes of status for H–2 workers.

In response to proposed 8 CFR 214.2(h)(16)(ii), a research organization requested that DHS provide an explanation as to why it decided to ''partially address the barriers to citizenship by H–2A visa participation'' rather than incentivizing citizenship. As an alternative to the proposed approach outlined in the NPRM, the organization suggested an approach to establish a clear pathway to citizenship, while incentivizing workers to return to their country of origin. Specifically, citing research, the organization suggested that new immigrants could work during an initial period under a provisional visa, during which they earn the benefit of permanent residence through ''a continuous and productive working career'' and through payment of taxes. The suggested approach would additionally entail a measure whereby workers would post a bond to an escrow account through their wages, and the bond would be forfeited if the worker becomes a resident.

Response: While DHS appreciates the comment, any new visa program or pathway to citizenship would require legislation. The suggestion about applying the language in new 8 CFR 214.2(h)(16) beyond the H–2 program is beyond the scope of this rule. The commenter's suggestion ''that there be no barriers to legal migration and change of status for H–2 workers'' is unclear. However, DHS notes that it proposed numerous changes to improve the efficiency of the H–2 programs and to reduce barriers to use of those programs. For example, DHS proposed to remove the eligible countries lists and to simplify the regulatory provisions regarding the effect of a departure from the United States. These provisions are part of this final rule and are discussed below.

Comment: While expressing support for an immigration process that permits H–2 workers in good standing to apply for permanent residence or citizenship, an association of State Governments questioned whether this change would cause additional administrative burdens for employers and employees, and for the requirements for lawful permanent resident status. The commenter requested the Department clarify the details of this immigration process in the final rulemaking.

Response: DHS does not expect the provision at 8 CFR 214.2(h)(16)(ii) to result in any additional administrative burden for H–2 employers or employees. The provision at 8 CFR 214.2(h)(16)(ii) is not creating a new program for lawful permanent residence or citizenship and does not create any new obligation for H–2 employers or employees; it merely clarifies that, standing alone, the fact that an individual has taken certain steps to pursue permanent residence will not be considered a violation of H–2 status or show an intent to abandon a foreign residence. It is important to note that, for those employers who choose to file an immigrant petition on behalf of a current or former H–2 nonimmigrant—or those H–2 workers who choose to pursue permanent residence through another avenue (whether employment-based or family-sponsored, or on the basis of diversity)—the provision at 8 CFR 214.2(h)(16)(ii) does not change the existing immigration process or eligibility requirements. The provision also does not revise existing eligibility requirements or procedures for adjustment to lawful permanent resident status.

Comment: A business association referenced the consular review process that H–2 workers face when they leave the United States and return on another H–2 visa. The commenter stated that the ''dual intent'' regulations would help the individuals if they were reviewed by DHS, but that the regulations would not hold sway over consular officials under the State Department. The commenter suggested DHS work with the State Department to ''harmonize their respective regulations and guidance documents'' to avoid conflictual applications of the two agencies' policies.

A professional association and a trade association expressed support for the Department's clarification but stated DHS's reasoning for the clarification, that an H–2 worker taking steps to become a permanent resident would not show an intent to abandon their foreign residence, appeared to be counterintuitive.

Response: DHS disagrees that the provision is counterintuitive. An H–2 worker may seek to eventually adjust status to that of a lawful permanent resident while maintaining a current intent to leave the United States at the end of their authorized period of stay and continuing to have a foreign residence that they have no current intention of abandoning. As the rule provides, the approval of a permanent labor certification, filing of a preference or other immigrant visa petition, or filing of an application for adjustment of status or an immigrant visa will be considered, together with all other facts presented, in determining whether the H–2 nonimmigrant is maintaining his or her H–2 status and whether the alien has a residence in a foreign country which he or she has no intention of abandoning. *See* new 8 CFR 214.2(h)(16)(ii). Standing alone, such filing will not, however, be sufficient basis to conclude that the H–2 nonimmigrant has failed to maintain his or her H–2 status or has the intent to abandon the person's residence in a foreign country. As noted above, the provision is consistent with longstanding precedent, *Matter of Hosseinpour,* 15 I&N Dec. 191, 192 (BIA 1975) (''[C]ourts have held that a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with lawful nonimmigrant status.'').

DHS agrees that coordination with DOS is important, and notes that the Foreign Affairs Manual (FAM) is not inconsistent with new 8 CFR 214.2(h)(16)(ii). The FAM, which constitutes guidance to DOS employees, is not binding on DHS and does not indicate that certain actions seeking lawful permanent resident status, standing alone, warrant denial of the visa.[109]

[109] Currently, the FAM states, in pertinent part: ''Unlike H–1B nonimmigrants, H–1B1, H–2, and H–3 nonimmigrants are subject to INA sec. 214(b) and are not accorded dual intent under INA sec. 214(h). Under INA 101(a)(15)(H)(ii)–(iii), an applicant is not classifiable as an H–2A, H–2B, or H–3 nonimmigrant unless the applicant has a residence abroad and no intention to abandon that residence.

Continued

5. Removal of ''Abscondment,'' ''Abscond,'' and Its Other Variations, and Notification to DHS

a. Removal of ''Abscondment,'' ''Abscond,'' and Its Other Variations

Comment: A few commenters expressed support for DHS's proposed technical change. Several commenters, including a few trade associations, an advocacy group, a joint submission, and a professional association, expressed that they have no concerns or objections to DHS's proposal to remove the words ''abscondment,'' ''abscond,'' and its other variations from the H–2 regulations and replace the word ''absconds'' with the phrase ''does not report for work for a period of 5 consecutive workdays without the consent of the employer.'' A trade association stated that it was ''agnostic'' as to whether the Department should remove the terms ''abscondment'' and ''abscond'' from the regulations. A joint submission stated that it has no objections to the Department's proposal to the extent that it does not substantively change any existing program obligations. The joint submission commented that it considers this a reasonable change to the regulatory text and supports the Department's rulemaking on this front. The joint submission concurred with the Department that workers deserve to be treated fairly. They further commented that in their experience, though rare, workers do leave employment for legitimate reasons, and in isolation, the act of separating employment should not adversely affect that worker's ability to secure subsequent employment if done through lawful processes. Similarly, a professional association stated that workers leave their employment for various reasons, the majority of which are entirely legitimate, including to undergo medical procedures, injury, pregnancy, emergencies back home, or to assume more advantageous employment elsewhere. The commenter remarked that it is critical to ensure that DHS uses appropriate and fair language when describing those workers who leave their employment for valid reasons since the negative connotation surrounding these words can negatively impact the workers' ability to obtain future U.S. immigration benefits.

A professional association noted that some people have a negative connotation of the words ''abscond'' and ''abscondment'' and recognized that workers may have valid reasons for leaving their contracts. Two advocacy groups welcomed the Department's removal of the words ''abscondment,'' ''abscond,'' and its other variations from the H–2 regulations as these words convey wrongdoing by the worker, without regard for the reality of their working and living conditions. The advocacy groups stated that there are many reasons why an H–2 worker may not report for work, including illness, injury, unsafe working conditions, and transportation issues. The commenters remarked that replacing these words is a positive step in the recognition of the imbalance of power between workers and employers since it is not uncommon for employers to use the threat of reporting abscondment to prevent workers from asserting their rights.

Response: DHS appreciates the support expressed by these commenters for removing terms ''abscondment,'' ''abscond,'' and its other variations from the H–2 regulations. These terms have negative connotations which suggest wrongdoing on the part of H–2 workers who may have a wholly valid reason to leave their employment prior to the end of a work contract. As explained in the supporting comments, in many instances, workers leave employment early for wholly valid reasons, such as safety concerns, medical issues, or emergencies that require their presence in their home countries. In finalizing the proposals to remove these terms, DHS reaffirms its recognition of the many legitimate reasons why workers may leave employment early.

b. Notification Requirements

Comment: A couple of advocacy groups urged the Department to reevaluate its decision to maintain the notification requirements in 8 CFR 214.2(h)(5)(vi)(B) and 8 CFR 214.2(h)(6)(i)(F). The advocacy groups stated that these requirements often function as another avenue of exploitation for abusive employers, who can rely on the threat of reporting a worker as having ''absconded'' to retaliate against workers seeking to leave. The commenters added that the coercive effect of the threat is intensified by the current policy that bars some absconded workers from the H–2A program for 5 years, and USCIS does not have the resources to verify the accuracy of these reports. The commenters asked that the Department amend this notification system or include avenues for worker notification and opportunities for workers to respond. The commenters concluded that including workers in the process will minimize the chances that H–2 employment-related reports will be used to retaliate against workers who have exercised their rights or to coerce them into remaining in an abusive or exploitative working environment.

Response: DHS appreciates the commenters' concerns regarding the potential for the H–2 notification requirements to be used by employers in a coercive or retaliatory manner. As demonstrated by the worker protection provisions finalized in this rule, the Department is strongly committed to addressing all forms of abuse in the H–2 programs, including coercive actions and threats of retaliation committed by employers. The Department has chosen not to substantially change or eliminate the notification requirements in 8 CFR 214.2(h)(5)(vi)(B) and 8 CFR 214.2(h)(6)(i)(F), because these information collections continue to have value for both DHS and DOL. The Department reiterates, however, that it does not consider the information provided in an employer notification, alone, to be conclusive evidence indicating the worker is immediately out of status. As noted in the proposed rule, in subsequent petitions on the workers' behalf, information or evidence may be requested regarding a worker's date of cessation to demonstrate maintenance of status. This is one reason, in addition to operational limitations, DHS is not adopting the suggestion that affected workers be made aware of and provided an opportunity to respond to notifications submitted by their employers.

Comment: A trade association expressed its concerns about what it described as the burdens, ''ineffective safeguards,'' and unequal regulatory requirements placed on employers who avail themselves of the H–2 program, such as notification requirements when a beneficiary does not report for work. The commenter stated that employers must continue to satisfy notification requirements when a beneficiary does not report for work, which is yet another requirement for which employers must comply. While the notifications may permit an employer to file for a replacement worker, this is a marginal benefit, reasoned the commenter, noting that a harvesting season may be nearly over before a replacement worker can arrive. On the other hand, the commenter continued, failure to provide such notification could result in sanctions on the petitioner, including that DOL may find the employer liable

Thus, the fact that an H–2 or H–3 nonimmigrant has sought or plans to seek permanent residence *may* be considered *evidence* of the applicant's intention to abandon foreign residence.'' DOS, Foreign Affairs Manual 9 FAM 402.10–10(A) (emphasis added), *https://fam.state.gov/FAM/09FAM/09FAM040210.html#M402_10_10_A.*

to pay wages for up to three-quarters of the hours offered to a worker who abandoned the job. The commenter also suggests that ''[H–2] regulating agencies show they are more concerned that employer submits an email than whether a beneficiary maintains their status.'' The commenter added that ''the Department must do better to ensure beneficiaries maintain status—either by completing job contracts or porting to another eligible job opportunity.''

Response: The commenter does not offer a clear supportive position on retention of petitioner notification requirements other than to suggest that it is important that employers notify DHS when workers have ''abandoned'' their jobs. The commenter also does not clearly oppose retention of these notification requirements or offer suggestions for revising the related regulatory provisions. Instead, the commenter appears to suggest that the current notification requirements are not ''equitable,'' as the burdens of complying with them fall heavily on petitioners yet these notification requirements only provide ''marginal benefits'' to petitioners. While DHS understands that the burdens of compliance fall on the petitioner, DHS believes these information collections continue to have value. For example, information that an H–2 worker is no longer working for a petitioner could be useful for public safety reasons and to maintain the integrity of the H–2 programs (or any other nonimmigrant visa programs) as well.

With regard to the commenter's suggestion that ''[H–2] regulating agencies show they are more concerned that employer submits an email than whether a beneficiary maintains their status,'' DHS strongly disagrees with these unfounded assertions. The Department also declines to make any changes with respect to the comment's statement that DHS must do even more to ensure beneficiaries maintain their status either by completing job contracts or porting to another eligible job opportunity. DHS is finalizing robust worker flexibility provisions in this rule, including expanded grace periods and access to portability, to help ensure H–2 beneficiaries can maintain status if situations arise where they need to find new employment.

F. Program Efficiencies and Reducing Barriers to Legal Migration

1. Eligible Countries Lists

a. Support for Eliminating Eligible Countries Lists

Comment: Multiple commenters expressed general support for the Department's removal of the H–2 eligible countries lists. While expressing their support, a professional association and a business association stated that the Department's rationale for the removal—improving efficiency and removing burdens for the Department and employers—seems appropriate. Another professional association remarked that removing the lists provides another efficiency to the H–2 program. A joint submission concurred with the Department that the existing national interest waiver framework is burdensome, a waste of resources, and difficult to administer, while adding that it unfairly punishes foreign nationals for circumstances involving their home country's government that are out of their control. The commenter agreed with the Department's assessment that the costs of the eligible countries lists outweigh its benefits to U.S. geopolitical interests. A professional association applauded the proposed removal of the eligible countries lists, stating that it would reduce burdens on DHS, USCIS, and H–2 employers, while also enhancing the accessibility of the H–2 programs. A research organization welcomed the change to remove the eligible countries lists, stating that the INA provides no authority to impose a presumptive bar to entire nationalities from participating in these programs. The commenter stated that banning certain countries can cause overstay rates from those countries to increase, citing Haiti as an example. An individual commenter expressed general support for the regulations' stance on reducing barriers to legal migration, and stated that the authorization of a select few countries/foreigners to work in the United States temporarily creates domestic labor shortages and diminishes opportunities for both foreign workers and U.S. industries.

An advocacy group remarked that the proposed provision would free up resources to be used on other pressing projects across DHS and the DOS, as well as reduce the burden on petitioners that seek to hire H–2 workers from ineligible countries. The commenter further stated that the provision would increase access to workers who are potentially available to businesses that utilize the H–2 programs.

Response: DHS appreciates the support from these commenters and agrees that eliminating the eligible countries lists reduces administrative burdens and avoids consequences for potentially blameless workers as a result of the actions of the countries they come from. DHS also appreciates the commenter's referral to a blog post discussing the increase in the Haitian overstay rate when at the time Haitian H–2A workers likely suspected that Haiti would be removed from the lists.[110] The author of the blog post infers that one reason H–2A overstays rates are typically so low is that noncitizen workers can usually count on returning to H–2 work each year if they abide by the program's requirements, therefore limiting the incentive to overstay their visa. The author believes that the perceived threat of a country's nationals becoming ineligible for employment under the H–2 programs may lead to some individuals choosing to overstay rather than risk being unable to return to H–2 employment the following year, as he claims likely happened in the case of Haitian workers in 2016. While the assumptions in that blog post are speculative, it is, if true, an argument supporting the removal of the eligible countries lists.[111] DHS is retaining the removal of the eligible countries lists in this final rule.

Comment: While expressing support for the proposed rule and specifically its provisions related to reducing paperwork burden by allowing employers to request workers from multiple countries within the same petition, a professional association suggested that DHS explore additional streamlining measures for returning applicants who have favorable reviews from previous employers.

Response: DHS appreciates the general support. However, as the commenter did not provide specific suggestions for additional streamlining measures for certain returning applicants, DHS is not making any changes as a result of this comment.

b. Opposition to Elimination of Eligible Countries Lists

Comment: A couple of commenters, including a joint submission from former DHS senior officials and a research organization, expressed

[110] Alex Nowrasteh, CATO Institute, ''Haitian Guest Workers Overstayed their Visas Because the Government Cancelled the Program for Them'' (Jan. 18, 2018), *https://www.cato.org/blog/haitian-guest-workers-overstayed-their-visas-because-government-cancelled-program-them.*

[111] DHS removed Haiti from the eligible countries list on January 18, 2018. *See* 83 FR 2646. It added Haiti back to the list on November 10, 2021, while noting that some factors, including nonimmigrant visa overstay and removal rates that precipitated Haiti's removal from the H–2 programs in 2018 remain a concern. *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 (Nov. 10, 2021). Thus, as this example shows, the eligible countries list has not proven to be an especially effective tool in preventing nonimmigrant overstays and punishing recalcitrant countries.

opposition to the proposed provision. The joint submission from former DHS senior officials stated that the eligible countries lists are important tools in preventing nonimmigrant overstays. The commenter remarked that the concerns regarding time spent on adjudication of waiver requests and the compilation of data prior to the lists being generated do not form a basis to ''jettison'' the entire lists. The commenter stated that the data in the entry-exit report pinpoint which countries' citizens are more routine abusers of nonimmigrant visas, information that should be used when evaluating which nationalities should be eligible recipients of the visas. While expressing the perceived importance of the lists to national security, public safety, and immigration enforcement, the commenter further remarked that removing one of the greatest punitive measures against a recalcitrant country would breed further non-cooperation. Additionally, the joint submission notes that it would not support the possible alternative to allow less frequent publication of the lists by providing that they remain in effect for up to 3 years instead of automatically expiring after 1 year, as it would be insufficient to combat the overstay rates and would still ''allow free passes for recalcitrant countries'' in years when no list is published. The commenter concluded that there was no attempt to find alternatives that would keep the lists in place, such as exempting returning workers from the lists in subsequent years.

A research organization strongly recommended that DHS maintain and strengthen the regulatory requirement that the Secretary designate countries whose nationals are eligible to participate in the H–2 programs. The commenter stated that it serves the interests of foreign workers and the U.S. government to bar participation from countries who fail to cooperate with U.S. laws and policies or abuse the visa programs. The commenter reasoned that limiting H–2 eligibility to nationals of countries who meet specific standards enables DHS to reduce risks of fraud and abuse in the H–2 programs and illegal immigration to the United States, all of which harm the integrity of the immigration system and labor conditions in the United States generally. The commenter cited the removal of the Philippines and the Dominican Republic from the list of eligible countries in 2019 as an example of the potential harms that continued inclusion could pose to the H–2 programs. The research organization disagreed with DHS that program reforms made under this proposed rulemaking will be sufficient to guard against harms such as illegal immigration and human trafficking. The commenter requested that DHS publicize the information it considered regarding agency resource allocation for making program eligibility determinations.

The research organization recommended the following additional requirements for country eligibility:

- DHS should determine that a country's inclusion in the visa programs would not negatively affect U.S. law enforcement and security interests;
- Participating countries should make similar forms of temporary work visas available to U.S. citizens; and
- Participating countries should enter into agreements with the United Staes to share information regarding whether citizens or nationals of the country represent a threat to the security or welfare of the United States or its citizens.

Response: DHS shares the commenters' concerns about recalcitrant countries but does not anticipate that retaining the eligible countries lists would significantly reduce overstays or encourage countries to cooperate with the United States on immigration matters. DHS reviewed the Congressional Research Service report [112] shared by one commenter. That report addresses INA sec. 243(d) visa sanctions in general,[113] rather than focusing on the eligible countries list within the context of the H–2 programs.[114] Most significantly, the report concludes that there are several alternatives to visa sanctions, and that both DHS and DOS ''reported success in achieving cooperation without resorting to visa sanctions, resulting in countries being removed from the recalcitrant or [at risk of non-compliance (ARON)] lists.''

DHS notes that other provisions in the rule address labor trafficking, including worker portability, whistleblower protections, and mandatory and discretionary denials for employers with certain violations. In addition, DOL recently finalized a rule that increases oversight of the program, including protections for advocacy and labor organizing, worker protections, and enhancing transparency from employers. 89 FR 33898 (Apr. 29, 2024).

DHS appreciates the suggested alternative to exempt returning employees from the lists in subsequent year to address the DHS's concerns with the lists; however, DHS disagrees that this suggestion would address all of those concerns. As noted in the proposed rule, eliminating the lists frees up DHS resources which currently are devoted to developing and publishing the lists in the **Federal Register**, and collaborating between several DHS components and agencies as well as DOS. DHS would also still incur the burden of adjudicating waiver requests, as are currently allowed, for nationals of countries not on the lists who are not returning workers. Similarly, employers would still incur the extra burdens of preparing a petition that requests a national from a country not on the lists who is not a returning worker.[115] While exempting returning workers could reduce some of the burdens, those that remain are not outweighed by the benefits of retaining the lists when, as discussed above, alternative visa sanctions and diplomatic efforts have been shown to be effective in encouraging cooperation with U.S. immigration laws by other countries.

As DHS declines to retain the eligible countries lists for the reasons discussed above, it also declines to add the new factors the commenter suggested for when DHS is deciding on which countries to include on the lists.

Regarding the request that DHS publicize the information it considered regarding agency's resource allocation for making program eligibility determinations, the NPRM already described the burdens associated with adjudicating waiver requests as well as the significant collaboration needed between several DHS components and agencies and DOS to come to these yearly eligibility determinations. 88 FR 65040, 65069–70, 65089–90 (Sept. 20, 2023). For example, the NPRM stated that it takes ''months of work to gather recommendations and information from

[112] Jill H. Wilson, Congressional Research Service, ''Immigration: 'Recalcitrant' Countries and Use of Visa Sanctions to Encourage Cooperation with Alien Removals,'' (July 10, 2020), *https://crsreports.congress.gov/product/pdf/IF/IF11025.*

[113] Section 243(d) of the INA, 8 U.S.C. 1253(d), provides for the Department of State's discontinuation of the granting of immigrant visas and/or nonimmigrant visas to citizens, subjects, nationals, and residents of a specified country upon DHS notification that such country denies or unreasonably delays in accepting repatriation requests.

[114] For example, the report discusses sanctions applied to tourist and business visas for certain government officials while vaguely referencing sanctions on a ''broader set of visa categories and applicants.''

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

offices across ICE, U.S. Customs and Border Protection (CBP), and USCIS, compile statistics and cooperate closely with DOS.'' 88 FR 65040, 65089. DHS is unable to provide more specific data beyond the information already provided in the NPRM, as it is not possible to quantify all the time and resources involved in these types of robust agency collaborations and the unique foreign policy considerations required for each analysis.

c. Mixed Feedback on Elimination of Eligible Countries Lists

Comment: A foreign government expressed mixed views on the removal of the eligible countries lists. The commenter expressed that the rationale for removing the list has merit, considering that the limited data available indicated that during FY 2022, the majority of countries currently on the lists did not participate in the H–2 programs. However, the commenter remarked that the elimination of the list may lead to workers from countries with high populations and rates of unemployment flooding the H–2 programs, which would serve as a disadvantage to smaller states that are already in the program. The commenter recommended the implementation of a mechanism to protect the participation of smaller countries, such as a quota system that provides for a minimum level of participation by countries meeting specific criteria.

Response: DHS appreciates the commenter's support for removing the eligible countries lists and concerns with the impact of doing so on smaller countries. DHS does not anticipate that elimination of the lists will result in the adverse impacts mentioned, however, as elimination of the country lists is country-neutral, and it is speculative that smaller countries would be adversely affected by the elimination of the lists.

2. Eliminating the ''Interrupted Stay'' Calculation, Reducing the Period of Absence for Resetting the 3-Year Stay Clock

a. General Support for the Provisions

Comment: Commenters expressed support for the proposed changes for a variety of reasons. Several commenters, including a business association, a professional association, and a joint submission expressed support for DHS simplifying the interrupted stay calculation and shortening the period of absence that will reset H–2 workers' 3-year limit of stay. A professional association said that shortening the period of absence to 60 days is a welcome change because H–2 workers satisfy a significant economic need for the United States, and therefore it is important to remove unnecessary hurdles to their contributions. A few commenters, including professional, business, and trade associations, expressed support for simplifying the interrupted stay calculation due to the current calculations being confusing for employers and workers. While expressing their support, a few trade organizations noted that this change would simplify the process of determining an H–2 worker's remaining length of stay. Additionally, a business association said that simplifying the interrupted stay calculation and shortening the period of absence that would reset the 3-year limit of stay should work well when H–2 workers leave the United States via an airport. A joint submission wrote that the proposed changes would improve certainty and predictability for H–2 workers and are a ''step towards improving H–2B workers' ability to seek legal support if needed.''

While describing DHS's proposed changes to the interrupted stay provisions and the 3-year clock, a joint submission concurred with DHS's justification for this change, writing that the existing standards are confusing, burdensome, and difficult to implement. The commenters provided an example of how named petitions to extend a beneficiary's stay require significant documentation, which the commenters said creates administrative work and lengthens the adjudication timeline. This joint submission also noted that reducing the time to reset the 3-year limit of stay to 60 days would not only accomplish the Department's policy objectives and reduce the burden on workers and employers but also foster interagency harmony, as this would bring DHS's standards in line with the DOL's ''10-month rule'' for evaluating temporary need. The commenters further stated that many H–2A employers utilize the full 10-month period of need, which can result in cases where workers reach their 3-year limit and are ineligible for an extension of stay in H–2A status. The commenters wrote that the proposed change would make it easier for employers with longer periods of need to extend their H–2A workers' stay as necessary. Similarly, a trade association wrote that for workers who return to their home countries every year, this change would align DHS's requirements with the maximum possible season of 10 months and clarify the dates for when workers can return to the United States. A professional association also expressed support for the proposed change to the interrupted stay calculation, as it would create uniformity between the two H–2 programs and increase efficiency and opportunity for workers.

Response: DHS appreciates the commenters' support for these changes. DHS agrees that these changes will simplify the process for determining an individual's remaining available time in H–2 status and will reduce confusion for employers. DHS also anticipates that the change will simplify USCIS adjudications, resulting in fewer requests for evidence and greater efficiency in adjudicating H–2 petitions.

b. Opposition to the Provisions

Comment: An advocacy group expressed opposition to the proposed changes. The commenters reasoned that if a worker left the United States, reducing the time to reset the 3-year limit of stay to 60 days would neither pause the period of stay clock nor extend the time a worker could work in H–2 status upon returning. The advocacy group wrote that this could harm workers and prevent them from seeing their families and taking care of them, when necessary, thereby potentially harming the workers' health.

While a professional association noted that current regulations regarding the 3-year limit and interrupted stay calculation are complicated for employers and workers to understand, the commenter stated that eliminating the interrupted stay calculation was not the correct solution. Instead, the commenter suggested allowing employees to maintain the ability to return to the United States if they had ''spent less time in H–2 status given potential 'interrupted status.' ''

Response: DHS does not agree that this provision will harm workers. Under current regulations, a period of absence from the United States will interrupt the stay of H–2 workers only in the following circumstances:

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

Under the final rule, USCIS no longer recognizes certain absences as an ''interrupted stay'' for purposes of pausing the calculation of the 3-year limit of stay. Specifically, H–2 workers who have an accumulated stay of less than 18 months and have an absence from the United States of 45 to 59 days will no longer have their period of stay

''interrupted.'' DHS recognizes that this subset of H–2 workers may not benefit from these changes, but as it relates to the H–2 program as a whole, the change to simplify the calculations and shorten the time to ''reset'' the clock will benefit H–2 workers and employers and help improve program efficiency overall. Further, this subset population of H–2 workers may still benefit from the reduced period for resetting their H–2 clock if they extend their stay outside of the United States for at least 60 days. Rather than ''interrupting'' the stay, an absence for the designated period of at least 60 days would in all cases ''reset'' the H–2 clock (instead of, per current regulations, just ''pausing'' the H–2 clock), and thus, allowing for an additional 3 years in the United States in H–2 status upon the worker's readmission. Moreover, this change does not in any way prevent an H–2 worker from making short trips outside the United States and returning to the United States in H–2 status. Therefore, the basis of the commenters' concerns about ''harm to the family and health of the worker'' and ''leaving in the ability for employees to return to the United States'' is unclear.

To the extent that these commenters are suggesting that any period of absence should interrupt the H–2 period of stay, similar to the current ''recapture'' provision for H–1B beneficiaries codified at 8 CFR 214.2(h)(13)(iii)(C), DHS explained in the NPRM that it considered and rejected this alternative. As explained in the NPRM, DHS determined that implementing a provision similar to the H–1B ''recapture'' provision'' would be only a minimally less confusing calculation for petitioners and H–2 workers, as well as for USCIS adjudicators. DHS believes a single, consistent standard under which an uninterrupted absence of at least 60 days would reset the 3-year limitation represents the best way to reduce confusion, resulting in fewer RFEs and greater efficiency in adjudicating H–2 petitions. Therefore, DHS declines to adopt the commenters' suggestions and is finalizing the provision without change.

c. Other Feedback and Recommendations Regarding the Interrupted Stay Provisions

Comment: While expressing support for simplifying the interrupted stay calculation, a union suggested the period of absence to reset H–2 workers' 3-year limit of stay remain at 90 days. The commenter reasoned that H–2 programs are temporary, and therefore a 90-day period of absence aligns better with the purpose of the program. The commenter added that program reform must advance both U.S. and migrant workers' interests, and that creating rules employers could misuse as year-round labor solutions would not be an acceptable outcome.

Response: DHS maintains that a 60-day period of absence is sufficient to ensure that an H–2 worker's stay is temporary in nature, while at the same time affording employers and workers the flexibility to fill an employer's temporary needs. Further, the commenter did not specifically explain why a 90-day period of absence would better align with the purpose of the program as opposed to 60 days.[116] DHS therefore declines to make any changes based on this comment. DHS maintains that a 60-day period of absence is sufficient to ensure that an H–2 worker's stay is temporary in nature, while at the same time affording employers and workers the flexibility to fill employers' temporary needs.

Comment: In the context of expressing support for the interrupted stay provisions, several business associations suggested that the Department implement a method for tracking land border crossings, which are not currently tracked, reasoning that this could prevent issues when H–2 workers who cross the border with Mexico return to the United States. A few business associations recommended incorporating this tracking method into the CBP One application so that workers could log their exit when leaving the United States for Mexico. Another business association expressed concern with the Department's ability to enforce the current and proposed requirements, reasoning that the Department does not currently have a way to track land border crossings and thus, a way of tracking the H–2A workers that cross the land border with Mexico. Like other commenters, the business association suggested including a function in the CBP One application to allow H–2A workers to log their location when returning to Mexico.

A business association provided a recommendation regarding the use of the CBP One application to track land border crossings. The commenter suggested that the Department build out the application's capabilities so that H–2 workers are responsible for recording their exit from the United States. Alternatively, the commenter suggested a two-step process where an employer first records the end of an H–2 worker's employment, and the employee then logs their official exit on the CBP One application when they leave the country.

Response: DHS notes that the burden of proof to establish eligibility for an immigration benefit is on the petitioner or applicant.[117] In the NPRM and final rule, DHS has provided a non-exhaustive list of evidence that may be provided to document relevant absences from the United States, including arrival and departure records, copies of tax returns, and records of employment abroad. While DHS appreciates the commenters' suggestions, DHS did not propose a method for tracking land border crossings or any changes or additions to the CBP One application in the NPRM. Because DHS did not propose any changes with respect to tracking land border crossings or the CBP One application, these comments are outside the scope of this rulemaking. Therefore, DHS declines to adopt these suggestions as part of this final rule. The Department continues to make improvements to the accuracy and reliability of the entry/exit system, and may consider these suggestions as it does so.

G. Severability

Comment: A professional association and a business association expressed support for the Department's proposal for the regulations to be severable. Another professional association remarked that it has no objection to including severability in the rule proposal.

[116] As noted in the NPRM, DHS did not provide specific policy reasons for setting the period of absence at ''3 months'' in prior regulations, noting only that it was reducing that period from 6 months ''in order to reduce the amount of time employers would be required to be without the services of needed workers, while not offending the fundamental temporary nature of employment under the H–2A program.'' *Modernizing H–2 Program Requirements, Oversight, and Worker Protections,* 88 FR 65040, 65072 (Sept. 20, 2023); *Changes to Requirements Affecting H–2A Nonimmigrants,*73 FR 8230, 8235 (Feb. 13, 2008) (proposing the reduction to 3 months); *Changes to Requirements Affecting H–2A Nonimmigrants,*73 FR 76891, 76904 (Dec. 18, 2008) (adopting the proposed reduction in waiting time without change and agreeing with comments stating that 3 months would ''enhance the workability of the H–2A program for employers while not offending the fundamental temporary nature of employment under the H–2A program''); *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers,*73 FR 49109, 49111 (Aug. 20, 2008) (proposing to reduce the required absence period to 3 months to ''reduce the amount of time employers would be required to be without the services of needed workers while not offending the fundamental temporary nature of employment under the H–2B program''); *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers,*73 FR 78104 (Dec. 19, 2008) (adopting the proposed reduction in waiting time without change).

[117] *See, e.g.,* INA sec. 291, 8 U.S.C. 1361; 8 CFR 103.2(b)(1), 214.1(a)(3).

Response: DHS appreciates these comments and is finalizing the severability provision with minor clarifying edits. DHS intends for the provisions of this rule to be severable from each other such that if a court were to hold that any provision is invalid or unenforceable as to a particular person or circumstance, the rule will remain in effect as to any other person or circumstance. While, as discussed in the NPRM and in this preamble, the various provisions of this rule, taken together, will provide maximum benefit with respect to strengthening program integrity, increasing worker flexibility, and improving program efficiency, none of the provisions are interdependent and unable to operate separately. In the severability clause contained in this final rule, DHS has identified the second level paragraphs (for example, (h)(6)) in which the severable amended provisions contained in this final rule can be found. These references along with the date of the final rule are intended to better identify the severable provisions and differentiate them from the existing provisions in 8 CFR 214.2 that are not being impacted by this final rule.

H. Input on Future Actions/Proposals for Beneficiary Notification

Comment: Multiple commenters suggested that the Department implement an electronic notification system of beneficiary and employer statuses, while also recommending that the Department implement an electronic filing process. A business association suggested using a system like DOL's Foreign Labor Application Gateway (FLAG) system, which would reduce cost and time burdens for employers and DHS. A trade association remarked that electronic filing is a necessary efficiency, and it would be a ''disservice'' to employers and beneficiaries to not implement electronic filing for H-2A petitions. A couple of trade associations, an advocacy group, and a business association recommended that the Department implement an electronic notification system through the technology the Department currently possesses, while also proposing to make the entire filing process electronic to reduce cost and time burdens to employers and the Department. The commenters added that it is inconceivable that employers must still file their petitions on paper, given they will be transcribed and entered into the Department's electronic system. A trade association stated that the paper petitions currently used are costly, time consuming, and inefficient, especially given that the Department already stores a large amount of information electronically.

A couple of commenters, including a professional association and a business association remarked that moving USCIS systems into the digital age as quickly as possible would be welcomed by H–2A workers, employers, and the Department itself.

A professional association stated that using email with digitized notices and enhancing website capabilities with real-time information would be the most effective, efficient, and affordable method of communication between beneficiaries, petitioners, and DHS. Another professional association recommended that the Department add an email section to Attachment-1 of Form I–129, which would allow USCIS to email the beneficiary that someone applied to amend their status. The commenter stated that at times, this may result in more work for employers, agents, and associations, but it would be an efficiency that would benefit the worker.

A joint submission concurred with DHS's reasoning on providing notifications directly to beneficiaries, but cautioned the Department not to implement a process that requires significant information collection or disclosure on the part of the employer. The commenter added that it would advocate against any process that makes the contact information of beneficiaries, such as email address, a mandatory field on petition forms. The commenter concluded that failure to provide beneficiary contact information should not serve as a basis for petition rejection or denial.

Another joint submission concurred with DHS that more notice and transparency is beneficial, and limiting notifications to the petitioning employer may restrict the beneficiary's options to transfer to subsequent employment or extend or change their status. The commenter expressed opposition to any changes to the Form I–129 that would dramatically increase the transaction cost associated with a named petition, such as the inclusion of multiple new fields or additional pages. The commenter recommended adding an optional email address field to Attachment-1 and using this information to copy the beneficiary on any notifications. The commenter concluded that a copy of notifications could be mailed to beneficiaries if an email address is not available since the Attachment-1 already requires U.S. and foreign addresses.

Response: DHS appreciates these comments. In the NPRM, DHS stated that it was seeking preliminary public input on ways to provide H–2 and other Form I–129 beneficiaries with notice of USCIS actions taken on petitions filed on their behalf as well as other suggestions regarding ways to ensure adequate notification to beneficiaries of actions taken with respect to petitions filed on their behalf. As indicated in the NPRM, the feedback was being sought to inform a potential future action, and DHS did not propose a particular approach in the NPRM. Therefore, DHS is not making any regulatory changes as a result of the request for preliminary input in this final rule but will take into serious consideration the input provided by these commenters as it continues to research and consider the feasibility, benefits, and costs of various options separate and apart from this final rule.

I. Other Comments Related to the Rule or H–2 Programs/Requirements

1. Alternatives and Other General Comments on the Proposed Rule

Comment: Some commenters provided broad recommendations to improve H–2 worker conditions while supporting USCIS for its efforts to protect H–2 workers' rights. For example, an advocacy group stated that in the longer term, additional changes would be needed to shift the balance of power in the employer-worker relationship in favor of workers' rights. A couple of individual commenters provided additional suggestions, requesting that the proposed rule establish safe and clean housing for workers and their families, a minimum wage for workers, access to healthy food, medical care, English language learning opportunities, and education for both adult workers and their children. An individual commenter stated, without elaboration, that H–2 workers should be well compensated for their labor, must have adequate rest periods and opportunities to organize for fair wages, and should have their living conditions and safety monitored.

Response: DHS appreciates the broad support for efforts to protect H–2 workers' rights. However, while DHS appreciates these holistic analyses of the H–2 programs, DHS declines to make any changes in response to these comments as they do not address specific elements outlined in this rulemaking or suggest specific changes. Further, issues involving housing standards, access to housing, H–2 wages, access to healthy foods, and rest periods, generally are better addressed by local, State, and Federal labor agencies such as DOL and are outside

the scope of this rule. Similarly, other concerns with the need for medical care, English language learning opportunities, and education for both adult workers and their children, are outside the scope of this rule.

Comment: An individual commenter requested that any employers who abuse H–2 workers face swift prosecution.

Response: DHS is committed to protecting all workers from exploitation and abuse. However, though it is not entirely clear what the commenter was referring to, DHS notes that the term ''prosecution'' generally relates to criminal proceedings.[118] As this rulemaking does not directly involve criminal proceedings, the comment is beyond the scope of this rulemaking.

Comment: A research organization requested that USCIS prioritize the selection of H–2B petitions in industries with the greatest need for workers in order to curtail fraud and abuse in the program.

Response: DHS appreciates the comment but is not making any changes in response to this comment because the comment is beyond the scope of this rulemaking. In any event, it is also unclear how an industry-based H–2B prioritization scheme would curtail fraud and abuse in the program.

2. Implementation

Comment: An advocacy group recommended developing a ''multi-pronged communications strategy to ensure that workers are aware of the changes related to worker flexibility and program integrity once implemented'' including clearly communicating all implemented changes related to aligning admissions periods and grace periods to H–2 workers, ensuring workers are aware they may stay in the United States for 60 days following unexpected termination of H–2 employment and for 30 days following the validity period of their H–2 contract. The commenter also requested that DHS partner with worker leaders, organizers, and trusted community organizations to communicate the changes in the proposed rule as well as workers' rights in the United States more broadly.

Response: DHS has worked diligently to develop a communications strategy in preparation for this final rule. After the publication of this final rule, DHS will announce various stakeholder events it intends to hold, which will be open to the public, to raise awareness of the final rule.

Comment: An individual commenter encouraged USCIS to improve the clarity and readability of the regulatory text through the use of plain language, active voice, bullet points, lists, examples, and illustrations. The commenter suggested, for example, that USCIS replace terms such as ''petitioner,'' ''beneficiary,'' ''certifying officer,'' or ''administrative law judge'' with simpler terms, such as ''employer,'' ''worker,'' ''DHS official,'' or ''judge.'' The commenter concluded that these adjustments would enhance the ability of employers and workers to understand and comply with program regulations.

Response: DHS/USCIS is dedicated to improving its communications with the public. We support the Plain Writing Act of 2010 and have an internal plain language program.[119] We strive to use plain language where it is possible to do so; however, often times it is necessary to use precise terms such as ''petitioner'' and ''beneficiary'' because these are the words that appear in related and corresponding regulatory text and have established meaning, and using alternate words would introduce ambiguity or confusion.

3. Employer/Petitioner Requirements, Processes, and Fees

Comment: A professional association expressed support for the provision in the proposed rule that would allow for the substitution of H–2A beneficiaries after admission and urged the Department to extend it to H–2B beneficiaries. The commenter said that not extending the provision to H–2B employers would place them on a different footing than H–2A employers and hinders H–2B employers who were looking for foreign labor assistance because they could not find domestic labor.

Response: The provision at 8 CFR 214.2(h)(5)(ix) that allows substitution of H–2A beneficiaries after admission is an existing provision to which DHS did not propose substantive changes. Rather, DHS proposed minor revisions to the provision to remove and replace the negatively charged terms ''abscond'' and ''absconded'' with more neutral terms. 88 FR 65040, 65068 (Sept. 20, 2023). Therefore, the commenter's suggestion is out of scope of this rulemaking.

4. Validity Period and 3-Year Maximum Period of Stay

Comment: A research organization suggested that the Department extend the 3-year maximum stay provision to 6 years, stating that easing the maximum stay provision would increase the availability of H–2 workers, reduce agency and employer burdens, and improve the bargaining power of workers. The commenter elaborated that the current limit imposes ''unnecessary burdens'' on agencies by requiring them to vet a new group of workers to replace those subject to the 3-year limit, which would expose the country to ''avoidable security risks.'' The commenter further elaborated that the current 3-year limit imposes burdens on employers, as employers are harmed by turnover caused by workers leaving the country during their jobs and are potentially blocked from rehiring returning workers whom they have already trained on their operations. The commenter also noted that workers nearing the end of their stay would not be able to change employers, thus giving their employers ''excessive leverage in setting wages and working conditions.'' The commenter added that the current maximum limit on stay exacerbates the shortage of H–2B workers because H–2B hires who are already in the United States are exempt from the H–2B cap, and that extending the maximum stay provision to 6 years would lead to a lower portion of the H–2 workforce receiving extensions. The commenter also added that the NPRM's grace periods proposal may radically increase the percentage of workers who reach their 3-year limit. Finally, the commenter stated that the NPRM's proposal to limit H–2 workers to a maximum of 3 years with H–2 status unless they have departed the United States for an uninterrupted period of 60 days has no basis in law. Referencing the regulatory history associated with the 3-year limit, and the statutory history of the 6-year limit applicable to the H–1B classification maximum period of admission, the commenter concluded that there is ''statutory ground'' for extending the provision to 6 years. Specifically, the commenter indicated that Congress had defined ''coming temporarily'' in the H–1B context as up to 6 years.

Response: DHS declines to extend the 3-year maximum period of stay provision to 6 years. First, the NPRM did not propose to substantively change the 3-year maximum period of stay, but rather, proposed to eliminate the ''interrupted stay'' calculation and reduce the period of absence to restart the 3-year maximum period of stay clock. Second, it is not necessary to change this longstanding regulatory standard which, as the commenter stated has existed since 1964,[120] was

[118] *Prosecution* definition, Black's Law Dictionary (11th ed., 2019).

[119] USCIS, ''About Us: USCIS Plain Language,'' *https://www.uscis.gov/about-us/uscis-plain-language* (last viewed May 6, 2024).

[120] 29 FR 11956, 11958 (Aug. 21, 1964). As promulgated in that rulemaking, 8 CFR 214.2(h)(3),

again referenced in the 1987 final rule, and is intended to ensure that a person's stay in H–2 status is in fact temporary, as required under section 101(a)(15)(H)(ii)(a) of the INA.[121] DHS further disagrees with the commenter that because Congress defined what ''coming temporarily'' means for purposes of the H–1B program, this provision should be applied in the H–2 context or provide support for similar treatment of H–2s. There is no requirement that the maximum period of stay for the H–2 classification be the same as that for the H–1B classification.

The new provisions being finalized in this rule, including the provisions to reduce the period of absence required to reset the worker's maximum period of stay and provide portability flexibility permanently, will alleviate many of the commenter's concerns about rehiring returning workers, pressures on employers due to the H–2B cap, and improving the bargaining power of workers. DHS does not agree with the commenter's concerns about agency burdens. The maximum validity period on an H–2 petition remains unchanged; each H–2 petition may only be approved for a validity period not to exceed 1 year (except for an H–2B petition approved for a one-time occurrence under 8 CFR 214.2(h)(6)(ii)(B)(*1*)). An employer seeking to employ an H–2 worker beyond the end of the petition validity period would still have to file another H–2 petition requesting an extension of stay for that worker. USCIS would still need to adjudicate each extension petition, at which time USCIS would screen the beneficiary for continued eligibility, and thus keeping the 3-year limit would not lead to ''avoidable security risks'' as suggested by the commenter.

J. Statutory and Regulatory Requirements

1. Administrative Procedure Act (APA)

Comment: Numerous commenters, including multiple trade associations, a joint submission from numerous industry associations, State Government agencies, and Federal elected officials, expressed general disappointment with the lack of extension or requested a 30- or 60-day extension to the comment period for the proposed rule. Many commenters reasoned that they and their members or constituents are limited in their ability to review and provide meaningful feedback on the proposed changes, as the comment period aligns with peak harvesting season or peak seasonal business needs. Additionally, multiple commenters reasoned that the comment period overlaps with multiple recent administrative actions—including public comment opportunities with the DOL and the USDA, and other agencies—that impact the same stakeholders and that require input during or around the same period. The commenters concluded that an extension would be necessary for the regulated community to analyze the full impact of the proposed changes, submit comments based on a comprehensive review of the rule, and meaningfully participate in the rulemaking process. A trade association expressed concern that because the proposed regulation does not acknowledge the existing legal investigative and enforcement structure for H–2 employment conditions, that the public cannot properly evaluate or comment on the proposal.

Response: As DHS noted in a November 3, 2023, letter that it posted to the rule's electronic docket (USCIS–2023–0012) for public viewing, DHS takes seriously the requirements under the Administrative Procedure Act to provide an opportunity for members of the public to participate in the rulemaking process by submitting data, views, or arguments on the proposed agency action. In that letter, DHS stated that it decided not to extend the comment period beyond 60 days, that is, past November 20, 2023, the last day of the comment period, noting that a 60-day comment period is generally considered sufficient for the public to provide input in response to proposed rulemaking actions. DHS has provided 60 days for public comment for other comprehensive rulemakings like this one in the past, and that duration has routinely been sufficient as evidenced by the volume and substance of public comments received. The letter emphasized that DHS believes the 60-day comment period for the 2023 H–2 NPRM provides sufficient time and a reasonable opportunity for the public to comment. DHS noted too that USCIS had engaged stakeholder groups over the past several years and incorporated comments and suggestions from these engagements into the 2023 H–2 NPRM.

As stated above, some commenters raised specific concerns with the comment period because it aligned with peak harvesting season or certain peak seasonal business needs, and because it overlapped with public comment opportunities for administrative actions by other agencies that could impact the same stakeholders. While the noted circumstances may have rendered the 60-day comment period a busier time for certain stakeholders, DHS believes it was sufficient to afford the public a meaningful opportunity to participate in the rulemaking process. Indeed, neither of these circumstances appears to have limited the public's ability to meaningfully engage in the notice and comment period. DHS notes that nearly two thousand commenters—including many stakeholders impacted by the harvest season and other agencies' administrative actions—submitted substantive comments during the 60-day comment period.

Comment: Several commenters, including an advocacy group, a professional association, and a business association, expressed appreciation for the opportunity to meaningfully comment on the proposed rulemaking. A joint submission from a union and numerous advocacy organizations urged USCIS to expedite finalization of the rule immediately following the standard 60-day comment period.

Response: DHS appreciates these commenters' support and the significant response and feedback it received on the published H–2 NPRM. Given the importance of the issues addressed herein, DHS has worked diligently to timely finalize the rule after carefully reviewing public comments and making appropriate changes based on public feedback.

Comment: A few commenters, including an advocacy group, a trade association, and a business association, urged USCIS to engage stakeholders more generously, such as through providing more details for comment, publishing another notice to the **Federal Register** with more detail, or other direct communication with stakeholders. One of these commenters indicated that the NPRM lacked sufficient explanation of the prohibited fees and denial provisions needed to properly apprise stakeholders of what is to be expected of them under this proposed rule. A State Government agency recommended USCIS offer forums for recruiters or hirers of foreign workers to express concerns earlier in the rulemaking process.

Response: DHS appreciates the suggestions from these commenters but disagrees that the NPRM lacked specificity necessary to apprise stakeholders of how the various proposal would operate or what would

the header for which read, ''Admission and extension,'' stated ''An alien defined in section 101(a) (15)(H)(ii) of the Act shall not be granted an extension which would result in an unbroken stay in the United States of more than 3 years.'' It is notable that while this regulation generally applied to all H classifications, the 3-year limit was specifically applied only to H–2s.

[121] ''Nonimmigrant Classes,'' 52 FR 20554, 20555 (June 1, 1987) (interim final rule codifying the 3-year limit noting that ''[t]here has traditionally been a three year limit on an H–2 alien's uninterrupted stay'').

be required of the public to comply. Nonetheless, as discussed in the section addressing, for example, prohibited fees, DHS has further refined these provisions to address requests for further clarification received from commenters, and has made other responsive edits to the regulation in response to public comments. The number and quality of public comments received on the NPRM further demonstrate that most commenters both understood the proposals and were able to provide salient feedback on those proposals. Therefore, DHS believes that the opportunity for notice and comment has been sufficient. In addition, following publication of the final rule, DHS will consider ways to effectively engage the regulated community on its new H–2 provisions and provide further guidance, if needed, to assist program participants with compliance.

Comment: A joint submission from former DHS senior officials stated that the proposed rulemaking violates the APA as it is ''both arbitrary and capricious'' and because USCIS must consider alternative options.

Response: DHS disagrees that the proposed changes in the NPRM, which are finalized in this rule, are arbitrary, capricious, and fail to consider alternatives. The NPRM and this final rule provide a reasonable basis for each of the changes proposed and made. To the extent possible and available, DHS has cited studies and data in support of the proposed changes and has used available data to assess the impact of the proposals, and where applicable, regulatory alternatives. In addition, where possible, DHS generated and considered specific alternative approaches to the changes made and explained why it was not proposing such alternatives. For example, DHS explained that rather than eliminating the eligible country list as proposed, it considered keeping the list in place until it is replaced by a new list and extending the timeframe for review from every 1 year to every 2 years. It then explained the shortcomings of this alternative as reasons for not proposing it. 88 FR 65040, 65070 (Sept. 20, 2023). In addition, as an alternative to the complicated calculations needed to determine an interrupted stay under the current H–2 framework, DHS considered adopting an interrupted stay provision similar to the current ''recapture'' provision for H–1B beneficiaries. Ultimately, DHS chose not to match the H–1B provision because it believes the H–1B provision to ''recapture time'' would be only a minimally less confusing calculation for petitioners and H–2 workers, as well as for USCIS adjudicators. 88 FR 65040, 65072. In addition, in the Initial Regulatory Flexibility Analysis in the NPRM, DHS discussed alternatives to the proposed regulation.[122]

Finally, in this final rule, DHS has considered and addressed alternatives proposed by commenters. For example, in this final rule DHS explains why it is not adopting the alternatives commenters proposed to the elimination of the exception to the prohibition on charging workers fees. As explained more fully in the responses to comments relating to prohibited fees, the prohibited fee provisions in this final rule are intended to complement DOL rules. DHS also explained how inconsistency between DHS's and DOL's H–2 rules may cause confusion and could discourage law-abiding employers from using the H–2 program to address labor shortages. As discussed elsewhere in this preamble, this final rule further clarifies the employer obligations related to prohibited fees to ensure that employers understand what is expected of them and are not discouraged from using the H–2 program to fill their legitimate temporary need for workers.

2. Regulatory Impact Analysis (RIA) (E.O. 12866 and E.O. 13563)

a. Impacts on Nonimmigrants/Workers or Their Representatives

Comment: An advocacy group responded to the request for comment on ''the prevalence, population, and cost of prohibited fees and their impacts on H–2 workers.'' The advocacy group stated that despite regulations prohibiting the requesting or receiving of payments or recruitment fees from workers in exchange for activity related to H–2A employment, workers are still vulnerable to fraud. The commenter provided an example of H–2A workers being asked to pay recruitment fees of between $3,000 and $4,000 per person as a condition for their employment. The commenter also referenced other federal court cases and reports of recruiters or employers charging prohibited fees, and referred to statistics suggesting the average payment issued by workers is $590 per person.[123] The advocacy group added that predatory actions such as charging workers prohibited fees can contribute to human trafficking, because H–2A workers often arrive to the United States in debt from unreimbursed costs and fees, putting them at greater risk of trafficking.

Response: DHS appreciates the commenters' input regarding the average amount of prohibited fees H–2 workers are being asked to pay. While DHS cannot independently verify the provided statistics, the input is nevertheless valuable as generally demonstrating the prevalence of the practice of charging prohibited fees despite current regulations that prohibit them. This final rule attempts to mitigate, to the extent possible, the harm to H–2 workers resulting from the imposition or threat of prohibited fees by those engaged in the practices described by the commenters.

b. Impacts on Employers/Petitioners or Their Representatives

Comment: An attorney remarked that while 88 FR 65040, 65045, n. 1 (Sept. 20, 2023) states that ''USCIS does not expect any additional costs to H–2B employers as, generally, they do not have to provide housing for workers,'' amusement industry employers have had to bear additional costs related to housing provision since 2016. The commenter then stated that USCIS has not conducted a cost-benefit analysis on this matter.

Response: DHS acknowledges that, while there is no statutory requirement for H–2B employers to provide housing, there are regulatory prohibitions against deductions from wages for the cost of housing by an H–2B employer when it is provided primarily for the benefit or convenience of the employer, such as in the context of an employer with a need for a mobile workforce. *See* 20 CFR 655.20(b), (c); 29 CFR 531.3(d)(1); 80 FR 24042, 24063 (Apr. 29, 2015). This rule's regulatory impact analysis of costs and benefits is being revised to acknowledge that certain H–2B employers in this limited scenario may face additional costs such as for housing, but because DHS does not have data on the population of H–2B employers that this provision would affect at this granular of a level, monetized impacts cannot be estimated.

[122] 88 FR 65040, 65098, subsection f, (Sept. 20, 2023). (''*Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities.*'').

[123] As examples of the reports of prohibited fees, the commenter cited *Ulloa* v. *Fancy Farms, Inc.,* 762 Fed. Appx. 859 (2019 U.S. App.), *Palma Ulloa* v. *Fancy Farms, Inc.,* 274 F. Supp. 3d 1287 (2017 U.S. Dist.), and ICE, ''3 Indicted In Immigration Fraud Scheme That Exploited Immigrant Farm Workers By Charging Prohibited Fees For Visas, Living Expenses'' (May 17, 2018), *https://www.ice.gov/news/releases/3-indicted-immigration-fraud-scheme-exploited-immigrant-farm-workers-charging.* As support for the statistics suggesting an average prohibited fee payment of $590, the commenter cited to Centro de los Derechos del Migrante, ''Recruitment Revealed'' (2018), *https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.*

Comment: An association of State Governments expressed concern that the proposed rule could cause administrative delays to the H–2B program and higher costs for agricultural employers. In particular, the association suggested that a shortage of labor exacerbated by the proposed rule could cause producers to turn to producing less labor-intensive agricultural products or turn the costs of restructuring their businesses onto consumers.

Response: It is speculative that this rule will exacerbate labor shortages and cause higher costs for agricultural employers and consumers. It is also speculative that this rule will cause administrative delays to the H–2B program. Insofar as the rule codifies new requirements for petitioners and new protections for workers, it does so in furtherance of program integrity.

c. Impacts on Small Entities (Regulatory Flexibility Act, Initial Regulatory Flexibility Analysis (IRFA))

Comment: An association of State Governments expressed concern that the proposed rule would adversely impact small agricultural employers who may lack resources needed to understand the regulatory requirements of the H–2 program. The commenter urged USCIS to specifically contact small entities to describe the proposed changes. A trade association remarked that small employers who rely on agents for recruiting workers and unintentionally violate the proposed stricter standards for prohibited fees could be disproportionately harmed, and some small growers could be put out of business.

Response: DHS appreciates the comment but declines to contact all possibly affected small businesses. DHS emphasizes that all regulatory requirements and procedures will be explained and analyzed through multiple channels (the promulgation of this rule as evidenced by publication after consideration of comments received during the notice and comment period, relevant form instructions, and established communication materials such as the ''Small Entity Compliance Guide''). Additionally, DHS believes that marginal burdens being placed on small entities in order to ensure that they comply with program requirements and worker protections is justified by the benefits of increased program integrity (as discussed above in the preamble).

d. Impacts on the Economy, U.S. Citizens/Taxpayers/Consumers

Comment: A research organization expressed concern that USCIS does not provide an impact assessment of the proposed permanent and expanded portability in the NPRM, stating that this prevents the public from comprehending the impact of the proposed rule on the U.S. labor market.

Response: The comment that the NPRM did not provide an impact assessment of the proposed permanent and expanded portability is inaccurate. In the NPRM, DHS provided a detailed explanation of the expected impact of the portability provision. 88 FR 65040, 65044, 65084–65089 (Sept. 20, 2023). Additionally, in this final rule DHS is has provided additional data showing the number of approved H–2B petitions and beneficiaries extending stay with and without a change in employer pursuant to the commenter's request (*see* Table 2 and Table 3, respectively).

Comment: A joint submission of former DHS senior officials stated that the economic analysis in the NPRM does not consider administrative costs of the proposed rule on U.S. workers, namely that the average wage for H–2B workers is lower than the national mean wage in several job categories. The joint submission remarked that this could make H–2B employees more favorable to employers than U.S. citizens.

Response: DHS appreciates the comment but disagrees with the commenters' conclusions regarding H–2B wages and making H–2B workers more favorable to employers than U.S. citizens. A certified TLC issued by the DOL is a necessary condition for the approval of a Form I–129 petition for H–2B workers. The TLC certifies that the employer has already attested and demonstrated that a qualified U.S. worker was not available to fill the petitioning H–2B employer's job opportunity and that the H–2B worker's employment in said job will not adversely affect the wages and working conditions of similarly employed workers in the United States. *See* INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(5)(ii), (h)(6)(iii)(A), and (h)(6)(v).

K. Out of Scope

DHS received numerous comments that were unrelated to the proposed revisions in the NPRM. Many of these comments would require Congressional action or additional regulatory action by DHS that was not proposed in the NPRM. Other comments suggested revisions within the purview of DOL or other Federal, State, or local agencies.

Although DHS has summarized the comments it received below (and in some cases, noted them above), DHS is not providing substantive responses to those comments as they are beyond the scope of this rulemaking. Comments from the public outside the scope of this rulemaking concerned the following issues:

- Comments specifically regarding DOL's rulemaking for H–2A workers, or comments specifically directed to DOL asking them to undertake certain actions;
- Suggestions related to H–2 wages, such as increasing H–2 wages or that farm workers should receive 8 hours of pay for a 4-hour workday;
- Comments to improve or expand the functionality of DOL's website, SeasonalJobs.dol.gov, or another similar resource to facilitate H–2 workers seeking new jobs;
- Comments asking DHS to engage in interagency efforts with DOJ, the Equal Employment Opportunity Commission, and the Department of Housing and Urban Development, in addressing discriminatory recruitment, labor trafficking, retaliation, and substandard housing;
- Comments to improve DOS's visa process;
- A suggestion that DOL allow certifications of H–2A and H–2B recurring jobs for up to 3 years, which would allow DHS to approve these workers' status for up to 3 years;
- A suggestion that DHS reduce the number of petitions an employer needs to make for a given season, including increasing the number of beneficiaries allowed per petition from 25 workers to at least 35 workers;
- Comments advocating for domestic solutions to the aging services staffing crisis, including a guest worker program for eldercare healthcare providers;
- Comments about increasing filing fees for H–2 petitions;
- Suggesting that ''employers without violations in the previous 5 years should be able to receive a 3-year labor certification rather than a single-year certification;''
- A request that DHS consider permitting for-profit, non-attorney agents who are not eligible to file a Form G–28, Notice of Entry of Appearance, to communicate with USCIS on behalf of employers if authorized to do so, and allow partial accreditation for this purpose;
- Comments about the annual statutory cap for H–2B visas;
- Comments about the exclusion of certain occupations from the H–2B program;

- General concerns with unauthorized immigration and its negative impacts on the United States;
- A request to close the U.S. southern border and force individuals who entered without authorization to work;
- A request to adjust fees based on the size or type of the employer, allocate visas based on employer and worker needs, and expand the list of eligible occupations based on market demand or worker availability;
- Requests to create a pathway to citizenship;
- Requests to create a clear path to ''legal permanent residency'' in the United States for H–2 workers;
- Suggestion to create a renewable seasonal visa;
- Comments about deferred action or parole;
- Comments about an ICE policy memorandum relating to enforcement actions in or near protected areas;
- Requests to authorize work employment for spouses of H–2 workers;
- Suggestions to make year-round work easier, including allocating a certain number of year-round temporary visas and increasing the 2-week maximum period for emergent circumstances for H–2A workers;
- Suggestions to create a way for H–2 workers to self-petition for their visas and connect directly with certified employers through a multilingual, government-hosted database of available jobs.

V. Statutory and Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

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

The Office of Management and Budget (OMB) has designated this rule a ''significant regulatory action'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094, however it is not significant under section 3(f)(1) because its annual effects on the economy do not exceed $200 million in any year of the analysis. Accordingly, OMB has reviewed this regulation.

1. Summary of Major Provisions of the Regulatory Action

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

2. Summary of Costs and Benefits of the Final Rule

This final rule will impose new direct costs on petitioners in the form of opportunity costs of time to complete and file H–2 petitions and time spent to familiarize themselves with the rule. The quantifiable costs of this rule that will impact petitioners consistently and directly are the increased opportunity cost of time to complete Form I–129 H Classification Supplement and opportunity costs of time related to the rule's portability provision. Over the 10-year period of analysis, DHS estimates the total costs of the final rule will be approximately $16,905,113 to $22,607,100 (undiscounted). DHS estimates the annualized costs of this final rule will range from $1,825,104 to $2,438,679 at a 3-percent discount rate and $2,014,389 to $2,686,606 at a 7-percent discount rate. In addition, DHS expects the rule will result in transfers from consumers to a limited number of H–2A and H–2B workers who may choose to supply additional labor (consumers pay for the goods made available by the marginal labor provided). The total annualized transfer amounts are estimated to be $2,918,958 in additional earnings at the 3-percent and 7-percent discount rate and related tax transfers of $337,122 ($168,561 from these workers + $168,561 from employers). Fees paid for Form I–129 and premium processing as a result of the final rule's portability provision constitute a transfer of $884,180 from petitioners of porting workers to USCIS (3- and 7-percent annualized equivalent).

Certain petitioners may also incur other costs that are difficult to quantify. For example, certain petitioners may incur additional opportunity costs of time should they be selected for a compliance review or a site visit. Other petitioners may face stricter consequences for charging prohibited fees, and/or may opt to transport and house H–2A beneficiaries earlier than they would have otherwise based on the proposed extension of the pre-employment grace period from 7 to 10 days. In general, petitioners that are found to be noncompliant with the provisions of the rule or other existing authorities (for example, H–2 program violators subject to mandatory and discretionary grounds for denial) may incur costs related to lost sales, productivity, or profits as well as additional opportunity costs of time spent attempting to comply with the rule. Moreover, USCIS may incur increased opportunity costs of time for adjudicators to review information regarding debarment and other past violation determinations more closely, issue RFEs or NOIDs, and for related computer system updates.

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

extended grace periods, the permanent ability to port, the clarification that employers who employ porting workers must continue to abide by all H–2 requirements regarding worker benefits and protections, and the elimination of the interrupted stay provisions and instead reducing the period of absence out of the country to reset the 3-year maximum period of stay. The Federal Government will also enjoy benefits, mainly through bolstering existing program integrity activities and providing a greater ability for USCIS to deny or revoke petitions for issues related to program compliance. Table 4 provides a more detailed summary of the final provisions and their impacts.

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Table 4: Summary of Provisions and Impacts

Provision	Purpose of Provision	Expected Impact of the Provision
8 CFR 214.2(h)(5)(vi)(A) and 8 CFR 214.2(h)(6)(i)(F)	DHS is adding stronger language requiring petitioners or employers to both consent to and fully comply with any USCIS audit, investigation, or other program integrity activity and clarify USCIS' authority to deny/revoke a petition if unable to verify information related to the petition, including due to lack of cooperation from the petitioner or employer during a site visit or other compliance review.	Costs: • Cooperation during a site visit or compliance review may result in opportunity costs of time for petitioners to provide information to USCIS during these compliance reviews and inspections. On average, USCIS site visits last 1.7 hours, which is a reasonable estimate for the marginal time that a petitioner may need to spend in order to comply with a site visit. • Employers that do not cooperate will face denial or revocation of their petition(s), which could result in costs to those businesses. Benefits: • USCIS will have clearer authority to deny or revoke a petition if unable to verify information related to the petition. The effectiveness of existing USCIS program integrity activities will be improved through increased cooperation from employers. More effective program integrity activities may benefit domestic workers, compliant petitioners, and H-2 workers.
8 CFR 214.2(h)(20)	DHS is providing H-2A and H-2B workers with "whistleblower protection" comparable to the protection currently offered to H-1B workers.	Costs: Employers may face increased RFEs, denials, or other actions on their H-2 petitions, or other program integrity mechanisms available under this rule or existing authorities, as a result of H-2 workers' cooperation in program integrity activity due to whistleblower protections. Such actions may result in potential costs such as lost productivity and profits to employers whose noncompliance with the program is revealed by whistleblowers. Benefits: • Such protections may afford workers the ability to expose issues that harm workers or are not in line with the intent of the H-2 programs while also offering protection to such workers (therefore potentially improving overall working conditions for both U.S. and noncitizen workers), but the extent to which this would occur is unknown.
8 CFR 214.2(h)(5)(xi)(A), 8 CFR 214.2(h)(5)(xi)(C),	DHS is significantly revising the provisions relating to prohibited fees to strengthen the existing	Costs: • Enhanced consequences for petitioners who charge prohibited fees could lead to increased

8 CFR 214.2(h)(6)(i)(B), 8 CFR 214.2(h)(6)(i)(C), and 8 CFR 214.2(h)(6)(i)(D)	prohibition on, and consequences for, charging certain fees to H-2A and H-2B workers, including new bases for denial for some H-2 petitions.	financial losses and extended ineligibility from participating in H-2 programs. Benefits: • Possibly increase compliance with provisions regarding prohibited fees and thus reduce the occurrence and burden of prohibited fees on H-2 beneficiaries. • More effective application of provisions regarding prohibited fees benefits domestic workers, compliant petitioners, and H-2 beneficiaries.
8 CFR 214.2(h)(10)(iv)	DHS is instituting certain mandatory and discretionary grounds for denial of an H-2A or H-2B petition.	Costs: • USCIS adjudicators may require additional time associated with reviewing information regarding debarment and other past violation determinations more closely, issuing RFEs or NOIDs, and conducting the discretionary analysis for relevant petitions. • The expansion of violation determinations that could be considered during adjudication, as well as the way debarments and other violation determinations would be tracked, would require some computer system updates resulting in costs to USCIS. • Expanding the grounds for denial could lead to increased financial losses and extended ineligibility from participating in H-2 programs for affected petitioners. Benefits: • Expected to increase compliance with H-2 program requirements, thereby increasing protection of H-2 workers directly and indirectly benefiting domestic workers and compliant petitioners.
8 CFR 214.2(h)(2)(ii) and (iii), 8 CFR 214.2(h)(5)(i)(F), and 8 CFR 214.2(h)(6)(i)(E)	Eliminate the lists of countries eligible to participate in the H-2 programs.	Costs*: • None expected. Benefits: • Employers and the Federal Government will benefit from the simplification of Form I-129 adjudications by eliminating the "national interest" portion of the adjudication that USCIS is currently required to conduct for beneficiaries from countries that are not on the lists. • Remove petitioner burden to provide evidence for beneficiaries from countries not on the lists. • Petitioners may have increased access to workers potentially available to the H-2 programs. • Free up agency resources currently devoted to developing and publishing the eligible country lists in the *Federal Register* every year.
8 CFR 214.2(h)(5)(viii)(B) and 8 CFR 214.2(h)(6)(vii)(A)	Change grace periods such that they will be the same for both H-2A and H-2B Programs. Create a 60-day grace period following any H-2A or H-2B	Costs**: • H-2A employers may face additional costs such as for housing, but employers likely would weigh those costs against the benefit of providing employees with additional time to prepare for the start of work.

8 CFR 214.2(h)(11)(iv) and 8 CFR 214.2(h)(13)(i)(C)	revocation or cessation of employment during which the worker will not be considered to have failed to maintain nonimmigrant status and will not accrue any unlawful presence solely on the basis of the revocation or cessation.	Benefits: • Provides employees (and their employers) with extra time to prepare for the start of work. Provides clarity for adjudicators and makes timeframes consistent for beneficiaries and petitioners. • Provides workers additional time to seek other employment or depart from the United States if their employer faces a revocation or if they cease employment.
8 CFR 214.2(h)(11)(iv)	Clarify responsibility of H-2A employers for reasonable costs of return transportation for beneficiaries following a petition revocation.	Costs: • None expected since H-2A petitioning employers are already generally liable for the return transportation costs of H-2A workers. Benefits: • Beneficiaries will benefit in the event that clarified employer responsibility decreases the incidence of workers having to pay their own return travel costs in the event of a petition revocation.
8 CFR 214.2(h)(16)(i)	Clarify that H-2 workers may take certain steps toward becoming a lawful permanent resident of the United States while still maintaining lawful nonimmigrant status.	Costs: • None expected. Benefits: • DHS expects this to enable some H-2 workers who have otherwise been dissuaded to take certain steps towards becoming a lawful permanent residence with the ability to do so without concern over becoming ineligible for H-2 status based solely on taking these steps.
8 CFR 214.2(h)(5)(viii)(C), 8 CFR 214.2(h)(6)(vii), and 8 CFR 214.2(h)(13)(i)(B)	Eliminate the "interrupted stay" calculation and instead reduces the period of absence to reset an individual's 3-year period of stay.	Costs: • Workers in active H-2 status considering making trips abroad for periods of fewer than 60 days but more than 45 days, may be disincentivized to make such trips. Benefits: • Simplifies and reduces the burden to calculate beneficiary absences for petitioners, beneficiaries, and adjudicators. • May reduce the number of RFEs related to 3-year periods of stay. Transfers: • As a result of a small number of H-2 workers at the 3-year maximum stay responding to the shorter absence requirement by working 30 additional days, DHS estimates upper bound annual transfer payment of $2,918,958 in additional earnings from consumers to H-2 workers and $337,122 in tax transfers from these workers and their employers to tax programs (Medicare and Social Security).
8 CFR 214.2(h)(2)(i)(D), 8 CFR 214.2(h)(2)(i)(I), and 8 CFR 274a.12(b)(21)	Make portability permanent for H-2B workers and remove the requirement that H-2A workers can only port to an E-Verify employer.	Costs: • The total estimated annual opportunity cost of time to file Form I-129 by human resource specialists is approximately $42,186. The total estimated annual opportunity cost of time to file

		Form I-129 and Form G-28 will range from approximately $93,628 if filed by in-house lawyers to approximately $161,434 if filed by outsourced lawyers. • The total estimated annual costs associated with filing Form I-907 if it is filed with Form I-129 is $4,728 if filed by human resource specialists. The total estimated annual costs associated with filing Form I-907 will range from approximately $9,006 if filed by an in-house lawyer to approximately $15,527 if filed by an outsourced lawyer. • The total estimated annual costs associated with the portability provision ranges from $144,636 to $216,633, depending on the filer. • DHS may incur some additional adjudication costs as more petitioners will likely file Form I-129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form. Benefits: • Enabling H-2 workers present in the United States to port to a new petitioning employer affords these workers agency of choice at an earlier moment in time consistent with other portability regulations and more similar to other workers in the labor force. • Replacing the E-Verify requirement for employers wishing to hire porting H-2A workers with strengthened site visit authority and other provisions that maintain program integrity will aid porting beneficiaries in finding petitioners without first needing to confirm if that employer is in good standing in E-Verify. Although this change impacts an unknown portion of new petitions for porting H-2A beneficiaries, no reductions in E-Verify enrollment are anticipated. • An H-2 worker with an employer that is not complying with H-2 program requirements will have additional flexibility in porting to another employer's certified position. Transfers: • Annual undiscounted transfers of $884,180 from filing fees for Form I-129 combined with Form I-907 from petitioners to USCIS.
8 CFR 214.2(h)(2)(i)(I)(*3*)	DHS is clarifying that a beneficiary of an H-2 portability petition is considered to have been in a period of authorized stay during the pendency of the petition and that the petitioner must still abide by all H-2 program requirements.	Costs: • None expected. Benefits: • Provides H-2 workers with requisite protections and benefits as codified in the rule in the event that a porting provision is withdrawn or denied.
Cumulative Impacts of Proposed Regulatory Changes		

DHS is making changes to the Form I-129, to effectuate the proposed regulatory changes.	Costs: • The time burden to complete and file Form I-129, H Classification Supplement, will increase by 0.23 hours as a result of the proposed changes. The estimated opportunity cost of time for each petition by type of filer will be $11.72 for an HR specialist, $26.26 for an in-house lawyer, and $45.28 for an outsourced lawyer. The estimated total annual opportunity costs of time for petitioners or their representatives to file H-2 petitions under this final rule ranges from $571,700 to $755,946.
Petitioners and/or their representatives will familiarize themselves with the rule.	Costs: • Petitioners and/or their representatives will need to read and understand the final rule at an estimated opportunity cost of time that ranges from $9,741,753 to $12,881,310, incurred during the first year of the analysis.

Source: USCIS analysis.

Notes:
* DHS notes that there were comments advising of possibly adverse costs from the removal of the eligible countries list, notably that the list provides an important incentive for other countries to cooperate with the United States, such as by accepting repatriation of their nationals who are subject to a final order of removal. DHS disagrees with those comments, as discussed above in the preamble.

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

OMB A-4 Accounting Statement ($ Millions, FY 2022) Time Period: FY 2024 through FY 2033				
Category	**Primary Estimate**	**Minimum Estimate**	**Maximum Estimate**	**Source Citation**
BENEFITS				
Monetized Benefits	N/A	N/A	N/A	Regulatory Impact Analysis ("RIA")
Annualized quantified, but unmonetized, benefits	N/A	N/A	N/A	RIA
Unquantified Benefits	Strengthened protections for workers who expose program or labor law violations, and for workers benefitting from increased grace periods; improvements to program integrity from reduced incentives for employers to collect prohibited fees and increased incentives to comply with program requirements; and increased access to workers potentially available to businesses that utilize the H-2 programs.	RIA		

	Elimination of the eligible countries lists will reduce burdens upon DHS, USCIS, and H-2 employers. DHS will focus these resources on continuing to identify human trafficking and other forms of noncompliance with the H-2 visa programs.			
COSTS ($ in Millions)				
Annualized monetized costs (7%)	$2.13	$1.83	$2.44	RIA
Annualized monetized costs (3%)	$2.35	$2.01	$2.69	
Annualized quantified, but unmonetized, costs	Increased cooperation with existing USCIS site visits that average 1.7 hours in duration. Whereas 12 percent of petitioners underestimated compliance burdens, additional costs to comply with existing program requirements may occur.	RIA		
Qualitative (unquantified) costs	Certain employers may incur costs (including, but not limited to, lost sales, productivity, or profits and additional opportunity costs of time) for failing to comply with investigative or adjudicative actions undertaken due to the rule.	RIA		
TRANSFERS ($ in Millions)				
Annualized monetized transfers: From consumers to limited number of workers supplying more labor	(3% and 7%) $2.92	N/A	N/A	RIA
Annualized monetized transfers: From limited number of H-2 workers to taxes	(3% and 7%) $0.17	N/A	N/A	RIA
Annualized monetized transfers: From limited number of H-2 employers to taxes	(3% and 7%) $0.17	N/A	N/A	RIA
Annualized monetized transfers: Fees from petitioners to USCIS	(3% and 7%) $0.88	N/A	N/A	RIA
Miscellaneous Analyses/Category	**Effects**	**Source Citation**		
Effects on State, local, or Tribal governments	None	RIA		
Effects on small businesses	None	RIA		

Effects on wages	None	None
Effects on growth	None	None

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Furthermore, a limited number of changes have been made to the final rule relative to the NPRM. First, the final rule has been updated to reflect the publication of the USCIS Fee Rule.[124] Second, the final rule has been updated to reflect the publication of the most recent H–2B Supplemental Cap Temporary Final Rule.[125] Both updates affected the final rule's costs and transfers due to changes to the analytical baseline depicting the world absent the impacts of this rule rather than policy changes from the NPRM. Additionally, some small methodological changes were made to the calculation for the number of marginal Form I–129 filings due to the rule's portability provision.

3. Summary of Comments Related to the Regulatory Impact Analysis and Associated Responses

DHS requested comments from the public on several topics discussed in the NPRM. Several of those comments discussed issues related to the regulatory impact analysis and the economic impacts of the rule. These comments, and their responses, are discussed at length in the preamble but, in the interest of transparency, are also discussed here.

a. Impacts on the Economy, U.S. Citizens/Taxpayers/Consumers

Comment: A research organization expressed concern that USCIS does not provide an impact assessment of the proposed permanent and expanded portability in the NPRM and that, in failing to do so, USCIS prevents the public from comprehending the impact of the proposed rule on the U.S. labor market.

Response: The comment that the NPRM did not provide an impact assessment of the proposed permanent and expanded portability is inaccurate. In the NPRM, DHS provided a detailed explanation of the expected impact of the portability provision. 88 FR 65044, 65084–65089 (Sept. 20, 2023). Additionally, in this final rule DHS has provided additional historical data showing the number of approved H–2B petitions and beneficiaries extending stay with and without a change in employer (*see* Table 2 and Table 3, respectively) pursuant to the commenter's request.

Comment: A joint submission of former DHS senior officials stated that the economic analysis in the NPRM does not consider administrative costs of the proposed rule on U.S. workers, namely that the average wage for H–2B workers is lower than the national mean wage in several job categories. The joint submission remarked that this could make H–2B employees more favorable to employers than U.S. citizens and therefore could have negative impacts on the domestic labor force.

Response: DHS appreciates the comment but disagrees with the commenter's conclusions regarding H–2B wages and making H–2B workers more attractive relative to the domestic labor force. A certified TLC is a necessary condition for the approval for a Form I–129 for H–2B workers and, as such, any prospective H–2B employer has legally attested that they have already attempted to hire domestic labor and that any H–2B beneficiaries will not adversely impact wages and working conditions of similar workers already in the United States.[126]

Comment: A research organization expressed concern that the NPRM does not discuss important aspects of the H–2B program, including extensions of stay, and therefore does not properly address the ''true'' size of the program. The commenter discussed concerns regarding publicly available data and that the program has grown beyond its statutorily mandated parameters.

Response: DHS appreciates the comment but notes that much of the comment's substance focuses on aspects of the H–2 program that would not be affected by the rule and therefore should not be considered as an impact of the rule. DHS provided an in-depth analysis regarding the annual impacts of the final rule's portability provision. Furthermore, DHS also provided additional data in this final rule to address the commenter's concerns regarding extensions of stay (*see* Table 2 and Table 3). In summary, the Department did not receive comments related to the RIA or the rule's economic impacts that necessitated changing the population calculation methodology or analytical content of the RIA present in the NPRM.

4. Background and Purpose of the Rule

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

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

The H–2B visa classification program was designed to serve U.S. businesses that are unable to find a sufficient number of qualified U.S. workers to perform nonagricultural work of a temporary nature, which may be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.[127] For an H–2A or H–2B nonimmigrant worker to be admitted into the United States under one of these nonimmigrant classifications, the hiring employer is required to: (1) obtain a TLC from DOL (or, in the case of H–2B employment on Guam, from the Governor of Guam); and (2) file Form I–129, Petition for a Nonimmigrant Worker, with DHS. The temporary nature of the services or labor described on the approved TLC is subject to DHS

[124] *See* ''U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements; Final Rule,'' 89 FR 6194 (31 Jan. 2024).

[125] *See* ''Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2024 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers; Temporary Final Rule,'' 88 FR 80394 (17 Nov. 2023).

[126] *See* 20 CFR 655.1(a); *see also* INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(5)(i)(A) and (ii), (h)(6)(iii)(A), and (h)(6)(v).

[127] *See* 8 CFR 214.2(h)(6)(ii).

review during adjudication of Form I–129.[128]

For the H–2B program there is a statutory cap of 66,000 visas allocated per fiscal year, with up to 33,000 allocated in each half of a fiscal year, for the number of nonimmigrants who may be granted H–2B nonimmigrant status.[129] [130] Any unused numbers from the first half of the fiscal year will be available for employers seeking to hire H–2B workers during the second half of the fiscal year. However, any unused H–2B numbers from one fiscal year do not carry over into the next and will therefore not be made available.[131]

5. Population

The final rule will impact petitioners (employers) that file Form I–129 seeking to bring foreign nationals (beneficiaries or workers) to the United States to fill temporary agricultural and nonagricultural jobs through the H–2A and H–2B visa programs, respectively. This rule also will have additional impacts on employers and workers presently in the United States under the H–2A and H–2B programs by permanently providing ''portability'' to all H–2A and H–2B workers. Portability, for purposes of this proposed rule, is the ability to begin new qualifying employment upon the filing of a nonfrivolous petition rather than upon petition approval. Workers may transfer, or ''port,'' to a qualifying new job offer that is in the same nonimmigrant classification that the worker currently holds. Porting, as described in this final rule, does not include transferring from one H-visa classification to another such as, for example, transferring from a H–2A nonimmigrant status to an H–2B nonimmigrant status, or vice versa. The new job offer may be through the same employer that filed the petition or a different employer after an H–2B petition is filed. This provision will apply to all H–2A and H–2B workers on a permanent basis, whereas currently portability applies to only certain H–2A workers and on a time-limited basis to all H–2B workers.[132] Portability allows H–2A and H–2B workers to continue to earn wages and gaining employers to continue obtaining necessary workers. Table 5 and Table 6 present the total populations this final rule would impact. For provisions impacting a subset of these populations, the analysis provides separate population totals, when possible, for more specific analysis.

Table 5: Total H-2A Petitions Received Using Form I-129 for Total Beneficiaries with Total Approved H-2A Petitions and Beneficiaries, FY 2013 through FY 2022.

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

Source: USCIS Office of Policy and Strategy -- C3, Electronic Immigration System (ELIS) USCIS Data System as of Oct. 18, 2022.

As shown in Table 5, the number of Form I–129 H–2A petitions increased from 7,332 in FY 2013 to 24,370 in FY 2022 while approved petitions increased from 7,280 in FY 2013 to 23,704 in FY 2022.[133] The number of beneficiaries also increased over this period from 105,095 to 415,229 with approved beneficiaries increasing from 104,487 to 396,255. Note that petitioners can petition for multiple beneficiaries on one petition, hence the much larger number of beneficiaries compared to petitions received and approved. On average, 13,722 H–2A petitions were received for an average 240,853 beneficiaries and 13,504 H–2A petitions

[128] Revised effective January 18, 2009 (73 FR 78104).

[129] *See* INA sec. 214(g)(1)(B), (g)(10), 8 U.S.C. 1184(g)(1)(B), (g)(10).

[130] In addition to the statutorily available 66,000 H–2B visas per fiscal year, DHS and DOL have also generally provided supplemental visas when granted that authority by Congress. *See, e.g.,* 88 FR 80394.

[131] A TLC approved by DOL must accompany an H–2B petition. The employment start date stated on the petition generally must match the start date listed on the TLC. *See* 8 CFR 214.2(h)(6)(iv)(A) and (D).

[132] *See* ''Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,'' 87 FR 76816 (Dec. 15, 2022) (providing temporary H–2B portability to petitioners and H–2B nonimmigrant workers initiating employment through the end of January 24, 2024).

[133] DHS notes that the number of filed H–2A petitions has grown by a compound average growth rate of approximately 12.76 percent between FY2013 and FY2022. DHS acknowledges that potential costs may be underestimated in this analysis if historical growth rates continue.

were approved for an annual average of 234,865 beneficiaries.

Table 6: Total H-2B Petitions Received Using Form I-129 for Total Beneficiaries with Total Approved H-2B Petitions and Beneficiaries, FY 2013 through FY 2022.				
Fiscal Year	**Total Petitions Received**	**Total Number of Beneficiaries**	**Total Petitions Approved**	**Total Beneficiaries Approved[134]**
2013	4,720	81,220	4,546	78,532
2014	5,314	91,150	5,132	87,859
2015	5,412	93,160	5,165	90,031
2016	6,527	114,181	5,946	105,213
2017	6,112	110,794	5,860	105,839
2018	6,148	113,850	5,941	108,380
2019	7,461	128,122	7,337	125,773
2020	5,422	95,826	5,269	93,345
2021	9,160	160,790	8,937	156,528
2022	12,392	185,700	12,153	182,037
Total	**68,668**	**1,174,793**	**66,286**	**1,133,537**
10-Year Average	**6,867**	**117,479**	**6,629**	**113,354**
Source: USCIS, Office of Performance and Quality -- SAS PME C3 Consolidated, as of Sept. 09, 2023, TRK 12921				

Table 6 shows that the number of Form I–129 H–2B petitions and number of beneficiaries increased from FY 2013 through FY 2019, declined in FY 2020 due to labor market conditions during COVID–19, and then increased again in FY 2021 and FY 2022.[135] As previously discussed, the total number of H–2B visas is constrained in recent fiscal years by statutory numerical limits, or ''caps,'' with some exceptions, on the total number of noncitizens who may be issued an initial H–2B visa or otherwise granted H–2B status during each fiscal year.[136] Whereas the exact statutory limits (including any supplemental limits) on H–2B visas are unknown for FY 2025 and beyond, the receipts and approvals seen in FY 2022 are assumed to be a reasonable estimate of future H–2B petitions and beneficiaries.

As these tables show, U.S. employers and foreign temporary workers have been increasingly interested in the H–2A and H–2B programs from FY 2013 to FY 2022 as evidenced by an increasing number of petitions filed for an increasing number of beneficiaries. However, the H–2B program remains constrained by the statutory cap of 66,000 visas allocated per fiscal year, provided for under INA sec. 214(g)(1)(B), 8 U.S.C. 1184(g)(1)(B), though Congress, through time-limited legislation, has allowed, to date, supplemental allocations beyond that 66,000 visa cap.[137] The supplements allocate additional visas for nonimmigrants who may be granted H–2B nonimmigrant status in each half of a fiscal year.[138]

6. Cost-Benefit Analysis

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

a. Integrity and Worker Protections

To improve the integrity of the H–2 programs, the final rule will: (1) provide clearer requirements for USCIS compliance reviews and inspections; (2)

[134] This number includes workers who are exempt from the H–2B cap and those who were approved under any applicable temporary supplemental cap. This number reflects the number of H–2B workers who are in petitions that have been approved by DHS (including ones that have not yet been issued an H–2B visa or otherwise acquired H–2B status).

[135] Although Congress provided the Secretary of Homeland Security with the discretionary authority to increase the H–2B cap in FY 2020, the Secretary did not exercise that authority. *See* 86 FR 28202 (May 25, 2021).

[136] On November 17, 2023, DHS made available to employers an additional 64,716 H–2B temporary nonagricultural worker visas for fiscal year 2024. *See* 88 FR 80394.

[137] *See* section 543 of Division F of the Consolidated Appropriations Act, 2017, Public Law 115–31; section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115–141; section 105 of Division H of the Consolidated Appropriations Act, 2019, Public Law 116–6; section 105 of Division I of the Further Consolidated Appropriations Act, 2020, Public Law 116–94; section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116–260 (FY 2021 Omnibus); section 105 of Division O of the Consolidated Appropriations Act, 2021, FY 2021 Omnibus, sections 101 and 106(3) of Division A of Public Law 117–43, Continuing Appropriations Act, 2022, and section 101 of Division A of Public Law 117–70, Further Continuing Appropriations Act, 2022; section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117–103, and section 101(6) of Division A of Public Law 117–180, Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, and section 303 of Division O, Consolidated Appropriations Act, 2023, Public Law 117–328; Public Law 118–15, Continuing Appropriations Act, 2024 and Other Extensions Act, Division A, sections 101(6) and 106 (extending into 2024 DHS funding and other authorities, including the authority to issue supplemental H–2B visas that was provided under title III of Division O of Pub. L. 117–328, through November 17, 2023).

[138] *See* INA sec. 214(g)(1)(B), (g)(10), 8 U.S.C. 1184(g)(1)(B), (g)(10).

provide H–2A and H–2B workers with ''whistleblower protections;'' (3) include provisions relating to prohibited fees; and (4) institute certain mandatory and discretionary grounds for denial of an H–2A or H–2B petition. We address each of these provisions in turn below.

(1) USCIS Compliance Reviews and Inspections

The final rule includes provisions that codify USCIS' authority to conduct compliance reviews and inspections within the H–2A and H–2B programs, clarify the scope of such reviews and inspections, and specify the consequences of a refusal or failure to fully cooperate with such compliance reviews and inspections. While no inspection that the USCIS FDNS conducts is mandatory, if an inspection is conducted, this provision will make the successful completion of an inspection required for a petition's approval.[139] Inspections can include site visits, telephone interviews, or correspondence (both electronic and mail).[140] This regulatory change will apply to both pre- and post-adjudication petitions, which will codify USCIS' ability to either deny or revoke petitions accordingly. This final rule will provide USCIS with a greater ability to obtain compliance from petitioners and employers. Outside of this final rulemaking, USCIS is planning to conduct future site visits for both H–2A and H–2B work sites, some of which are expected to occur in later fiscal years.

Data on H–2 program inspections are limited and generally consist of site visits. USCIS has conducted only 189 H–2A program site visits associated with fraud investigations since calendar year 2004. With respect to H–2B program inspections, USCIS conducted a limited pilot program in FY 2018 and FY 2019 in which USCIS conducted site visits and inspections at 364 (randomly selected) H–2B employment sites.[141] Of the site visits USCIS conducted, USCIS officers were unable to make contact with employers or workers over 12 percent of the time (45 instances).[142] On average, each site visit took 1.7 hours.[143] Of the limited number of site visits USCIS has conducted thus far, non-cooperation exists in at least some cases. Cooperation is crucial to USCIS' ability to verify information about employers and workers, and the overall conditions of employment.

This final rule will provide a clear disincentive for petitioners who do not cooperate with compliance reviews and inspections while giving USCIS a greater ability to access and confirm information about employers and workers as well as identify fraud. Employers who may be selected to participate in such inspections may incur costs related to the opportunity cost of time to provide information to USCIS instead of performing other work. As discussed above, FDNS data on previous H–2B site visits show that the average site visit takes 1.7 hours. DHS believes that, due to the rule's provisions clarifying the consequences of a refusal or failure to fully cooperate with compliance reviews and inspections, the rate of ''inconclusive'' site visits will be negligible. As such, each site visit that warrants a conclusive finding under the rule that would have warranted an ''inconclusive'' finding under the baseline scenario would therefore cause a 1.7-hour time burden to accrue to the respective petitioner due to the petitioner having to expend time cooperating that they would not have under the baseline.

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

DHS does not expect this provision to result in additional costs to the Federal Government because it will not require additional resources or time to perform compliance reviews and inspections and, at the same time, USCIS is not seeking to establish a particular number of compliance reviews and inspections to complete annually or increase the number of compliance reviews and inspections or the number of H–2 program site visits. A benefit is that USCIS will have regulations to clearly refer to its existing authority to deny or revoke a petition if unable to verify information related to the petition. Additionally, existing USCIS program integrity activities will be made more effective by additional cooperation from employers. More effective program integrity activities may benefit domestic workers, compliant petitioners, and H–2 workers.

(2) Whistleblower Protections

This final rule provides H–2A and H–2B workers with ''whistleblower protections'' comparable to the protections currently offered to H–1B workers.[144] For example, if an H–1B worker: (1) is a beneficiary of a petition seeking to extend their H–1B status or change their nonimmigrant status; (2) indicates that they faced retaliatory action from their employer because they reported a labor condition application violation; and (3) lost or failed to maintain their H–1B status related to such violation, USCIS may consider this situation to be an instance of ''extraordinary circumstances'' as defined by sections 8 CFR 214.1(c)(4) and 248.1(b). In addition, H–1B workers normally are not eligible to extend or change their status if they have lost or failed to maintain their H–1B status. However, if they can demonstrate ''extraordinary circumstances,'' USCIS may use its discretion to excuse this loss or failure to maintain H–1B status on a case-by-case basis.

DHS does not currently have specific data related to whistleblower protections for the H–1B program nor does it have data on other similar types of reports on worker issues from the H–2 populations.[145] Therefore, it is possible that whistleblower protections may afford H–2 workers the ability to expose issues that harm beneficiaries or are not congruent with the intent of H–2 employment. This impact could, potentially, improve working conditions but the extent to which H–2 workers would cooperate in program integrity activities as a direct result of prohibitions on specified employer

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

[140] The expected time burden to comply with audits conducted by DHS and OFLC is 12 hours. The number in hours for audits was provided by USCIS, Service Center Operations. *See* 87 FR 76816 (Dec. 15, 2022).

[141] The H–2B petitions were randomly selected so they do not represent a population that data led USCIS to believe were more vulnerable to fraud or abuse.

[142] Site visits can be categorized as ''inconclusive'' for a variety of reasons including, but not limited to, noncooperation or a lack of personnel (petitioner, beneficiary, or other relevant personnel) present at the respective site.

[143] Data from USCIS FDNS, Reports and Analysis Branch.

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

[145] WHD prohibits retaliation and publishes fact sheets and other resources online. *See, e.g.,* WHD, ''Retaliation,'' *https://www.dol.gov/agencies/whd/retaliation* (last visited Jun. 17, 2024); WHD, ''Fact Sheet #77D: Retaliation Prohibited under the H–2A Temporary Visa Program'' (Apr. 2012), *https://www.dol.gov/agencies/whd/fact-sheets/77d-h2a-prohibiting-retaliation;* WHD, ''Fact Sheet #78H: Retaliation Prohibited under the H–2B Temporary Visa Program,'' *https://www.dol.gov/agencies/whd/fact-sheets/78h-h2b-retaliation-prohibited* (last visited Jun. 17, 2024).

retaliations is unknown. It is also possible that employers may face increased RFEs, denials, or other actions on their H–2 petitions, or other program integrity mechanisms available under this rule or existing authorities, as a result of H–2 workers' cooperation in program integrity activity due to whistleblower protections. Such actions may result in potential costs such as lost productivity and profits to employers whose noncompliance with the program is revealed by whistleblowers.

(3) Prohibited Fees

The final rule includes provisions relating to prohibited fees that strengthen the existing prohibitions on, and consequences for, charging certain fees to H–2A and H–2B workers, including new grounds for denial for some H–2 petitions. The economic impacts of these changes are difficult to assess because USCIS currently does not have the means to track or identify petitions associated with the payment of prohibited fees. Prohibited fees are paid by a worker and include, but are not limited to, withholding or deducting workers' wages; directly or indirectly paying a recruiter, employer, agent, or anyone else in the recruitment chain agent; or paying for other work-related expenses the employer is required by statute or regulation to cover.

USCIS generally has no direct interaction with beneficiaries, so it currently depends in significant part on findings by DOS consulates to determine if prohibited fees have been paid, usually in relation to applicant interviews or investigations. For example, the DOS Office of Fraud Prevention, in collaboration with several consulates in Mexico, confirmed they do not have data on the average number of prohibited fees charged nor the amount paid.[146] A consulate in Mexico shared that during visa interviews beneficiaries may disclose the payment of prohibited fees, but typically these admissions are for fees paid to previous facilitators or employers from returning applicants who are going to work for a new employer.[147] This is likely due to disincentives to admitting to the payment of fees for current petitions for fear of losing the proffered job opportunity in the United States.[148] DOS assumes it only receives reports from a small fraction of the workers who pay prohibited fees because they still are able to obtain work and make more money in the United States than they would in Mexico regardless of whether they pay fees or not leading some workers to choose not to report the prohibited fees.[149] Further, DOS also noted that workers usually only report paying prohibited fees when fees are increased, when they do not have the money to pay the fee in a current year, or they are excluded from being listed on a petition.

Moreover, DOS noted that prohibited fees are commonplace and pervasive in the H–2 program, but that this issue largely goes unreported.[150] Consular employees noted, in their experience, that fees ordinarily range from $800 to $1,000 for a beneficiary to be included on a petition but that non-monetary transfers may also occur.[151]

Data on the prevalence of prohibited fees are very limited. However, according to one non-profit organization that conducted a survey, about 58 percent of H–2 workers reported paying a prohibited fee.[152] Since data on the prevalence of prohibited fees are very limited, we use the 58 percent estimate as a primary estimate of beneficiaries that may be subject to some form of prohibited fee. Using this estimated percentage, we can multiply by the total number of FY 2022 beneficiaries to consider the potential population impacted by prohibited fees.[153] If we assume 58 percent of beneficiaries pay an average fee of $900,[154] we estimate that prohibited fees (including those incurred both within and outside of the United States) may have cost H–2A workers around $216.7 million and H–2B workers around $96.9 million in FY 2022.[155] If prohibited fees are a prevalent problem on such an economically significant scale, it may not be reasonable to assume that this rule would stop all fees paid by H–2 workers. However, for beneficiaries who currently pay prohibited fees or could pay them in the future, this final rule provision seeks to minimize the occurrence and burden of prohibited fees on H–2 beneficiaries.

It is difficult to estimate the specific impacts that this regulatory change will have, but DHS expects that enhanced consequences for petitioners would act as a deterrent to charge or collect prohibited fees from H–2 workers. In addition, the harsher consequences for employers charging prohibited fees could, in conjunction with whistleblower protections that are to be implemented with this rule, reduce disincentives for workers to report that prohibited fees had been charged. However, DHS is not able to estimate whether and to what extent those disincentives are expected to be reduced. Consequently, under this final rule, there will be additional unquantifiable and non-monetizable reductions in indenture and harms from other more serious abuses such as those discussed in section III, Background. Furthermore, the more effective and consistent application of provisions regarding prohibited fees will benefit domestic workers, compliant petitioners, and H–2 beneficiaries by reducing the ability of noncompliant firms to abuse the H–2 programs.

(4) Mandatory and Discretionary Grounds for Denial

As another integrity measure and deterrent for petitioners that have been found to have committed labor law violations or abused the H–2 programs, DHS will institute certain mandatory and discretionary grounds for denial of an H–2A or H–2B petition. The impacts of these provisions are targeted at H–2 petitioners that have committed serious violations or have otherwise not complied with H–2 program requirements.

To understand the baseline, DHS has data on current DOL debarments.[156] DHS relies on debarment data shared by DOL to determine the eligibility of certain H–2 petitions. As of December 19, 2022, there were 76 active debarments for both the H–2A and H–2B programs. Historically, from FY 2013 through FY 2022, USCIS has tracked a total of 326 recorded debarments for a company, individual, or agent as provided by DOL. USCIS regularly performs additional research to confirm

[146] Information from email discussions. *See* DOS Emails Re_Prohibited fees (H–2) (Sept. 19, 2022).

[147] *Id.*

[148] Workers have a disincentive to report prohibited fees since regulations stipulate that a visa should be denied to those admitting to paying these fees.

[149] Information from email discussions. *See* DOS Emails Re_Prohibited fees (H–2) (Sept. 19, 2022).

[150] *Id.*

[151] In additional to the non-exhaustive list of prohibited fees, there are also other types of non-fee payments, including favors, meals, or even the transfer of livestock.

[152] *See* Centro de los Derechos del Migrante, ''Recruitment Revealed: Fundamental Flaws in the H–2 Temporary Worker Program and Recommendations for Change,'' *https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf* (last accessed Mar. 31, 2023).

[153] FY 2022 Total H–2A beneficiaries 415,229×0.58=240,833 (rounded); FY 2022 Total H–2B beneficiaries 185,700×0.58=107,706 (rounded).

[154] We take an average of the range provided by the consular office in Mexico: ($800+$1000)/2=$900.

[155] Calculations: Half of FY 2022 H–2A beneficiaries 240,833×$900 fee = $216.7 million (rounded); Half of FY 2022 H–2B beneficiaries 107,706×$900 fee=$96.9 million (rounded).

[156] Please note that impacts from this provision are based on debarment data from DOL. DHS cannot accurately estimate the impact of other mandatory and discretionary denials due to a lack of data, as explained in this section.

debarment and petitioner information to assist in adjudications. For the period of debarment, a petition covered by the debarment cannot be approved where the debarred organization—or its successor-in-interest in some limited circumstances, whether or not having the same name as that listed—is the petitioner or employer.

Costs under this provision of the final rule will be borne by such petitioners or their successor in interest through denials that preclude participation in the H–2 program during the debarment period which can range between 1 to 5 years. More petitioners may face financial losses as a result of these new grounds for denial because they may lose access to labor for extended periods. While DHS expects program participants to comply with program requirements, however, those who do not could experience significant impacts due to this final rule such as experiencing too few workers, loss of revenue, and possibly going out of business.

DHS also notes that the final rule encompasses more than debarments as grounds for mandatory or discretionary denials, including but not limited to USCIS findings of fraud or willful misrepresentation, violation(s) under section 274(a) of the Act, the revocation of an approved TLC, and final revocations by USCIS on the basis of a variety of prohibited behaviors. However, DHS does not have data on the total population of employers that these mandatory and discretionary denial provisions would affect at this granular of a level, or what the impact of potential economic losses could be given the heterogeneity of H–2 employers and the specific fact-patterns in each instance where new mandatory or discretionary grounds for denial could apply.[157] Monetized impacts therefore cannot be estimated. Although monetized impacts cannot be estimated, DHS expects these provisions to provide various benefits. For instance, DHS expects that the final rule will hold certain petitioners more accountable for violations, including certain findings of labor law and other violations, and will result in fewer instances of worker exploitation and safer working environments for beneficiaries. As is the case with other program integrity provisions of the final rule, DHS believes that these provisions benefit H–2 workers directly and benefit domestic workers and compliant petitioners indirectly by reducing the ability of noncompliant firms to abuse the H–2 programs.

The Federal Government may experience costs associated with implementing these provisions. Specifically, USCIS adjudicators may require additional time associated with reviewing petitioner information relating to debarment by DOL (in the case of H–2A and H–2B debarments) and GDOL (in the case of H–2B debarments), and other determinations of past violations more closely (as they will now be able to consider past noncompliance in the current adjudications), issuing an RFE or NOID, and, if the violation determination is covered under the discretionary bar provision, including when debarment has concluded, conducting the discretionary analysis for relevant petitions. Additionally, the expansion of grounds for denial based on debarment as well as the need to improve the way debarments are tracked in current USCIS systems would require additional inter-agency coordination and information sharing.

b. Worker Flexibilities

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

(1) Grace Periods

DHS will provide increased flexibility for H–2 workers by extending grace periods. Workers will not experience an increase in work time due to these extended grace periods because these grace periods do not authorize employment. More specifically, this rule will provide the same 10-day grace period prior to a petition's validity period that H–2B nonimmigrants currently receive to H–2A nonimmigrants, resulting in the extension of the initial grace period of an approved H–2A petition from 1 week to 10 days. The updated initial grace period will also apply to their dependents in the H–4 visa classification. DHS does not have data on how early H–2 workers arrive in the United States prior to a petition's validity period. As a result, we do not know how many H–2B workers currently or historically arrive up to 10 days prior to their employment start date, nor do we know how many H–2A workers currently or historically arrive a full week (7 days) early. Further, the portion of the H–2A populations that may benefit from this provision is unknown. Extending the grace period prior to a petition's validity period for H–2A workers by 3 days may result in additional costs to employers, such as for housing.[158] However, since H–2A employers pay for and normally arrange transportation to the worksite, DHS assumes employers will weigh the costs of providing additional days of housing to H–2A workers against the benefit of providing their employees with additional time to prepare for the start of work. For example, it may be beneficial for an employer to provide workers additional time to adjust to a new time zone or climate. DHS will also extend the grace period following the expiration of their petition from 10 days to 30 days for H–2B nonimmigrants, subject to the 3-year maximum limitation of stay. DHS does not have data on the length of time H–2A or H–2B workers typically spend in the United States following the validity period of a petition because departures from the United States are not always tracked. Unlike the general practice regarding entries, departures are not always tracked and do not typically require an encounter with U.S. Customs and Border Protection, so it is difficult to determine when nonimmigrants leave the United States. Furthermore, DHS notes that while there is no statutory requirement for H–2B employers to provide housing, there are regulatory prohibitions against deductions from wages for the cost of housing by an H–2B employer when it is provided primarily for the benefit or convenience of the employer. See 20 CFR 655.20(b), (c); 29 CFR 531.3(d)(1); 80 FR 24042, 24063 (Apr. 29, 2015). DHS acknowledges that H–2B employers who are subject to this provision may face additional costs if they opt to keep

[157] For example, DHS possesses limited data from DOL on H–2B violators with violation findings in FY 2020 through FY 2023 as a result of the H–2B TFRs from FY 2022 through FY 2024. DOL Wage and Hour Division publishes enforcement data on several worker programs at *https://enforcedata.dol.gov/homePage.php.* This data alone cannot reliably predict how many of these employers might be subject to a discretionary denial under this rule, because DHS will apply multiple factors to consider whether to approve or deny a petition, as noted above. Furthermore, these data cannot be relied upon here to determine the possible population of violators because the parameters of the violations are more limited than the violations that could be covered under the new discretionary provision.

[158] H–2A workers must be provided housing. *See* WHD, ''H–2A: Temporary Agricultural Employment of Foreign Workers,'' *https://www.dol.gov/agencies/whd/agriculture/h2a* (last visited Jun. 17, 2024).

workers in the United States for a longer period due to the extended post-validity grace period. DHS does not have data on the population of employers that this provision would affect at this granular of a level, however, so monetized impacts cannot be estimated. Therefore, the population that may be affected by this provision is unknown due to a lack of available data. Lack of data notwithstanding, DHS does not expect any significant additional costs to accrue to employers as this final rule will extend only the H–2B grace period and, except for the limited scenario described above, H–2B employers are not required to provide housing for their workers during the time of employment or during the grace period. The extended grace period for H–2B workers will benefit the workers by providing additional time to prepare for departure or seek alternative work arrangements such as applying for an extension of stay based on a subsequent offer of employment or porting to a new employer. Additionally, this provision will align the grace periods for H–2A and H–2B workers so that they both are afforded 10 days prior to the approved validity period and 30 days following the expiration of an H–2 petition, thereby reducing confusion for potential employers and better ensuring consistency in granting workers the grace periods.

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

(2) Transportation Costs for Revoked H–2 Petitions

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

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

This final rule clarifies that H–2 workers may take certain steps toward becoming lawful permanent residents of the United States while still maintaining lawful nonimmigrant status. The population impacted by this provision can be seen in Table 7. Historical receipts data for Form I–485 (Application to Register Permanent Residence or Adjust Status) show a 5-year total of 9,748 receipts from applicants with H–2A and H–2B status. The annual average is 1,950 receipts.

Table 7: Form I-485 Receipts from Applicants with H-2A and H-2B Status, FY 2018 through FY 2022

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

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

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

(4) Portability

This final rule permanently provides portability for eligible H–2A and H–2B nonimmigrants. The population affected by this provision are nonimmigrants in H–2A and H–2B status who are present in the United States on whose behalf a nonfrivolous H–2 petition for new employment has been filed, with a request to amend or extend the H–2A or H–2B nonimmigrant's stay in the same classification they currently hold, before their period of stay expires and who have not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment. Codifying this provision in regulation for H–2 nonimmigrants will provide stability and job flexibility to the beneficiaries of approved H–2 visa petitions. This portability provision facilitates the ability of individuals to move to more favorable employment situations and/or extend employment in the United States without being tied to one position with one employer. Additionally, the final rule clarifies that H–2 employers must comply with all H–2 program requirements and responsibilities (such as worker protections) in the event that a petition for a porting worker is withdrawn or denied.

Previously, portability was available on a permanent basis to H–2A workers, but it was limited to E-Verify employers.[159] E-Verify is a DHS web-based system that allows enrolled employers to confirm the identity and eligibility of their employees to work in the United States by electronically matching information provided by employees on the Employment Eligibility Verification (Form I–9) against records available to DHS and the Social Security Administration.[160] DHS does not charge a fee for employers to participate in E-Verify and create cases to confirm the identity and employment eligibility of newly hired employees. Under this final rule, employers petitioning for a porting H–2A worker will no longer need to be enrolled in E-Verify, but will remain subject to all program requirements based on the approved TLC and the filing of the H–2 petition.

Although there is no fee to use E-Verify, this requirement could result in savings to newly enrolling employers. Employers that newly enroll in E-Verify to hire H–2 workers incur startup enrollment or program initiation costs as well as additional opportunity costs of time for users to participate in webinars and learn about and incorporate any new features and system updates that E-Verify may have every year. DHS assumes that most employers that are currently participating in E-Verify will not realize cost savings of these expenses since they previously incurred enrollment costs and will continue to participate in webinars and incorporate any new E-Verify features and system changes regardless of this final rule.[161] Additionally, DHS expects that only those employers who enroll for the explicit purpose of petitioning on behalf of a porting employee will realize a cost savings for verifying the identity and work authorization of all their newly hired employees, including any new H–2A workers as a result of this final rule. For employers currently enrolled in E-Verify that choose to hire an H–2A worker, the final rule will not result in a cost savings to such employers since they already must use E-Verify for all newly hired employees as of the date they signed the E-Verify Memorandum of Understanding (MOU).[162] Therefore, with or without the final rule, an employer already enrolled in E-Verify that chooses to hire a porting H–2A worker will continue to incur the opportunity cost of time to confirm the employment authorization of any newly hired employees.

Participating in E-Verify and remaining in good standing requires employers to enroll in the program online,[163] electronically sign the associated MOU with DHS that sets the terms and conditions for participation and create E-Verify cases for all newly hired employees. The MOU requires employers to abide by lawful hiring procedures and to ensure that no employee will be unfairly discriminated against as a result of E-Verify.[164] If an employer violates the terms of this agreement, it can be grounds for immediate termination from E-Verify.[165] Additionally, employers are required to designate and register at least one person that serves as an E-Verify administrator on their behalf.

For this analysis, DHS assumes that each employer participating in E-Verify designates one HR specialist to manage the program on its behalf. Based on the most recent Paperwork Reduction Act (PRA) Information Collection Package for E-Verify, DHS estimates the time burden for an HR specialist to undertake the tasks associated with E-Verify. DHS estimates the time burden for an HR specialist to complete the enrollment process is 2 hours 16 minutes (2.26 hours), on average, to provide basic company information, review and sign the MOU, take a new user training, and review the user guides.[166] Once enrolled in E-Verify, DHS estimates the time burden is 1 hour to users who may participate in voluntary webinars and learn about and incorporate new features and system updates to E-Verify annually.[167] This may be an overestimate in some cases as webinars are not mandatory, but we recognize that some recurring burden to users exists to remain in good standing with E-Verify.

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

According to Bureau of Labor Statistics (BLS) data, the average hourly wage rate for HR specialists is $35.13.[168] DHS accounts for worker benefits by calculating a benefits-to-wage multiplier using the most recent BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.45 and is able to estimate the full opportunity cost per E-Verify user, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement, etc.[169]

[159] While unrelated to this final rule, we note that on April 20, 2020, a TFR was published to temporarily amend its regulations to allow H–2A workers to immediately work for any new H–2A employer to mitigate the impact on the agricultural industry due to COVID–19. This TFR was effective from April 20, 2020, through August 18, 2020. *See* 85 FR 21739. Another TFR published August 20, 2020, again allowing H–2A workers to immediately work for any new H–2A employer. That TFR was effective from August 19, 2020, through August 19, 2023 and allowed employers to request the flexibilities under this TFR by filing an H–2A petition on or after August 19, 2020, and through December 17, 2020. *See* 85 FR 51304.

[160] *See* DHS, ''About E-Verify,'' *https://www.e-verify.gov/about-e-verify* (last updated Apr. 10, 2018).

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

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

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

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

[165] *See* USCIS, ''The E-Verify Memorandum of Understanding for Employers'' (June 1, 2013), *http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf.*

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

[167] *Id.*

[168] *See* BLS, Occupational Employment and Wages, May 2022, Human Resources Specialists (13–1071), *https://www.bls.gov/oes/2022/may/oes131071.htm.*

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

Therefore, DHS calculates an average hourly compensation rate of $50.94 for HR specialists.[170] Applying this average hourly compensation rate to the estimated time burden of 2.26 hours for the enrollment process, DHS estimates an average opportunity cost of time savings for a new employer to enroll in E-Verify is $115.12.[171] DHS assumes the estimated opportunity cost of time to enroll in E-Verify is a one-time cost to employers. In addition, DHS estimates an opportunity cost of time savings associated with 1 hour of each E-Verify user to attend voluntary webinars and learn about and incorporate new features and system changes for newly enrolled entities would be $50.94 annually in the years following enrollment.

Newly enrolled employers will also incur opportunity costs of time savings from not having to enter employee information into E-Verify to confirm their identity and employment authorization. DHS estimates the time burden for an HR specialist to create a case in E-Verify is 7.28 minutes (or 0.121 hours).[172] Therefore, DHS estimates the opportunity cost of time savings would be approximately $6.57 per case.[173] These employers will not be able to verify the employment eligibility information of newly hired employees against government data systems if they fail to register and use E-Verify.

Table 8 shows the number of Form I–129 H–2A petitions filed for extensions of stay due to change of employer and Form I–129 H–2A petitions filed for new employment for FY 2018 through FY 2022. The average rate of extension of stay due to change of employer compared to new employment was approximately 6.7 percent over this time period. USCIS also considered the number of beneficiaries that correspond to the Form I–129 H–2A petitions that filed extensions of stay due to a change of employer to estimate the average number of beneficiaries per petition of six. Table 8 also shows that although petitions have been increasing for extension of stay due to change of employer, the number of beneficiaries on each petition has declined from FY 2018 to FY 2022. This indicates that it may be harder for petitioners to find porting workers. One reason may be because petitioners face certain constraints such as the ability for petitioners to access workers seeking to port or a limited number of workers seeking to port.

Table 8: Number of Form I-129 H-2A Petitions and Beneficiaries Filed for Extension of Stay due to Change of Employer and Form I-129 H-2A Petitions Filed for New Employment, FY 2018 – FY 2022.

Fiscal Year	Form I-129 H-2A Petitions Filed for Extension of Stay Due to Change of Employer	Form I-129 H-2A petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings	Number of Beneficiaries Corresponding to Form I-129 H-2A Extension of Stay Petitions Filed	Average Number of Beneficiaries Per Petition Filed for Extension of Stay Due to Change of Employer
	A	B	C=A/B	D	E=D/A
2018	425	10,841	0.039	3,566	8
2019	626	12,177	0.051	4,265	7
2020	915	12,989	0.070	5,995	7
2021	1,334	15,128	0.088	7,226	5
2022	1,526	18,093	0.084	7,250	5
Total	**4,826**	**69,228**		**28,302**	
5-Year Average	**965**	**13,846**	**0.067**	**5,660**	**6**

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

[170] Calculation: $35.13 average hourly wage rate for HR specialists × 1.45 benefits-to-wage multiplier = $50.94 (rounded).

[171] Calculation: 2.26 hours for the enrollment process × $50.94 total compensation wage rate for an HR specialist = $115.12.

[172] The USCIS Office of Policy and Strategy, PRA Compliance Branch estimates the average time burdens. *See* PRA E-Verify Program (OMB Control Number 1615–0092), Mar. 30, 2021. The PRA Supporting Statement can be found at *https://www.reginfo.gov/public/do/PRAView Document?ref_nbr=202103-1615-015* under Question 12 (last accessed Apr. 4, 2023).

[173] Calculation: 0.121 hours to submit a query × $50.94 total compensation wage rate for an HR specialist = $6.57 (rounded).

DHS expects that existing H–2A petitioners will continue to participate in E-Verify and thus will not realize a cost savings due to this final rule. Employers that do not yet port H–2A workers, but do obtain TLCs from DOL, will experience a cost-savings relevant to avoiding enrollment and participation in E-Verify. However, they will not be able to verify the employment eligibility information of newly hired employees against government data systems. However, for employers that do not yet port H–2A workers and do not yet obtain TLCs, the cost-savings will be offset by their need to submit DOL's Employment and Training Administration (ETA) Form 9142A. The public reporting burden for Form ETA–9142A is estimated to average 3.63 hours per response for H–2A.[174] Depending on the filer, the cost to submit Form ETA–9142A is estimated at $184.91 for an HR specialist, $414.44 for an in-house lawyer, and $714.57 for an out-sourced lawyer.[175] Compared to the absolute minimum opportunity cost of time to enroll in, participate in an hour of training, and submit one query in E-Verify of $172.63,[176] regardless of the filer, a new H–2A porting employer needing to obtain TLCs will not experience a cost-savings in the first year following this rule.[177]

By removing the requirement for a petitioner to participate in E-Verify to benefit from portability, this provision may result in increased demand for H–2A petitioners to petition to port eligible H–2A workers. DHS expects H–2A petitioners that already hire porting H–2A beneficiaries to continue to use E-Verify in the future. However, DHS is unable to estimate the number of future employers that will opt not to enroll in E-Verify in the future as a result of this rule or how many would need to obtain TLCs. DHS does not expect any reduction in protection to the legal workforce as a result of this rule as some H–2A petitioners will continue to use E-Verify. Any new petitioners for porting H–2A workers will still be required to obtain TLCs through DOL, these H–2A employers will be subject to the site visit requirements and comply with the terms and conditions of H–2 employment set forth in this final rule and under other related regulations, and the porting worker will have already been approved to legally work in the United States as an H–2A worker.

Temporary portability for H–2B workers has been provided as recently as the FY 2025 H–2B Supplemental Cap TFR and was available under previous supplemental caps dating back to FY 2021. 89 FR 95626 (Dec. 2, 2024). However, data show that there is a longer history of extensions of stay due to changes of employer for H–2B petitions filed even in years when portability was not authorized.[178] Since it is difficult to isolate the impacts of inclusion of temporary portability provisions in the FY 2021 through FY 2025 H–2B Supplemental Cap TFRs from the extensions of stay due to changes of employer that are expected in the absence of this provision, we reproduce the FY 2025 H–2B Supplemental Cap TFR's analysis here.[179] Additionally, DHS is unclear how many additional H–2B visas Congress will allocate in future fiscal years beyond the 66,000 statutory cap for H–2B nonimmigrants.

The population affected by this provision are nonimmigrants in H–2B status who are present in the United States and the employers with valid TLCs seeking to hire H–2B workers. In the FY 2025 H–2B Supplemental Cap TFR, USCIS uses the population of 66,000 H–2B workers authorized by statute and the 64,716 additional H–2B workers authorized by the rule as a proxy for the H–2B population that could be currently present in the United States.[180] DHS uses the number of Form I–129 petitions filed for extension of stay due to change of employer relative to the number of petitions filed for new employment from FY 2011 though FY 2020. This includes the 10 years prior to the implementation of the first portability provision in an H–2B Supplemental Cap TFR. Using these data, we estimate the baseline rate and compare it to the average rate from FY 2011 through FY 2020 (Table 9). We find that the average rate of extension of stay due to change of employer compared to new employment from FY 2011 through FY 2020 is approximately 10.5 percent.

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

[175] Calculations: HR specialist: $50.94 hourly wage × 3.63 hours = $184.91 (rounded), In-house lawyer: $114.17 hourly wage × 3.63 hours = $414.44 (rounded); Out-sourced lawyer = $196.85 hourly wage × 3.63 hours = $714.57 (rounded).

[176] Calculation: $115.12 enrollment + $50.94 annual training + $6.57 query submission = $172.63.

[177] DHS recognizes that the opportunity cost of time would be higher than this absolute minimum because employers would have more than one employee and E-Verify participants are required to query every new employee.

[178] *Id.*

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

[180] 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 2022, USCIS approved 522 requests for change of status to H–2B, and Customs and Border Protection (CBP) processed 1,217 crossings of visa-exempt H–2B workers. *See* USCIS, ''Characteristics of H–2B Nonagricultural Temporary Workers FY2022 Report to Congress'' (Apr. 17, 2022), *https://www.uscis.gov/sites/default/files/document/data/USCIS_H2B_FY22_Characteristics_Report.pdf.* DHS assumes some of these workers, along with current workers with a valid H–2B visa under the cap, could be eligible to port under this provision. DHS does not know the exact number of H–2B workers who would be eligible to port at this time but uses the cap and supplemental cap allocations as a possible proxy for this population.

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 2011–FY 2020.

Fiscal Year	Form I-129 H-2B petitions filed for extension of stay due to change of employer	Form I-129 H-2B petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings
2011	360	3,891	9.3
2012	294	3,690	8.0
2013	264	4,123	6.4
2014	314	4,671	6.7
2015	415	4,596	9.0
2016	427	5,750	7.4
2017	556	5,298	10.5
2018	744	5,136	14.5
2019	812	6,252	13.0
2020	804	3,997	20.1
FY 2011–2020 Total	**4,990**	**47,404**	**10.5**

Source: USCIS, Office of Performance and Quality -- SAS PME C3 Consolidated, as of Sept. 09, 2023, TRK 12921

In FY 2021, the first year an H–2B Supplemental Cap TFR included a portability provision, there were 1,113 petitions filed using Form I–129 for extension of stay due to change of employer compared to 7,206 petitions filed for new employment.[181] In FY 2022, there were 1,795 petitions filed using Form I–129 for extension of stay due to change of employer compared to 9,231 petitions filed for new employment.[182] In FY 2023, there were 2,113 petitions filed using Form I–129 for extension of stay due to change of employer compared to 9,579 petitions filed for new employment.[183] Over the period when a portability provision was in place for H–2B workers, the rate of petitions filed using Form I–129 for extension of stay due to change of employer relative to new employment was 19.3 percent.[184] This is above the 10.5 percent rate of filings expected when there was no portability provision in place. We estimate that a rate of about 19.3 percent should be expected in periods with portability.

In order to estimate the number of marginal Forms I–129 filed as a result of the final rule's portability provision, DHS must first estimate the number of beneficiaries per petition. As discussed above, DHS has provided supplemental H–2B visa allocations each year since FY 2021. These supplemental allocations are based on time-limited authority granted by Congress, however, and should not be included in any prospective analysis as their existence is not certain. As such, the proper reference population for calculating the marginal impact of the portability provision is the annual statutory cap of 66,000 H–2B visas. Table 10 contains the total petitions, total beneficiaries, and beneficiaries per petition for H–2B Forms I–129 filed under the statutory cap for fiscal year 2019 through fiscal year 2023.

[181] USCIS, Office of Performance and Quality—SAS PME C3 Consolidated, as of Sep. 09, 2023, TRK 12921.

[182] *Id.*

[183] *Id.*

[184] Calculation, Step 1: 1,113 Form I–129 petitions for extension of stay due to change of employer FY 2021 + 1,795 Form I–129 petitions for extension of stay due to change of employer in FY 2022 + 2,113 Form I–129 petitions for extension of stay due to change of employer in FY 2023 = 5,021 Form I–129 petitions filed extension of stay due to change of employer in portability provision years.

Calculation, Step 2: 7,206 Form I–129 petitions filed for new employment in FY 2021 + 9,231 Form I–129 petitions filed for new employment in FY 2022 + 9,579 Form I–129 petitions filed for new employment in FY 2022 = 26,016 Form I–129 petitions filed for new employment in portability provision years.

Calculation, Step 3: 5,021 extensions of stay due to change of employment petitions ÷ 26,016 new employment petitions = 19.3 percent rate of extension of stay due to change of employment to new employment.

Table 10: Forms I-129 H-2B Receipts and Beneficiaries under Annual Statutory Cap, FY 2019- FY 2023

Fiscal Year	Total Petitions	Total Beneficiaries[185]	Beneficiaries per Petition
2019	3,130	74,384	23.76
2020	3,378	73,552	21.77
2021	3,454	73,682	21.33
2022	4,020	80,374	19.99
2023	4,154	74,364	17.9
Average	3,627	75,271	20.75

Source: USCIS, Office of Performance and Quality -- SAS PME C3 Consolidated, as of Sept. 09, 2023, TRK 12921

Using 3,627 as our estimate for the number of petitions filed using Form I–129 for H–2B new employment in FY 2024, we estimate that 381 petitions for extension of stay due to change of employer will be filed in absence of this rulemaking's portability provision.[186] With the rule's portability provision in effect, we estimate that 700 petitions will be filed using Form I–129 for extension of stay due to change of employer.[187] As a result of this provision, we estimate 319 additional petitions using Forms I–129 will be filed.[188] DHS acknowledges that any future legislation that provides a supplemental allocation of H–2B visas will necessarily increase the number of Forms I–129 filed as a result of the final rule's portability provision. As such, the estimates presented here should be interpreted as a reasonable lower bound for the impact of the final rule's portability provision.

As shown in Table 17, an average 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 146 of these petitions and an HR specialist will file the remaining 173.[189] Similarly, we estimated that about 93.57 percent of petitions using Form I–129 for H–2B beneficiaries are filed with Form I–907 to request premium processing. As a result of this portability provision, we expect that an additional 298 requests using Form I–907 will be filed.[190] We expect lawyers to file 137 requests using Forms I–907 and HR specialists to file the remaining 161 requests.[191]

Petitioners seeking to hire H–2B nonimmigrants who are currently present in the United States in lawful H–2B status will need to file Form I–129 and pay the associated fees. Additionally, if a petitioner is represented by a lawyer, the lawyer must file Form G–28; if premium processing is desired, a petitioner must file Form I–907 and pay the associated fee. We expect these actions to be performed by an HR specialist, in-house lawyer, or an outsourced lawyer. Moreover, as previously stated, we expect that about 45.84 percent of petitions using Form I–129 would be filed by an in-house or outsourced lawyer. Therefore, we expect that 146 petitions will be filed by a lawyer and the remaining 173 petitions will be filed by an HR specialist. The opportunity cost of time to file a Form I–129 H–2B petition will be approximately $243.85 for an HR specialist; and the opportunity cost of time to file a Form I–129 H–2B petition with accompanying Form G–28 will be approximately $641.29 for an in-house lawyer and $1,105.71 for an outsourced lawyer.[192] Therefore, we estimate the cost of the additional petitions filed using Form I–129 from the portability provision for HR specialists will be approximately $42,186.[193] The estimated cost of the additional petitions filed using Form I–129 accompanied by Forms G–28 from the portability provision for lawyers will be about $93,628 if filed by in-house lawyers and $161,434 if filed by outsourced lawyers.[194]

We previously stated that about 93.57 percent of Form I–129 H–2B petitions are filed with Form I–907 for premium processing. As a result of this provision, we expect that an additional 298

[185] This number includes beneficiaries who are exempt from the H–2B cap and reflects the number of H–2B workers who are in petitions that have been approved by DHS (including ones that have not yet been issued an H–2B visa or otherwise acquired H–2B status).

[186] Calculation: 3,627 Form I–129 H–2B petitions filed for new employment × 10.5 percent = 381 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, no portability provision.

[187] Calculation: 3,627 Form I–129 H–2B petitions filed for new employment × 19.3 percent = 700 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, with a portability provision.

[188] Calculation: 700 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, with a portability provision—381 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, no portability provision = 319 Form I–129 H–2B petition increase as a result of portability provision.

[189] Calculation, Lawyers: 319 additional Form I–129 due to portability provision × 45.84 percent of Form I–129 for H–2B positions filed by an attorney or accredited representative = 146 (rounded) estimated Form I–129 filed by a lawyer.

Calculation, HR specialist: 319 additional Form I–129 due to portability provision—146 estimated Form I–129 filed by a lawyer = 173 estimated Form I–129 filed by an HR specialist.

[190] Calculation: 316 Form I–129 H–2B petitions × 93.57 percent premium processing filing rate = 298 (rounded) Forms I–907.

[191] Calculation, Lawyers: 298 Forms I–907 × 45.84 percent filed by an attorney or accredited representative = 137 Forms I–907 filed by a lawyer.

Calculation, HR specialists: 298 Forms I–907—137 Forms I–907 filed by lawyer = 161 Forms I–907 filed by an HR specialist.

[192] Calculation, HR Specialist: $50.94 hourly opportunity cost of time × 4.787-hour time burden for form I–129 = $243.85 estimated cost to file a Form I–129 H–2B petition.

Calculation, In-house lawyer: $114.17 hourly opportunity cost of time × 5.617-hour time burden for form I–129 and Form G–28 = $641.29 estimated cost to file a Form I–129 H–2B petition.

Calculation, outsourced lawyer: $196.85 hourly opportunity cost of time × 5.617-hour time burden for form I–129 and Form G–28 = $1,105.71 (rounded) estimated cost to file a Form I–129 H–2B petition.

[193] Calculation, HR specialist: $243.85 estimated cost to file a Form I–129 H–2B petition × 173 petitions = $42186 (rounded).

[194] Calculation, In-house Lawyer: $641.29 estimated cost to file a Form I–129 H–2B petition and accompanying Form G–28 × 146 petitions = $93,628 (rounded).

Calculation, Outsourced Lawyer: $1,105.71 estimated cost to file a Form I–129 H–2B petition and accompanying Form G–28 × 146 petitions = $161,434 (rounded).

requests for premium processing using Form I–907 will be filed.[195] We expect 136 of those requests will be filed by a lawyer and the remaining 160 will be filed by an HR specialist.[196] The estimated opportunity cost of time to file Form I–907 will be about $18.85 for an HR specialist; and the estimated opportunity cost of time for an in-house lawyer to file Form I–907 will be approximately $42.24 and for an outsourced lawyer it will be about $72.83.[197] The estimated annual cost of filing additional requests for premium processing using Form I–907 if HR specialists file will be approximately $3,035.[198] The estimated annual cost of filing additional requests for premium processing using Form I–907 will be about $5,787 if filed by in-house lawyers, and approximately $9,978 if filed by outsourced lawyers.[199]

The estimated annual cost of this provision ranges from $144,636 to $216,633 depending on what share of the forms are filed by in-house or outsourced lawyers.[200]

The transfer payments from filing petitions using Form I–129 for an H–2B beneficiary include the filing costs to submit the form. USCIS' current fee rule was published on January 31, 2024, and became effective on April 1, 2024. 89 FR 6194, 6246–6248; 89 FR 20101 (Apr. 1, 2024). Table 11 shows the current fee schedule for Form I–129 requesting H–2A workers.

Table 11: Fee Summary Table for Form I-129 H-2A Petitioners

Benefit Request	Entities with more than 25 Full-Time Equivalent (FTE) Workers	Entities with 25 or Fewer FTE Workers	Nonprofit Entities
H-2A – Named Beneficiaries	$1,090	$545	$545
H-2A – Unnamed Beneficiaries	$530	$460	$460

Furthermore, certain petitioners must pay the $600 Asylum Program Fee. Small employers with 25 or fewer employees pay a reduced Asylum Program Fee of $300 while nonprofits are exempt from the Asylum Program Fee. Therefore, total filing fees for H–2A petitioners range from $1,690 to $460 depending on the characteristics of the petitioner.[201]

Similarly, Table 12 shows the base filing fees for petitioners requesting H–2B workers.

Table 12: Fee Summary Table for Form I-129 H-2B Petitioners

Benefit Request	Entities with more than 25 FTE Workers	Entities with 25 or Fewer FTE Workers	Nonprofit Entities
H-2B – Named Beneficiaries	$1,080	$540	$540
H-2B – Unnamed Beneficiaries	$580	$460	$460

As was the case to H–2A petitioners, certain H–2B petitioners also must pay the $600 Asylum Program Fee. Small employers with 25 or fewer employees pay a reduced Asylum Program Fee of $300 while nonprofits are exempt from the Asylum Program Fee. Additionally, petitioners requesting H–2B workers must submit a $150 Fraud Prevention and Detection Fee. Therefore, total filing fees for H–2B petitioners range from $1,830 to $610 depending on the characteristics of the petitioner.[202]

For the purposes of this analysis, USCIS assumes that all marginal Forms I–129 filed due to the final rule's portability provision request named

[195] Calculation: 319 estimated additional Form I–129 H–2B petitions × 93.57 percent accompanied by Form I–907 = 298 (rounded) additional Form I–907.

[196] Calculation, Lawyers: 298 additional Form I–907 × 45.84 percent = 136 (rounded) Form I–907 filed by a lawyer. Calculation, HR specialists: 298 Form I–907—136 Form I–907 filed by a lawyer = 160 Form I–907 filed by an HR specialist.

[197] Calculation, HR Specialist: $50.94 hourly opportunity cost of time × 0.37-hour time burden to file Form I–907 = $18.85 cost to file Form I–907.

Calculation, In-house lawyer: $114.17 hourly opportunity cost of time × 0.37-hour time burden to file Form I–907 = $42.24 cost to file Form I–907.

Calculation, outsourced lawyer: $196.85 hourly opportunity cost of time × 0.37-hour time burden to file Form I–907 = $114.17 cost to file Form I–907.

[198] Calculation, HR specialist: $18.85 to file a Form I–907 × 161 forms = $3,035 (rounded).

[199] Calculation, In-house lawyer: $42.24 to file a Form I–907 × 137 forms=$5,787 (rounded).

Calculation for an outsourced lawyer: $72.72 to file a Form I–907 × 137 forms = $9,978 (rounded).

[200] Calculation for HR specialists and in-house lawyers: $42,186 for HR specialists to file Form I–129 H–2B petitions + $90,554 for in-house lawyers to file Form I–129 and the accompanying Form G–28 + $4,728 for HR specialists to file Form I–907 + $9,006 for in-house lawyers to file Form I–907 = $144.636.

Calculation for HR specialists and outsourced lawyers: $42,186 for HR specialists to file Form I–129 H–2B petitions + $156,132 for outsourced lawyers to file Form I–129 and the accompanying Form G–28 + $4,728 for HR specialists to file Form I–907 + $15,527 for outsourced lawyers to file Form I–907 = $216,633.

[201] *See* USCIS, Form G–1055, ''USCIS Fee Schedule,'' *https://www.uscis.gov/sites/default/files/document/forms/g-1055.pdf* (last accessed Apr. 18, 2024).

[202] *Id.*

beneficiaries and that the petitioners are representative of the greater Form I–129 filing population.[203] More specifically, we assume that of the 319 marginal Form I–129 petitions that were filed as a result of the final rule's portability provision, 30 percent have 26 or more employees, 55 percent have 25 or fewer employees, and that 15 percent have non-profit status.[204] This equates to 96 ''large'' petitioners, 175 ''small'' petitioners, and 48 non-profit petitioners.[205] These petitioners will pay total fees of $1,830, $990, and $690, respectively.[206] 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. The annual value of transfers from petitioners to the Government for filing Form I–129 due to the final rule's portability provision will be approximately $382,050.[207]

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 to request premium processing for H–2B petitions is $1,685.[208] Based on historical trends, DHS expects that 93.57 percent of petitioners will file a Form I–907 with Form I–129. Applying that rate to the expected number of filings of Form I–129 petitions will result in 298 requests for premium processing using Form I–907 filed due to the rule.[209] We estimate that the annual transfers from petitioners to the Federal Government related to filing Form I–907 due to the rule will be approximately $502,130.[210] The undiscounted annual transfers from petitioners to the Federal Government due to the rule are $884,180.[211] [212]

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

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

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

(1) Eligible Countries Lists

DHS will remove the lists that designate certain countries as eligible to participate in the H–2 programs. Currently, nationals of countries that are not eligible to participate in the H–2 programs may still be named as beneficiaries on an H–2A or H–2B petition. However, petitioners must: (1) name each beneficiary who is not from an eligible country; and (2) provide evidence to show that it is in the U.S. interest for the individual to be the beneficiary of such a petition. USCIS also recommends that H–2A and H–2B petitions for workers from countries not listed on the respective eligible countries lists be filed separately.[213]

To understand the population of beneficiaries who come from countries not on the eligible countries lists and the petitioners who apply for these workers, we considered historical data from FY 2013 through FY 2022 on the beneficiary country of birth for both H–2A and H–2B receipts by fiscal year.[214] The data are extremely limited, with an average of 77 percent and 75 percent of H–2A and H–2B receipts, respectively, missing the beneficiary's country of birth. Data are primarily limited because of the high percentage of H–2 petitions filed requesting unnamed beneficiaries. Additionally, these data are input manually, with only certain fields entered. Country of birth is not a mandatory field and tends to be blank.

On the eligible countries lists published November 10, 2021, FY 2022 data did not identify any H–2A beneficiaries with a country of birth from 55 of 85 eligible countries.[215] Additionally, 30 petitions with 141 beneficiaries from 12 countries were not on the eligible countries list. Of the 86 eligible countries for H–2B beneficiaries, the FY 2022 data did not identify any beneficiaries with a country of birth from 43 of these countries. It also showed that there was only a total of 12 petitions with 79 beneficiaries from five countries not on the eligible countries list.

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

As stated earlier, USCIS recommends that H–2A and H–2B petitions for

[203] Per Form I–129 instructions, beneficiaries must be named if they are currently in the United States. Therefore, a Form I–129 petition filed as a result of the final rule's portability provision would necessarily be for named beneficiaries. *See* USCIS, Form I–129, ''Instructions for Petition for Nonimmigrant Worker Department of Homeland Security,'' OMB Control Number 1615–0009, (expires Feb. 28, 2027), *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf.*

[204] *See* 89 FR 6194, 6246–6248, Table 25 (Jan. 31, 2024); 89 FR 20101 (Apr. 1, 2024).

[205] Calculation, ''Large'' Petitioners: 319 marginal Form I–129 filings × 0.3 rate of ''large'' petitioners = 96 ''large'' petitioners (rounded).

''Small'' Petitioners: 319 marginal Form I–129 filings × 0.55 rate of ''small'' petitioners = 175 ''small'' petitioners (rounded).

Non-profit petitioners: 319 marginal Form I–129 filings × 0.15 rate of non-profit petitioners = 48 non-profit petitioners (rounded).

[206] Fees for ''large'' petitioner: $1,080 base filing fee + $600 Asylum Program Fee + $150 Fraud Prevention and Detection Fee = $1,830.

Fees for ''Small'' Petitioner: $540 base filing fee + $300 Asylum Program Fee + $150 Fraud Prevention and Detection Fee = $990.

Fees for Non-profit Petitioner: $540 base filing fee + $150 Fraud Prevention and Detection Fee = $690.

For more information regarding the fee schedule for Forms I–129, please see *https://www.uscis.gov/sites/default/files/document/forms/g-1055.pdf* (accessed Apr. 29, 2024)

[207] Calculation: (96 ''large'' petitioners × $1,830 total fees) + (175 ''small'' petitioners × $990 total fees) + (48 nonprofit petitioners × $690 total fees) = $382,050.

[208] *See* USCIS, Form I–907, ''Instructions for Request for Premium Processing Service,'' OMB Control Number 1615–0048, *https://www.uscis.gov/sites/default/files/document/forms/i-907instr.pdf* (last accessed Apr. 15, 2024).

[209] Calculation: 319 petitions × 93.57 Form I–907 rate = 298 Forms I–907 (rounded).

[210] Calculation: $1,685 per petition × 298 Forms I–907 = $502,130.

[211] Calculation: $382,050 + $502,130 = $884,180.

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

[213] *See* USCIS, Form I–129, ''Instructions for Petition for Nonimmigrant Worker Department of Homeland Security,'' OMB Control Number 1615–0009 (expires Feb. 28, 2027), *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf.*

[214] Country of citizenship data are available for about 20 percent of the H–2A category but not for the H–2B category. For consistency and because there are slightly more data available, we use country of birth data in this analysis.

[215] The publication of the eligible countries lists for H–2A and H–2B visa programs referred to here was published on November 10, 2022. 87 FR 67930. For the purpose of this analysis, we rely on the eligible countries lists from 2021 because we have data from FY 2022 that would include any impacts of that prior lists on the behavior of petitioners and their beneficiaries.

workers from countries not listed on the respective eligible countries lists be filed separately. DHS does not have data on the number of H–2 employers that file petitions separately for workers from countries not listed on the respective eligible countries lists from those on the eligible countries lists. For those that file separately, though, this provision will result in saved fees.[216] As discussed above, total filing fees for H–2A petitioners range from $460 to $1,690 depending on the characteristics of the petitioner while total filing fees for H–2B petitioners range from $610 to $1,830 depending on the characteristics of the petitioner.[217] Therefore, employers currently filing separate petitions could save $460 to $1,640 per H–2A petition and $610 to $1,830 per H–2B petition.[218]

To produce the eligible countries lists each year, several DHS components and agencies provide data, collaboration, and research. For DHS, this includes months of work to gather recommendations and information from offices across ICE, CBP, and USCIS, compile statistics, and cooperate closely with DOS. Research in these efforts focuses on topics including overstays, fraud, human trafficking concerns, and more. However, some of the work involved in creating the eligible countries lists is duplicative, time-consuming, and limited in its response to ever-changing global dynamics. For example, DOS already performs regular national interest assessments and would not approve H–2 work visas that it deems problematic regardless of the country's standing on the eligible countries lists.

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

(2) Eliminating the ''Interrupted Stay'' Calculation and Reducing the Period of Absence To Reset an Individual's 3-Year Period of Stay

DHS is eliminating the ''interrupted stay'' calculation and reduce the period of absence from the United States from 3 months to 60 days to reset an individual's 3-year period of stay.[219] Under current regulations, an individual's total period of stay in H–2A or H–2B nonimmigrant status may not exceed 3 years. Currently, an individual who has spent 3 years in H–2A or H–2B status may not seek extension, change status, or be readmitted to the United States in H–2 status unless the individual has been outside of the United States for an uninterrupted period of 3 months. In the final rule, the total period of stay of 3 years remains unchanged, but the period of absence that resets an individual's 3-year period of stay will be reduced. For ease of understanding, the term ''clock'' is used in this section to describe the 3-year maximum period of stay for an H–2 worker and the term ''absence'' generally is used in place of ''interruption.'' As critical context, the estimated population impacted by this change is constrained because the DOL-certified seasonal or temporary nature of H–2A and H–2B labor needs means that, currently, most beneficiaries' clocks are effectively reset each year upon completion of the first and only petitioner's labor need and subsequent departure from the country. Instructions on DOL's Foreign Labor Application Gateway (FLAG) state that petitioners' certified seasonal or temporary labor needs must not exceed 9 months for H–2B labor certifications and should not normally exceed 10 months for H–2A certifications, so there will be no direct impacts nor costs to an employer from the simplifications to the existing definition of absence for the purpose of resetting the 3-year clock.[220]

Additionally, under this simplification, DHS will no longer recognize certain absences as an ''interrupted stay'' for purposes of pausing the calculation of the 3-year limit of stay. Thus, if a worker leaves the United States for less than 60 days, the absence will not pause the 3-year maximum period of stay clock nor extend the timeframe in which a worker could work in H–2 status upon their return from abroad. This change to the calculation of interrupted stay is not expected to impact the two current subset populations of H–2A and H–2B workers whose accumulated stay is 18 months or less and whose clock currently pauses when leaving the United States for at least 45 days but less than 3 months, and those whose accumulated stay is greater than 18 months but less than 3 years. Under this rule, the 3-year clock will no longer pause when an individual leaves the United States for the period of time specified in rows 2 and 3 of Table 13; rather, the 3-year clock will reset following an uninterrupted absence of 60 days, irrespective of the individual's period of accumulated stay in the United States.

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

[217] *See* USCIS, Form G–1055, ''Fee Schedule,'' *https://www.uscis.gov/sites/default/files/document/forms/g-1055.pdf,* (last accessed Apr. 18, 2024).

[218] *See* USCIS, Form I–129, ''Instructions for Petition for Nonimmigrant Worker Department of Homeland Security,'' OMB Control Number 1615–0009 (expires Feb. 28, 2027), *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf.*

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

[220] *See* DOL, ''H–2A Temporary Labor Certification for Agriculture Workers,'' *https://flag.dol.gov/programs/H-2A* (last visited May 31, 2023) (''The need for the work must be seasonal or temporary in nature [. . .] normally lasting 10 months or less'' for H–2A Temporary Certification For Agriculture Workers); DOL, ''H–2B, Temporary Labor Certification for Non-Agriculture Workers,'' *https://flag.dol.gov/programs/H-2B* (last visited May 31, 2023) (''The employer's job opportunities must be . . . [t]emporary (9 months or less, except one-time occurrences)''). DOL regulations at 20 CFR 655.6(b) limit an H–2B period of need to 9 months, except where the employer's need is based on a one-time occurrence, but due to an appropriations rider that is currently in place, DOL uses the definition of temporary need as provided in 8 CFR 214.2(h)(6)(ii)(B), which does not list a 9-month limit. Consolidated Appropriations Act 2023, Pub. L. 117–328, Division H, Title I, Sec. 111.

Table 13: H-2 Clock and Absences from the United States During a 3-Year Maximum Period of Stay

	Current	Proposal and Impact to H-2 Workers and Employers		
Time Worked in H-2 Status	Clock Reset or Interruption*	Proposed Absence Counted as Reset	Cost	Benefit
3 years	Reset at 3 months	Reset at 60 days	N/A	30 fewer days required to reset clock
18 months or less	Interruption pause accrues at 45 days, but less than 3 months	Reset at 60 days	N/A	N/A
More than 18 months, but less than 3 years	Interruption pause accrues at 2 months, but less than 3 months	Reset at 60 days	N/A	N/A

Source: USCIS analysis.
*An interruption is when the 3-year clock is paused, meaning the period of time outside the United Stated, the absence, isn't counted towards 3-year maximum period of stay.

DHS next considers a potential subpopulation of workers who, under the baseline, might port from one petitioning employer with a labor certification to a subsequent petitioner with a TLC three or more times to maximize earnings over the 3-year (1,095 days) limit. DHS does not have data on the size of the H–2A or H–2B worker populations that currently leave the United States while in H–2 status or for how long. Without information on the number of workers who experience absences from the United States, it is not possible to predict additional impacts to the behavior of H–2 visa holders and the petitioners with DOL-certified seasonal or temporary labor needs, however, the present observed rates of porting shown in Tables 6 and 7 suggest beneficiaries porting more than 3 times without leaving the country is small to non-existent. DOL requires H–2A and H–2B employers to pay workers at least the highest of the prevailing wage rate obtained from the ETA or the applicable Federal, State, or local minimum wage.[221] Additionally, the Fair Labor Standards Act covers requirements for all workers in the United States with respect to overtime and a job offer must always be consistent with Federal, State, and local laws.[222]

To estimate the potential impacts from a small number of H–2 workers choosing to provide 30 additional days of labor every 3 years, we first consider wages. The Federal minimum wage is currently $7.25.[223] While using the Federal minimum wage may be appropriate in some instances, DHS recognizes that many States have higher minimum wage rates than the Federal minimum wage. Therefore, DHS believes that a more accurate and timely estimate of wages is available via data from the DOL, BLS National Occupational Employment and Wage Estimates. DHS believes that the unweighted, 10th percentile wage estimate for all occupations of $13.14 per hour is a reasonable lower bound for the population in question.[224] DHS accounts for worker benefits by calculating a benefits-to-wage multiplier using the most recent BLS report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.45 and, therefore, is able to estimate the full opportunity cost per applicant, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement, etc.[225] Although the Federal minimum wage could be considered a lower bound income for the population of interest, DHS calculates the total rate of compensation for the 10th percentile hourly wage is $19.05, which is 81.3 percent higher than the Federal minimum wage.[226]

DHS does not rule out the possibility that some portion of H–2A and H–2B employees might earn more than the 10th percentile wage, but without empirical information, DHS believes that including a range with the lower bound relying on the 10th percentile

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

[222] *See* WHD, ''Wages and the Fair Labor Standards Act,'' *https://www.dol.gov/agencies/whd/flsa* (last visited Dec. 15, 2022).

[223] *See* 29 U.S.C. 206; *See also* WHD, ''Minimum Wage,'' *https://www.dol.gov/general/topic/wages/minimumwage* (the minimum wage in effect as of Dec. 15, 2022).

[224] *See* Occupational Employment and Wage Estimates United States, May 2022. BLS, ''Occupational Employment and Wage Statistics program, All Occupations,'' *https://www.bls.gov/oes/2022/may/oes_nat.htm#00-0000* (last visited July 28, 2023).

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

[226] Calculations (1) for lower bound compensation: $13.14 lower bound wage × 1.45 total compensation factor = $19.05 (rounded to 2 decimal places); (2) (($19.05 wage—$10.51 wage) ÷ $10.51)) wage = 0.813, which rounded and multiplied by 100 = 81.3 percent.

wage with benefits of $19.05 is justifiable for both H–2A and H–2B workers. For H–2A workers, DHS uses an upper bound wage specific to agricultural workers of $17.04.[227] DHS calculates the average total rate of compensation for agricultural workers as $24.71 per hour, where the mean hourly wage is $17.04 per hour worked and average benefits are $7.67 per hour.[228] For H–2B workers, DHS relies on the average wage rate for all occupations of $29.76 as an upper bound in consideration of the variance in average wages across professions and States.[229] Therefore, DHS calculates the average total rate of compensation for all occupations as $43.15 per hour, where the mean hourly wage is $29.76 per hour worked and average benefits are $13.39 per hour.[230]

Since DHS calculates absences from the United States based on calendar days, and wage estimates are specifically linked to hours, we apply the scalar developed as follows. Calendar days are transformed into workdays to account for the actuality that typically, 5 out of 7 days of the calendar week, or 71.4 percent, is allotted to work-time, and that a workday is typically 8 hours.[231] Thus, in limited instances, individuals resetting their clock at or immediately after the 1,095th day of the 3-year limitation may be afforded an opportunity to work 30 additional calendar days, or approximately 21 days of H–2. DHS notes that some H–2 workers may work more days or hours per week in some instances. Additionally, if overtime hours are worked, DHS has no basis for which to measure the extent to which this may occur among these populations. Based on the 10th percentile wage (lower bound), each calendar day generates about $108.81 in relevant earnings for potential H–2 workers. It follows that for the upper wage bounds that each calendar day generates about $141.14 per H–2A worker and about $246.47 per H–2B worker in relevant earnings.[232] Over 30 potential workdays, this equates to a lower bound of $3,264 in additional earnings with upper bounds of $4,234 for H–2A workers and $7,394 for H–2B workers (*see* Table 14).[233]

Table 14: Earnings Estimates for H-2 Workers with 30 Additional Days.

	Hourly Wage	Calendar Day Scalar	Work Hours	Daily Additional Wages	Additional Wages for 30 Days	Additional Taxes
	A	B	C	D=A×B×C	E=D×30	F=E×15.3%
Lower Bound	$19.05	0.714	8	$108.81	$3,264	0 *
H-2A Upper Bound	$24.71			$141.14	$4,234	0 *
H-2B Upper Bound	$43.15			$246.47	$7,394	$1,131

Source: USCIS analysis.
* H-2A workers and employers are not subject to U.S. social security and Medicare taxes

In instances where an employer with a DOL-certified temporary labor need cannot transfer the 21 days of work onto other H–2 workers, DHS acknowledges that this additional work may result in additional tax revenue to the government. It is difficult to quantify income tax transfers because individual tax situations vary widely,[234] but DHS estimates the potential payments to other employment tax programs, namely Medicare and Social Security, which have a combined tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).[235] While H–2A wages are exempt from these taxes, H–2B wages are not.[236] With both the employee and employer paying their respective portion of Medicare and Social Security taxes, the total estimated tax transfer for Medicare and Social Security is 15.3 percent.[237] DHS recognizes this quantified estimate is not representative of all potential tax losses by Federal, State, and local governments and we make no claims this quantified estimate includes all tax losses. We continue to acknowledge the potential for additional Federal, State, and local government tax losses in the scenario where a company

[227] The average wage for agricultural workers is found at BLS, Occupational Employment and Wages—May 2022 (Apr. 25, 2023), Table 1. National employment and wage data from the Occupational Employment and Wage Statistics survey by occupation, May 2022, *https://www.bls.gov/news.release/archives/ocwage_04252023.pdf.* DHS notes that the agricultural wages contained in the OEWS survey represent a subset all agricultural workers.

[228] Calculation of the weighted mean hourly wage for agricultural workers: $17.04 per hour × 1.45 benefits-to-wage multiplier = $24.71 (rounded).

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

[230] The calculation of the weighted mean hourly wage for applicants: $29.76 per hour × 1.45 benefits-to-wage multiplier = $43.15 (rounded) per hour.

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

[232] Calculations: 10thpercentile wage (lower bound): 0.714 × 8 hours per day × $19.05 wage = $108.81 (rounded). H–2A average wage for agricultural workers (upper bound): 0.714 × 8 hours per day × $24.71 wage = $141.14 (rounded). H–2B average wage for all occupations (upper bound): 0.714 × 8 hours per day × $43.15 wage = $246.47 rounded.

[233] Calculations: 10th percentile wage (lower bound): $108.81 × 30 days = $3,264 (rounded).

H–2A average wage for agricultural workers (upper bound): $141.14 × 30 days = $4,234 (rounded).

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

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

[235] The various employment taxes are discussed in more detail at *https://www.irs.gov/businesses/small-businesses-self-employed/understanding-employment-taxes. See* Internal Revenue Service Publication 15, Circular E, ''Employer's Tax Guide'' (Dec. 16, 2021), *https://www.irs.gov/pub/irs-pdf/p15.pdf,* for specific information on employment tax rates.

[236] *See* IRS, ''Federal Income Tax and FICA Withholding for Foreign Agricultural Workers with an H–2A Visa,'' *https://www.irs.gov/pub/irs-pdf/p5144.pdf* (last accessed July 31, 2023).

[237] Calculation: (6.2 percent Social Security + 1.45 percent Medicare) × 2 employee and employer losses = 15.3 percent total estimated tax transfer payment to government.

cannot transfer additional work onto current employees and cannot hire replacement labor for the position the H–2 worker is absent. As seen in Table 14, tax transfers could range from $0 for H–2A workers to as much as $1,131 for H–2B workers over a 30-day period.

One benefit of this provision is that it will make it easier for DHS, petitioners, and beneficiaries to calculate when a beneficiary reaches their 3-year limit on stay, irrespective of how long the individual has been in the United States in H–2 status. As described earlier, to accurately demonstrate when an individual's limit on H–2 status will be reached, employers and workers currently need to monitor and document the accumulated time in H–2 status and calculate the total time in H–2 status across multiple time periods following interruptive absences. USCIS adjudicators must also make these same determinations in adjudicating H–2 petitions with named workers to assess whether a beneficiary is eligible for the requested period of stay. No longer needing to monitor absences from the United States of less than 60 days simplifies calculations for employers, workers, and adjudicators. Additionally, DHS expects that USCIS adjudicators may issue fewer RFEs related to the 3-year maximum period of stay to workers with absences, which would reduce the burden on employers, workers, and adjudicators and save time in processing petitions. As shown in Table 15, RFEs related to the 3-year maximum period of stay have increased since FY 2020 for H–2A workers and have generally remained stable at between 200 to 300 each year since FY 2020 for H–2B workers.

Table 15: RFEs Relating to 3-Year Maximum Stay for H-2 Workers.

Fiscal Year	H-2A	H-2B
2018	63	134
2019	53	649
2020	22	207
2021	272	292
2022	436	208
Total	846	1,490
5-Year Average	169	298

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

While it is not clear how many RFEs are directly related to the calculation of interruptions while in H–2 status, as opposed to RFEs for those who may be reaching the maximum 3-year period of stay generally, DHS anticipates that eliminating the calculation for interrupted stays will at least render some RFEs unnecessary.[238] This will in turn reduce the burden on employers, workers, and adjudicators associated with calculating interruptions and through subsequent RFEs and petitions could be processed more expeditiously.

Collectively, Tables 6, 7, and 10 indicate very few H–2 workers approach the 3-year limitation despite existing potential to port from certified temporary labor need for 3 years before exiting the country for 90 days. Nevertheless, DHS has considered as an upper bound, possible additional earnings and related labor market impacts should workers already approaching the 3-year limit respond to this proposed change by working 30 additional days at the end of their 1,095 days or at the start of their subsequent 3-year period. Recall that if the worker intended to return to their home country before 3-years, as most do upon completing their temporary labor for the initial petitioner, this change has no impact to the employer nor to wages earned by the worker. Multiplying the H–2A population of 169 in Table 15 by $4,234 in additional wages for 30 days in Table 14 bounds potential additional annual earnings at $715,546. Additionally, the H–2B population of 298 in Table 15 multiplied by $7,394 in Table 14 bounds additional annual H–2B earnings at $2,203,412 with estimated tax transfers of $337,122. For H–2A and H–2B workers, the total impact from this change is approximately $2,918,958 in additional earnings and about $337,122 in tax transfers ($168,561 from workers + $168,561 from employers).

d. Other Impacts of the Final Rule

(1) Form I–129 Updates

The costs for filing Form I–129 include the opportunity costs of time to complete and file the form. The estimated time needed to complete and file Form I–129 is 2.487 hours.[239] There is also an estimated time burden of 2.07 hours for petitioners to complete the H classification supplement for Form I–129. The total time burden of 4.557 hours for Form I–129 also includes the time for reviewing instructions, to file and retain documents, and submit the request. In this final rule, only the estimated burden to complete the H classification supplement will change. This rule will increase the public reporting burden for the H Classification Supplement by 0.23 hours, for a total of 2.3 hours. The increased time burden will result in a total time burden of 4.787 hours for Form I–129 H–2

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

[239] The public reporting burden for this form is 2.487 hours for Form I–129 and an additional 2.07 hours for H Classification Supplement. *See* USCIS, Form I–129, ''Instructions for Petition for Nonimmigrant Worker Department of Homeland Security,'' OMB Control Number 1615–0009 (expires Feb. 28, 2027), *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf.*

petitioners. The petition must be filed by a U.S. employer, a U.S. agent, or a foreign employer filing through the U.S. agent. 8 CFR 214.2(h)(2). DHS was unable to obtain data on the number of Form I–129 H–2A and H–2B petitions filed directly by a petitioner and those that are filed by a lawyer on behalf of the petitioner. Therefore, DHS presents a range of estimated costs, including if only HR specialists file Form I–129 or if only lawyers file Form I–129.[240] Further, DHS presents cost estimates for lawyers filing on behalf of petitioners based on whether all Form I–129 petitions are filed by in-house lawyers or by outsourced lawyers.[241] DHS presents an estimated range of costs assuming that only HR specialists, in-house lawyers, or outsourced lawyers file these forms, though DHS recognizes that it is likely that filing will be conducted by a combination of these different types of filers.

To estimate the total opportunity cost of time to petitioners who complete and file Form I–129, DHS uses the mean hourly wage rate of HR specialists of $35.13 as the base wage rate.[242] If applicants hire an in-house or outsourced lawyer to file Form I–129 on their behalf, DHS uses the mean hourly wage rate of $78.74 as the base wage rate.[243] DHS multiplied the average hourly U.S. wage rate for HR specialists and for in-house lawyers by the benefits-to-wage multiplier of 1.45 to estimate the full cost of employee wages. The total per hour wage is $50.94 for an HR specialist and $114.17 for an in-house lawyer.[244] In addition, DHS recognizes that an entity may not have in-house lawyers and therefore, seek outside counsel to complete and file Form I–129 on behalf of the petitioner. Therefore, DHS presents a second wage rate for lawyers labeled as outsourced lawyers. DHS estimates the total per hour wage is $196.85 for an outsourced lawyer.[245] [246] If a lawyer submits Form I–129 on behalf of the petitioner, Form G–28, Notice of Entry of Appearance as Attorney or Accredited Representative, must accompany the Form I–129 submission.[247] DHS estimates the time burden to complete and submit Form G–28 for a lawyer is 50 minutes (0.83 hours, rounded).[248]

Since only the time burden for the H Classification Supplement will change, this analysis only considers the additional opportunity cost of time for 0.23 hours as a direct cost of this rule. Therefore, the estimated additional opportunity cost of time for an HR specialist to complete and file Form I–129 for an H–2 petition is $11.72, for an in-house lawyer to complete and file is $26.26, and for an outsourced lawyer to complete and file is $45.28.[249]

DHS expects this rule to impose costs on the population of employers that currently petition for H–2 workers, an estimated 36,762 petitioners.[250] We expect filing the relevant forms will be performed by an HR specialist, in-house lawyer, or outsourced lawyer, with the assumption that this will be done at the same rate as petitioners who file a Form G–28.

To properly account for the costs associated with filing across the entire H–2 population, DHS must calculate a weighted average rate for G–28 filing across the separate H–2A and H–2B populations. Table 16 and Table 17 show the recent G–28 filing trends for each separate H–2 population.

[240] For the purposes of this analysis, DHS assumes an HR specialist, or some similar occupation, completes and files these forms as the employer or petitioner who is requesting the H–2 worker. However, DHS understands that not all entities have HR departments or occupations and, therefore, recognizes equivalent occupations may prepare these petitions.

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

[242] *See* BLS, Occupational Employment and Wages, May 2022, Human Resources Specialists (13–1071), *https://www.bls.gov/oes/2022/may/oes131071.htm.*

[243] *See* BLS, Occupational Employment and Wages, May 2022, Lawyers (23–1011), *https://www.bls.gov/oes/2022/may/oes231011.htm.*

[244] Calculation for the total wage of an in-house lawyer: $78.74 × 1.45 = $114.17 (rounded).

[245] Calculation: Average hourly wage rate of lawyers × Benefits-to-wage multiplier for outsourced lawyer = $78.74 × 2.5 = $196.85 (rounded).

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

[247] USCIS, ''Filing Your Form G–28'' (Aug. 10, 2020), *https://www.uscis.gov/forms/filing-your-form-g-28.*

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

[249] HR specialist calculation: $50.94 × (0.23 hours) = $11.72.

In-house lawyer calculation: $114.17 × (0.23 hours) = $26.26.

Outsourced lawyer calculation: $196.85 × (0.23 hours) = 45.28 (rounded).

[250] Calculation: 24,370 H–2A + 12,392 H–2B = 36,762 H–2 petitioners in FY 2022 as estimated as the population who would be most likely be affected by this rule.

Table 16: Form I-129 H-2A Petition Receipts That Were Accompanied by a Form G-28, FY 2017-2021.

Fiscal Year	Number of Form I-129 H-2A petitions accompanied by a Form G-28	Total Number of Form I-129 H-2A petitions received	Percent of Form I-129 H-2A petitions accompanied by a Form G-28
2017	1,648	11,602	14.20%
2018	2,166	13,444	16.11%
2019	2,617	15,509	16.87%
2020	2,854	17,012	16.78%
2021	3,322	20,323	16.35%
2017 - 2021 Total	12,607	77,890	16.19%
Source: USCIS, Office of Policy & Strategy-- C3, ELIS USCIS Data System			

Table 17: 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	4,228	9,160	46.16%
2022	5,983	12,392	48.28%
2018 - 2022 Total	18,605	40,583	45.84%
Source: USCIS, Office of Performance and Quality -- SAS PME C3 Consolidated, as of Sept. 09, 2023, TRK 12921			

Using the data from Table 16 and Table 17, DHS calculates that the weighted average rate of G–28 filing across the entire H–2 population is 26.35 percent.[251]

Therefore, we estimate that 9,687 lawyers will incur additional filing costs, and 27,075 HR specialists will incur additional filing costs.[252]

The estimated total opportunity cost of time for 27,075 HR specialists to file petitions under this final rule is approximately $317,319.[253] The estimated annual opportunity cost of time for 9,687 lawyers to file petitions under this rule is approximately $254,381 if all are in-house lawyers and $438,627 if all are outsourced lawyers.[254] Therefore, the estimated annual opportunity costs of time for petitioners or their representatives to file H–2 petitions under this rule will range from $571,700 to $755,946.[255]

(2) Technical Definitional Updates

As a technical update in this rule, DHS is removing the phrase ''abscond'' and the definition ''abscondment'' for clarification purposes. DHS expects these changes will have only marginal impacts.

(3) Familiarization Costs

DHS expects this rule will impose one-time familiarization costs associated with reading and understanding this rule on the population of employers that currently petition for H–2 workers, an estimated 36,762 petitioners.[256] We expect familiarization with the rule will be performed by a HR specialist, in-house lawyer, or outsourced lawyer,

[251] Calculation: Step 1. 12,607 H–2A petitions with G–28 + 18,605 H–2B petitions with G–28 = 31,212 H–2 petitions with G–28; Step 2. 77,890 total H–2A petitions + 40,583 total H–2B petitions = 118,473 total H–2 petitions; Step 3. 31,212 H–2 petitions with G–28 ÷ 118,473 total H–2 petitions = 0.2635 (rounded).

[252] Calculation for lawyers: 36,762 H–2 petitioners × 26.35 percent represents by a lawyer = 9,687 (rounded) represented by a lawyer. Calculation for HR specialists: 36,762 H–2 petitioners – 9,687 represented by a lawyer = 27,075 represented by a HR specialist.

[253] Calculation: $11.72 additional burden × 27,075 HR specialists = $317,319.

[254] Calculations: $26.26 additional burden × 9,687 in-house lawyers = $254,381; $45.28 additional burden × 9,687 outsourced lawyers = $438,627 (rounded).

[255] Calculation: HR specialists $317,319 + in-house lawyers $254,381 = $571,700; HR specialists $317,319 + outsourced lawyers $438,627 = $755,946.

[256] Calculation: 24,370 H–2A + 12,392 H–2B = 36,762 H–2 petitioners in FY 2022 as estimated as the population who would be most likely to read this rule.

with the assumption that this will be done at the same rate as petitioners who file a Form G–28. An estimated 26.34 percent will be performed by lawyers and the remaining 73.66 percent by an HR specialist. Therefore, we estimate that 27,075 HR specialists and 9,687 lawyers will incur familiarization costs.[257]

To estimate the cost of rule familiarization, we estimate the time it would take to read and understand the rule by assuming a reading speed of 238 words per minute.[258] This rule has approximately 56,000 words.[259] Using a reading speed of 238 words per minute, DHS estimates it will take approximately 3.92 hours to read and become familiar with this rule.[260] The estimated hourly total compensation for a HR specialist, in-house lawyer, and outsourced lawyer are $50.94, $114.17, and $196.85, respectively. The estimated opportunity cost of time for each of these filers to familiarize themselves with the rule are $199.68, $447.55, and $771.65, respectively.[261] The estimated total opportunity cost of time for 27,075 HR specialists to familiarize themselves with this rule is approximately $5,406,336. Additionally, the estimated total opportunity cost of time for 9,687 lawyers to familiarize themselves with this rule is approximately $4,335,417 if all are in-house lawyers or $7,474,974 if all are outsourced lawyers. Thus, the estimated total opportunity costs of time for petitioners or their representatives to familiarize themselves with this rule ranges from $9,741,753 to $12,881,310, which we assume will be incurred in the first year of the period of analysis.[262]

e. Total Costs of the Rule

In the previous sections, we presented the estimates of the impacts of the final rule. The quantifiable costs of this rule that will impact petitioners consistently and directly are the costs associated with an increased opportunity cost of time to complete Form I–129 H Classification Supplement and opportunity costs of time related to the rule's portability provision. Annual costs due to the rule range from $716,336 to $972,579 depending on the filer.[263] Over the 10-year period of analysis, DHS estimates the total costs of the final rule will be approximately $16,905,113 to $22,607,100 (undiscounted).[264] DHS estimates the annualized costs of this final rule will range from $1,825,104 to $2,438,679 at a 3-percent discount rate, with a midpoint of $2,131,891, and $2,012,604 to $2,686,606 at a 7-percent discount rate, with a midpoint of $2,349,605. The midpoints of these ranges are presented as the primary estimates.

In addition, the rule results in transfers from consumers of goods and services to a limited number of H–2A and H–2B workers that may choose to supply additional labor. The total annualized transfer is approximately $2,918,958 in additional earnings at the 3-percent and 7-percent discount rate and related tax transfers are approximately $337,122 ($168,561 from these workers + $168,561 from employers).

B. Regulatory Flexibility Act

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

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

Small entities primarily impacted by this final rule are those that will incur additional direct costs to complete an H–2 petition. DHS conducted an analysis using a statistically valid sample of H–2 petitions to determine the number of small entities directly impacted by this final rule. These costs are related to the additional opportunity cost of time for a selected small entity to complete the updated Form I–129 H Classification Supplement in this rule.

[257] Calculation for lawyers: 36,762 H–2 petitioners × 44.43 percent represents by a lawyer = 9,687 (rounded) represented by a lawyer. Calculation for HR specialists: 36,762 H–2 petitioners − 9,687 represented by a lawyer = 27,075 represented by a HR specialist.

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

[259] Please note that the actual word count of the final rule may differ from the estimated length presented here.

[260] Calculation: 56,000 words ÷ 238 words per minute = 235 (rounded) minutes. 235 minutes ÷ 60 minutes per hour = 3.92 (rounded) hours.

[261] Calculation: Total respective hourly compensation HR $50.94 × 3.92 hours = $199.68, In-house Lawyer $114.17 × 3.92 = $447.55, or Outsourced Lawyer $196.85 × 3.92 hours = $771.65.

[262] Calculation, lower bound: $5,406,336 familiarization costs, HR Representative + $4,335,417 familiarization costs, in-house lawyer = $9,741,753.

Calculation, upper bound: $5,406,336 familiarization costs, HR Representative + $7,474,974 familiarization costs, outsourced lawyer = $12,881,310.

[263] Calculation, lower bound: $571,700 annual costs from marginal OCT to file Forms I–129 + $144,636 in costs due to the portability provision = $716,336 annual costs in years 1 through 10.

Calculation, upper bound: $755,946 annual costs from marginal OCT to file Forms I–129 + $216,633 in costs due to the portability provision = $972,579 annual costs in years 1 through 10.

[264] Calculation, lower bound: familiarization costs of $9,741,753 (year 1) + $716,336 annual costs due to the rule (year 1–10) = $16,905,113 over 10-year period of analysis.

Calculation, upper bound: familiarization costs of $12,881,310 (year 1) + $972,579 annual costs due to the rule (year 1–10) = $22,607,100 over 10-year period of analysis.

Final Regulatory Flexibility Analysis (FRFA)

1. A Statement of the Need for, and Objectives of, the Rule

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

2. A Statement of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

DHS requested comments on the IRFA as part of the NPRM and received several specific to the IRFA. A brief summary of those comments and USCIS' response are below.[265]

Comment: Various stakeholders expressed concern that affected small entities may lack resources needed to understand the rule's changes and may unintentionally violate certain provisions, harming such entities in a disproportionate manner.

Response: DHS acknowledged the comments but declines to implement any changes to the rule as a result of this comment. DHS emphasizes that all regulatory requirements and procedures will be explained and analyzed through multiple channels (the promulgation of this rule as evidenced by publication after consideration of comments received during the notice and comment period, relevant form instructions, and established communication materials such as the ''Small Entity Compliance Guide''). Additionally, DHS believes that marginal burdens being placed on small entities in order to ensure that they comply with program requirements and worker protections is justified by the benefits of increased program integrity discussed in the preamble.

3. The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule

The Chief Counsel for Advocacy of the Small Business Administration did not provide any comments on the IRFA.

4. A Description and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why No Such Estimate Is Available

DHS conducted the analysis using a statistically valid sample of H–2 petitions to determine the maximum potential number of small entities directly impacted by this final rule. DHS used a subscription-based online database of U.S. entities—Hoovers Online—as well as two other open-access, free databases of public and private entities—Manta and Cortera—to determine the North American Industry Classification System (NAICS) code, revenue, and employee count for each entity.[266] In order to determine the size of a small entity, DHS first classified each entity by its NAICS code, and then used Small Business Administration (SBA) guidelines to note the requisite revenue or employee count threshold for each entity.[267] Some entities were classified as ''small'' based on their annual revenue and some by number of employees.

Using FY 2018 to FY 2022 data on H–2A petitions, DHS collected internal data for each filing organization.[268] Each entity may make multiple filings. For instance, there were 90,658 H–2A petitions filed over the 5-fiscal-year period of analysis, but only 13,244 unique entities that filed H–2A petitions. DHS developed a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. To achieve a 95 percent confidence level and a 5 percent confidence interval on a population of 13,244 entities, DHS determined that a minimum sample size of 374 entities was necessary. However, DHS drew a sample size 10 percent greater than the minimum statistically valid sample for a sample size of 411 to increase the likelihood that our matches would meet or exceed the minimum required sample.[269] Of the 411 entities sampled, 387 instances resulted in entities defined as small (*see* Table 18). Of the 387 small entities, 344 entities were classified as small by revenue or number of employees. The remaining 63 entities were classified as small because information was not found (either no petitioner name was found, or not enough information was found in the databases). A total of 24 entities were classified as not small. Therefore, of the 13,244 entities that filed at least one Form I–129 in FY 2018 through FY 2022, DHS estimates that 96 percent or 12,714 entities are considered small based on SBA size standards.[270]

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[265] More thorough comment summaries and responses are contained in the rule's preamble.

[266] The Hoovers website can be found at *http://www.hoovers.com/;* the Manta website can be found at *http://www.manta.com/;* and the Cortera website can be found at *https://www.cortera.com/.* NAICS 2017 classifications were used for the purpose of this analysis as provided by these databases.

[267] The SBA has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR, section 121.201. At the time this analysis was conducted, NAICS 2017 classifications were in effect. SBA size standards effective August 19, 2019, *https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019.pdf.*

[268] USCIS Office of Policy and Strategy, C3, ELIS (Oct. 19, 2022).

[269] Calculation: 368 + (368 × 10 percent) = 405.

[270] Calculation: 13,244 entities × 96 percent = 12,714 small entities (rounded).

Table 18: Summary and Results of Small Entity Analysis of H-2A Petitions.

Parameter	Quantity	Proportion of Sample (percent)
Population — H-2A petitions	90,658	-
Population — Unique H-2A Entities	13,244	-
Minimum Required Sample	374	-
Selected Sample	411	100
Entities Classified as "Not Small"		
by revenue	23	6
by number of employees	1	0
Entities Classified as "Small"		
by revenue	281	69
by number of employees	43	11
because not enough information found in databases	63	16
Total Number of Small Entities	387	96 [a]

Source: USCIS analysis.

[a] Calculation: 69 percent (Entities classified as small by revenue) + 11 percent (Entities classified as small by number of employees) + 16 percent (Entities classified as small because no information found in database) = 96 percent (total number of small entities, rounded).

As previously stated, DHS classified each entity by its NAICS code to determine the size of each entity. Table 19 shows a list of the top 10 NAICS industries that submit H–2A petitions.

Table 19: Top 10 NAICS Industries Submitting Form I-129 for H-2A Petitions, Small Entity Analysis Results.

Rank	NAICS Code	NAICS U.S. Industry Title	Frequency	Size Standards in Millions of Dollars[a]	Size Standards in Number of Employees[a]	Percent
1	111998	All Other Miscellaneous Crop Farming	79	$1.0	-	19.2
2	N/A	Unclassified Establishments	25	$8.0	-	6.1
3	561499	All Other Business Support Services	15	$16.5	-	3.6
4	111331	Apple Orchards	12	$1.0	-	2.9
5	112111	Beef Cattle Ranching and Farming	12	$1.0	-	2.9
6	112990	All Other Animal Production	9	$1.0	-	2.2
7	111421	Nursery and Tree Production	8	$1.0	-	1.9
8	424910	Farm Supplies Merchant Wholesalers	8	-	200	1.9
9	112112	Cattle Feedlots	7	$8.0	-	1.7
10	561990	All Other Support Services	7	$12.0	-	1.7

Source: USCIS analysis.

Notes:
[a] The SBA has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR, section 121.201. At the time this analysis was conducted, NAICS 2017 classifications were in effect.

DHS used the same methodology developed for H–2A petitions for analyzing H–2B petitions. Using FY 2018 to FY 2022 data on H–2B petitions, DHS collected internal data for each filing organization.[271] Each entity may make multiple filings. For instance, there were 40,579 H–2B petitions filed over these 5 fiscal years by 8,506 unique entities. DHS devised a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. To achieve a 95 percent confidence level and a 5 percent confidence interval on a population of 8,506 entities, DHS determined that a minimum sample size of 368 entities was necessary. DHS created a sample size 10 percent greater than the minimum statistically valid sample for a sample size of 368 in order to increase the likelihood that our matches would meet or exceed the minimum required sample.[272] Of the 405 entities sampled, 384 instances resulted in entities defined as small (*see* Table 20). Of the 384 small entities, 307 entities were classified as small by revenue or number of employees. The remaining 46 entities were classified as small because information was not found (either no petitioner name was found, or not enough information was found in the databases). A total of 21 entities were classified as not small. Therefore, of the 8,506 entities that filed at least one Form I–129 in FY 2018 through FY 2022, DHS estimates that 95 percent or 8,081 entities are considered small based on SBA size standards.[273]

[271] USCIS Office of Policy and Strategy, C3, ELIS (Oct. 19, 2022).

[272] Calculation: 368 + (368 × 10 percent) = 405.

[273] Calculation: 8,506 entities × 95 percent = 8,081 small entities (rounded).

Table 20: Summary and Results of Small Entity Analysis of H-2B Petitions.

Parameter	Quantity	Proportion of Sample (percent)
Population — H-2B petitions	40,579	-
Population — Unique H-2B Entities	8,506	-
Minimum Required Sample	368	-
Selected Sample	405	100
Entities Classified as "Not Small"		
by revenue	20	5
by number of employees	1	0
Entities Classified as "Small"		
by revenue	307	76
by number of employees	31	8
because not enough information found in databases	46	11
Total Number of Small Entities	384	95 [a]

Source: USCIS analysis.

Note:
[a] Calculation: 76 percent (Entities classified as small by revenue) + 8 percent (Entities classified as small by number of employees) + 11 percent (Entities classified as small because no information found in database) = 95 percent (total number of small entities, rounded).

As previously stated, DHS classified each entity by its NAICS code to determine the size of each business. Table 21 shows a list of the top 10 NAICS industries that submit H–2B petitions.

Table 21: Top 10 NAICS Industries Submitting Form I-129 for H-2B Petitions, Small Entity Analysis Results.

Rank	NAICS Code	NAICS U.S. Industry Title	Frequency	Size Standards in Millions of Dollars[a]	Size Standards in Number of Employees[a]	Percent
1	561730	Landscaping Services	56	8.0	-	13.8
2	541320	Landscape Architectural Services	55	8.0	-	13.6
3	721110	Hotels (except Casino Hotels) and Motels	22	35.0	-	5.4
4	N/A	Unclassified Establishments	19	8.0	-	4.7
5	722511	Full-Service Restaurants	12	8.0	-	3.0
6	713910	Golf Courses and Country Clubs	12	16.5	-	3.0
7	236115	New Single-Family Housing Construction (except For-Sale Builders)	10	39.5	-	2.5
8	424460	Fish and Seafood Merchant Wholesalers	9	-	100	2.2
9	238160	Roofing Contractors	6	16.5	-	1.5
10	561990	All Other Support Services	6	12.0	-	1.5

Source: USCIS analysis.

Note:
[a] The SBA has developed size standards to carry out the purposes of the Small Business Act and those size standards can be found in 13 CFR section 121.201. At the time this analysis was conducted, NAICS 2017 classifications were in effect.

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As stated above, petitioning employers may incur costs they would not have otherwise incurred if they are selected to participate in compliance reviews or inspections that are necessary for the approval of a petition, but fail or refuse to comply with such reviews or inspections. Because the random sample is drawn from the H–2 petitioner population at-large, it is not practical to estimate small entities' representation within this noncooperative subpopulation. Thus, the FRFA assumes 12 percent of small entities, like larger entities, may have underestimated the reasonable, existing compliance burden of site visits and thus incur some additional compliance costs.

Petitioner-employers are not expected to be impacted by changes to the interrupted stay calculation. DHS cannot determine how beneficiaries' behavior would change as a result of this simplification to the calculation. Similarly, DHS does not expect flexibilities that allow beneficiaries to arrive in-country earlier would impose any compliance costs upon industries that choose to petition for or employ H–2 workers.

Table 5 shows that an average 13,722 H–2A petitions are received annually. Table 18 shows that 96 percent of entities that petition for H–2A workers are considered small based on SBA size standards. Therefore, DHS reasonably assumes that of the 13,722 H–2A petitions received, 13,500 [274] petitions are submitted by small entities.

Table 6 shows that USCIS receives an average of 6,867 H–2B petitions annually. Table 20 shows that 95 percent of entities that petition for H–2B workers are considered small based on SBA size standards. Therefore, DHS reasonably assumes that of the 6,867 H–2B petitions received, 6,524 petitions are submitted by small entities.[275]

5. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record

This final rule does not impose any new or additional direct ''reporting'' or ''recordkeeping'' requirements on filers of H–2 petitions. The final rule does not require any new professional skills for reporting. As discussed, to the extent that existing statutorily and regulatorily authorized site visits described in the current Form I–129 instructions result in neither a finding of compliance nor noncompliance (described throughout this rule as noncooperation), the provision to revoke or deny petitions may result in unquantified additional compliance burdens to those petitioners that underestimate the reasonable burden of compliance with unannounced site visits. Under the final rule, a petitioner that was selected for a site visit and would not have cooperated under the baseline would face (up to) a 1.7-hour marginal time burden (on average) in order to comply with the provisions of the rule. Also, the provisions of this final rule regarding prohibited fees and labor law violations (see 8 CFR 214.2(h)(5)(xi)(A) through (C), 8 CFR 214.2(h)(6)(i)(B) through (D) regarding prohibited fees, and 8 CFR 214.2(h)(10)(iv) regarding labor law violations and other violations) will subject petitioners, including small entities, to petition denials should they engage in activities that are prohibited by the final rule.

Denial or revocation of petitions for noncooperation with existing site visit and verification requirements is

[274] Calculation: 13,722 petitions received annually × 96 percent = 13,173 submitted by small entities (rounded).

[275] Calculation: 6,867 annually selected petitions × 95 percent = 6,524 submitted by small entities (rounded).

expected to impact 12 percent of petitioners who, despite agreeing to permit the statutorily and regulatorily authorized site visits on their Form I–129 petition, yielded inconclusive (''not defined'') site visit results. Petitioners that do not cooperate with all site visit requirements may have underestimated the reasonable compliance burden they assented to, and, due to this final rule, would experience or expect to experience additional compliance burden associated with unchanged site visits and verification activities. DHS notes that employers who do not cooperate would face denial or revocation of their petition(s), which could result in costs to those businesses such as potential lost revenue or potential lost profits due to not having access to workers.

Furthermore, the final rule causes direct costs to accrue to affected petitioners due to opportunity costs of time from both marginal time burden increases (for H Classification Supplement to Form I–129) and increased filing volumes (additional Forms I–129 filed due to the rule's portability provision).

The increase in cost per petition to file the H classification supplement for Form I–129 on behalf of an H–2 worker is the additional opportunity cost of time of 0.23 hours. As previously stated in Section d(1) of the regulatory impact analysis, this final rule will add $11.72 in costs if an HR specialist files, $26.26 in costs if an in-house lawyer files, and $45.28 in costs if an outsourced lawyer files.[276] USCIS acknowledges that the rule could impose other indirect costs on small entities including, but not limited to, the time required to comply with site visits and any actions required to remain compliant with the rule's strengthened worker provisions. These indirect impacts are not explicitly included within the RFA because of uncertainty related to how many small entities would be affected and the degree to which affected entities would be impacted. The Regulatory Impact Analysis included above contains more in-depth analysis of those possible impacts and how they may impact small entities. Those entities not in compliance with the program would experience direct impacts as a result of this rule; DHS does not know how many entities are noncompliant.

In all instances, DHS acknowledges that several aspects of the rule impose costs on affected entities. DHS has determined, however, that these costs are outweighed by the benefits of increased program integrity and compliance. DHS has considered opportunities to achieve the rule's stated objectives while minimizing costs to small entities.

6. A Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each of the Other Significant Alternatives to the Rule Considered by the Agency Was Rejected

DHS considered alternatives to elements of the final rule that would minimize the impact on small entities while still accomplishing the rule's objectives, such as improving the integrity and efficiency of the H–2 program. First, DHS acknowledges that, as discussed above, the vast majority (approximately 96 percent of H–2A petitioners and 95 percent of H–2B petitioners) of affected petitioners are small businesses. Therefore, costs due to the rule would necessarily be borne by those small businesses. Minimizing any costs due to the rule would therefore compromise the ability of this regulation to effectively address the goals stated in the preamble.

DHS considered not proposing regulations that would revoke or deny petitioners refusing to cooperate with current statutorily and regulatorily authorized USCIS site visit and verification activities. Roughly 12 percent of current H–2 site visits are inconclusive due to noncooperation on the part of petitioners. USCIS' inability to reach a conclusion concerning compliance or noncompliance concerning petitioners that triggered a site visit is critical to oversight of the program and integrity measures. The compliance burden for a small entity is not the duration of the site visit and verification activities, but rather the discrepancy between what USCIS and the assenting petitioner estimated such reasonable compliance burdens to be. DHS will not consider permitting any small entity to willfully violate the statutory and regulatory requirements explained in the existing Form I–129 instructions, thus the IRFA alternative considered was rejected for failing to meet the rule's objective of improving H–2 program integrity. Furthermore, 12 percent of USCIS resources dedicated toward investigating noncompliance with H–2 program requirements are sunk, resulting in no findings. USCIS investigative officers are an important tool and a scarce resource. These investigatory resources could be made more effective if, at some additional compliance costs to would-be noncooperative small entities, USCIS was able to reach a finding. For this reason, DHS rejected the IRFA alternative for failing to meet the rule's objective of improving H–2 efficiency with respect to USCIS investigative resources.

Finally, an additional objective of the rule is enhancement of worker protections. The IRFA alternative of minimizing additional compliance burdens to 12 percent of entities from site visits and verification activities was rejected because it risks undermining the impacts of other proposed provisions of this rule that are expected to achieve greater protections for workers who report violations. Furthermore, DHS considered not expanding porting to minimize those impacts to small entities, but concluded that the availability of porting is integral to accomplishing the objectives of enhancing program integrity and increasing worker protections.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule, or final rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. 2 U.S.C. 1532(a).

In addition, the inflation-adjusted value of $100 million in 1995 is approximately $192 million in 2022 based on the Consumer Price Index for All Urban Consumers (CPI–U).[277]

[276] Calculations: HR specialist calculation: $50.94 × (0.23 hours) = $11.72 (rounded).

In-house lawyer calculation: $114.17 × (0.23 hours) = $26.26 (rounded).

Outsourced lawyer calculation: $196.85 × (0.23) = $45.28 (rounded).

[277] *See* BLS, ''Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month,'' *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202403.pdf* (last visited Apr. 29, 2024). Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2022); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2022 − Average monthly CPI–U for 1995) ÷ (Average monthly CPI–U for 1995)] × 100 = [(292.655–152.383) ÷ 152.383] × 100 = (140.272 ÷ 152.383) × 100 = 0.92052263 × 100 = 92.05 percent = 92 percent (rounded). Calculation

Continued

The term ''Federal mandate'' means a Federal intergovernmental mandate or a Federal private sector mandate. See 2 U.S.C. 1502(1), 658(6). The term ''Federal intergovernmental mandate'' means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program). 2 U.S.C. 658(5). The term ''Federal private sector mandate'' means, in relevant part, a provision that would impose an enforceable duty upon the private sector (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program). 2 U.S.C. 658(7).

This final rule does not contain such a mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by this rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA. 2 U.S.C. 1502(1), 658(6). The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA. DHS has, however, analyzed many of the potential effects of this action in the regulatory impact analysis above.

D. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this final does not meet the definitional criteria outlined in 5 U.S.C. 804(2), for purposes of Congressional review of agency rulemaking pursuant to the Congressional Review Act, Pub. L. 104–121, title II, sec. 251 (Mar. 29, 1996), 110 Stat. 868 (codified at 5 U.S.C. 801–808). This rule will not result in an annual effect on the economy of $100 million or more.

DHS will send this final rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

E. Executive Order 13132 (Federalism)

This final rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this final 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 final rule was drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform. This final rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. DHS has determined that this final rule meets the applicable standards provided in section 3 of E.O. 12988.

G. Executive Order 13175

This final rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

H. National Environmental Policy Act (NEPA)

DHS and its components analyze proposed actions to determine whether the National Environmental Policy Act [278] (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive 023–01, Rev. 01 (Directive) and Instruction Manual 023–01–001–01, Rev. 01 (Instruction Manual) [279] establish the procedures DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA. *See* 40 CFR parts 1500 through 1508. The CEQ regulations allow Federal agencies to establish in their NEPA implementing procedures categories of actions (''categorical exclusions'') that experience has shown normally do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require preparation of an Environmental Assessment or Environmental Impact Statement. *See* 40 CFR 1501.4(a). Instruction Manual, Appendix A, Table 1 lists the DHS categorical exclusions.

Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect.[280]

This final rule amends administrative and procedural requirements to modernize and improve H–2 programs. The final rule will improve program integrity while increasing flexibility, efficiency, and improving access to the H–2 programs. Specifically, DHS is clarifying which fees are prohibited to be collected under H–2 regulations, strengthening the prohibition on collecting or agreeing to collect such fees from H–2 workers, extending grace periods for H–2 workers to give them the same amount of flexibility to come to the United States early and prepare for employment, and to remain in the United States after their employment ends to prepare for departure or seek new employment. The final rule also includes a new, longer grace period for H–2 workers whose employment terminated early. DHS is also making portability permanent in the H–2 programs, and allowing H–2 workers to take certain steps toward becoming permanent residents of the United States while still maintaining lawful nonimmigrant status. DHS is also codifying additional efficiencies in the H–2 programs by eliminating the H–2 eligible countries lists and the H–2 ''interrupted stay'' provisions, and by reducing the period of absence needed to reset a worker's 3-year maximum period of stay.

DHS is not aware of any significant impact on the environment, or any change in environmental effect from current H–2 program rules, that will result from the final rule changes. DHS therefore finds that this final rule clearly fits within categorical exclusion A3 established in the Department's implementing procedures in Instruction Manual, Appendix A.

The amendments contained in this final rule are stand-alone rule changes for USCIS H–2 programs and are not a part of any larger action. In accordance with its implementing procedures, DHS finds no extraordinary circumstances

of inflation-adjusted value: $100 million in 1995 dollars × 1.92 = $192 million in 2022 dollars.

[278] *See* Pub. L. 91–190, 42 U.S.C. 4321 through 4347.

[279] *See* DHS, Directive 023–01, Rev 01, ''Implementation of the National Environmental Policy Act,'' (Oct. 31, 2014), and DHS Instruction Manual 023–01–001–01, Revision 01, ''Implementation of the National Environmental Policy Act (NEPA)'' (Nov. 6, 2014), *https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex.*

[280] *See* Instruction Manual, section V.B.2 (a–c).

associated with this final rule that may give rise to significant environmental effects requiring further environmental analysis and documentation. Therefore, this action is categorically excluded and no further NEPA analysis is required.

I. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Pub. L. 104–13, all agencies must submit to OMB, for review and approval, any reporting requirements inherent in a rule, unless they are exempt.

In compliance with the PRA, DHS requested comments to the information collection associated with this rulemaking in the NPRM published in the **Federal Register** on September 20, 2023. DHS would have addressed any comments received on information collection activities in Section IV. of this final rule. After the publication of the NPRM, DHS published the Fee Schedule Final Rule (''Fee Rule'') on January 31, 2024, and that rule went into effect on April 1, 2024. 89 FR 6194. Subsequently, DHS updated the information collection and the baseline estimated total number of respondents and the amount of time estimated for an average respondent to respond, to reflect the changes to the information collection approved in connection with the Fee Rule. As a result, the estimated total public burden in hours and cost associated with the information collection has changed since the publication of the NPRM.[281]

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for a Nonimmigrant Worker.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–129; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer (or agent, where applicable) uses this form to petition USCIS for a noncitizen to temporarily enter as a nonimmigrant worker. An employer (or agent, where applicable) also uses this form to request an extension of stay or change of status on behalf of the nonimmigrant worker. The form serves the purpose of standardizing requests for nonimmigrant workers and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under certain nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–129 is 572,606 and the estimated hour burden per response is 2.487 hours; the estimated total number of respondents for the information collection E–1/E–2 Classification Supplement to Form I–129 is 12,050 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement to Form I–129 is 12,945 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection H Classification Supplement to Form I–129 is 471,983 and the estimated hour burden per response is 2.3 hours; the estimated total number of respondents for the information collection H–1B and H–1B1 Data Collection and Filing Fee Exemption Supplement is 398,936 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection L Classification Supplement to Form I–129 is 40,358 and the estimated hour burden per response is 1.34 hours; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I–129 is 28,434 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Q–1 Classification Supplement to Form I-129 is 54 and the estimated hour burden per response is 0.34 hour; and the estimated total number of respondents for the information collection R–1 Classification Supplement to Form I–129 is 6,782 and the estimated hour burden per response is 2.34 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 3,023,717 hours. This is a 108,556 increase from the current estimate of 2,915,161 burden hours annually. The overall change in burden estimates reflects the changes in the rule related to the removal of the list of countries of citizenship section on the form and eligible countries list from the instructions, addition of question on exception to the 3-year limit and requests for evidence, rewriting of questions and instructional content on prohibited fees and evidence and other H–2A and H–2B violations, addition of clarifying language to H–2A and H–2B petitioner and employer obligations questions, addition of questions and reformatting for the joint employer section, removal of E-Verify and corresponding H–2A petitions instructions, addition of instructional content in the recruitment of H–2A and H–2B workers section, removal of instructional content on interrupted stays, and addition of clarifying language to the notification requirements instructional content.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $294,892,090.

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.

Accordingly, DHS is amending chapter I of title 8 of the Code of Federal Regulations as follows:

PART 214—NONIMMIGRANT CLASSES

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

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1188, 1221, 1281, 1282, 1301–1305, 1357, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

■ 2. Section 214.2 is amended by:

■ a. Revising paragraph (h)(2)(i)(D);

[281] In the NPRM, DHS estimated that the total estimated number of respondents for the information collection I–129 was 294,751 and the estimated hour burden per response was 2.34 hours.

■ b. Redesignating paragraph (h)(2)(i)(I) as paragraph (h)(2)(i)(J) and adding a new paragraph (h)(2)(i)(I);
■ c. Revising paragraphs (h)(2)(ii) and (iii);
■ d. Removing paragraph (h)(5)(i)(F);
■ e. Removing and reserving paragraph (h)(5)(iii)(B);
■ f. Revising and republishing paragraph (h)(5)(vi);
■ g. Revising paragraphs (h)(5)(viii)(B) and (C) and adding (D);
■ h. Revising paragraphs (h)(5)(ix) and (xi);
■ i. Removing paragraph (h)(5)(xii);
■ j. Revising and republishing paragraph (h)(6)(i);
■ m. Revising paragraph (h)(6)(vii);
■ n. Adding paragraph (h)(10)(iv);
■ o. Adding paragraph (h)(11)(iv);
■ p. Revising paragraphs (h)(13)(i), (iv), and (v);
■ q. Revising paragraph (h)(16)(ii) and adding (h)(16)(iii);
■ r. Revising paragraph (h)(20); and
■ s. Adding paragraph (h)(30).

The revisions and additions read as follows:

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

* * * * *

(h) * * *

(2) * * *

(i) * * *

(D) *Change of employers.* If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition for a nonimmigrant worker requesting classification and an extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay must conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. Except as provided in paragraph (h)(2)(i)(I) of this section, 8 CFR 274a.12(b)(21), or section 214(n) of the Act, 8 U.S.C. 1184(n), the alien is not authorized to begin the employment with the new petitioner until the petition is approved. An H–1C nonimmigrant alien may not change employers.

* * * * *

(I) *H–2A and H–2B portability.* An eligible H–2A or H–2B nonimmigrant is authorized to start new employment upon the proper filing, in accordance with 8 CFR 103.2(a), of a nonfrivolous H–2A or H–2B petition on behalf of such alien requesting the same classification that the nonimmigrant alien currently holds, or as of the requested start date, whichever is later.

(*1*) *Eligible H–2A or H–2B nonimmigrant.* For H–2A and H–2B portability purposes, an eligible H–2A or H–2B nonimmigrant is defined as an alien:

(*i*) Who has been lawfully admitted into the United States in, or otherwise provided, H–2A or H–2B nonimmigrant status;

(*ii*) On whose behalf a nonfrivolous H–2A or H–2B petition for new employment has been properly filed, including a petition for new employment with the same employer, with a request to amend or extend the H–2A or H–2B nonimmigrant's stay in the same classification that the nonimmigrant currently holds, before the H–2A or H–2B nonimmigrant's period of stay authorized by the Secretary of Homeland Security expires; and

(*iii*) Who has not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment.

(*2*) *Length of employment.* Employment authorized under this paragraph (h)(2)(i)(I) automatically ceases upon the adjudication or withdrawal of the H–2A or H–2B petition described in paragraph (h)(2)(i)(I)(*1*)(*ii*) of this section.

(*3*) *Application of H–2A or H–2B program requirements during the pendency of the petition.* The petitioner and any employer is required to comply with all H–2A or H–2B program requirements, as applicable under the relevant program, with respect to an alien who has commenced new employment with that petitioner or employer based on a properly filed nonfrivolous petition and while that petition is pending, even if the petition is subsequently denied or withdrawn. During the pendency of the petition, the alien will not be considered to have been in a period of unauthorized stay or employed in the United States without authorization solely on the basis of employment pursuant to the new petition, even if the petition is subsequently denied or withdrawn.

(*4*) *Successive H–2A or H–2B portability petitions.* (*i*) An alien maintaining authorization for employment under this paragraph (h)(2)(i)(I), whose status, as indicated on the Arrival–Departure Record (Form I–94), has expired, will be considered to be in a period of stay authorized by the Secretary of Homeland Security for purposes of paragraph (h)(2)(i)(I)(*1*)(*ii*) of this section. If otherwise eligible under this paragraph (h)(2)(i)(I), such alien may begin working in a subsequent position upon the filing of another H–2A or H–2B petition in the same classification that the nonimmigrant alien currently holds or from the requested start date, whichever is later, notwithstanding that the previous H–2A or H–2B petition upon which employment is authorized under this paragraph (h)(2)(i)(I) remains pending and regardless of whether the validity period of an approved H–2A or H–2B petition filed on the alien's behalf expired during such pendency.

(*ii*) A request to amend the petition or for an extension of stay in any successive H–2A or H–2B portability petition requesting the same classification that the nonimmigrant alien currently holds cannot be approved if a request to amend the petition or for an extension of stay in any preceding H–2A or H–2B portability petition in the succession is denied, unless the beneficiary's previously approved period of H–2A or H–2B status remains valid.

(*iii*) Denial of a successive portability petition does not affect the ability of the H–2A or H–2B beneficiary to continue or resume working in accordance with the terms of an H–2A or H–2B petition previously approved on behalf of the beneficiary if that petition approval remains valid, and the beneficiary has either maintained H–2A or H–2B status, as appropriate, or been in a period of authorized stay and has not been employed in the United States without authorization.

* * * * *

(ii) *Multiple beneficiaries.* Up to 25 named beneficiaries may be included in an H–1C, H–2A, H–2B, or H–3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period, and in the same location. If more than 25 named beneficiaries are being petitioned for, an additional petition is required.

(iii) *Naming beneficiaries.* H–1B, H–1C, and H–3 petitions must include the name of each beneficiary. Except as provided in this paragraph (h), all H–2A and H–2B petitions must include the name of each beneficiary who is currently in the United States, but need not name any beneficiary who is not currently in the United States. Unnamed beneficiaries must be shown on the petition by total number. USCIS may require the petitioner to name H–2B beneficiaries where the name is needed to establish eligibility for H–2B nonimmigrant status. If all of the beneficiaries covered by an H–2A or H–2B temporary labor certification have not been identified at the time a petition is filed, multiple petitions for subsequent beneficiaries may be filed at

different times but must include a copy of the same temporary labor certification. Each petition must reference all previously filed petitions associated with that temporary labor certification.

* * * * *

(5) * * *

(vi) *Petitioner consent and notification requirements*—(A) *Consent.* In filing an H–2A petition, a petitioner and each employer consents to allow Government access to all sites where the labor is being or will be performed and where workers are or will be housed and agrees to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by USCIS, including an on-site inspection of the employer's facilities, review of the employer's records related to the compliance with immigration laws and regulations, and interview of the employer's employees and any other individuals possessing pertinent information, which may be conducted in the absence of the employer or the employer's representatives, as a condition for the approval of the petition. The interviews may be conducted on the employer's property, or as feasible, at a neutral location agreed to by the employee and USCIS away from the employer's property. If USCIS is unable to verify facts, including due to the failure or refusal of the petitioner or employer to cooperate in an inspection or other compliance review, then such inability to verify facts, including due to failure or refusal to cooperate, may result in denial or revocation of any H–2A petition for H–2A workers performing services at the location or locations that are a subject of inspection or compliance review.

(B) *Agreements.* The petitioner agrees to the following requirements:

(*1*) To notify DHS, within 2 workdays, and beginning on a date and in a manner specified in a notice published in the **Federal Register** if:

(*i*) An H–2A worker does not report for work within 5 workdays of the employment start date on the H–2A petition or within 5 workdays of the start date established by their employer, whichever is later;

(*ii*) The agricultural labor or services for which H–2A workers were hired is completed more than 30 days earlier than the employment end date stated on the H–2A petition; or

(*iii*) The H–2A worker does not report for work for a period of 5 consecutive workdays without the consent of the employer or is terminated prior to the completion of agricultural labor or services for which they were hired.

(*2*) To retain evidence of such notification and make it available for inspection by DHS officers for a 1-year period beginning on the date of the notification. To retain evidence of a different employment start date if it is changed from that on the petition by the employer and make it available for inspection by DHS officers for the 1-year period beginning on the newly-established employment start date.

(*3*) To pay $10 in liquidated damages for each instance where the employer cannot demonstrate that it has complied with the notification requirements, unless, in the case of an untimely notification, the employer demonstrates with such notification that good cause existed for the untimely notification, and DHS, in its discretion, waives the liquidated damages amount.

(C) *Process.* If DHS has determined that the petitioner has violated the notification requirements in paragraph (h)(5)(vi)(B)(1) of this section and has not received the required notification, the petitioner will be given written notice and 30 days to reply before being given written notice of the assessment of liquidated damages.

(D) *Failure to pay liquidated damages.* If liquidated damages are not paid within 10 days of assessment, an H–2A petition may not be processed for that petitioner or any joint employer shown on the petition until such damages are paid.

(vii) *Validity.* An approved H–2A petition is valid through the expiration of the relating certification for the purpose of allowing a beneficiary to seek issuance of an H–2A nonimmigrant visa, admission or an extension of stay for the purpose of engaging in the specific certified employment.

(viii) * * *

(B) *Period of admission.* An alien admissible as an H–2A nonimmigrant will be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to 10 days before the beginning of the approved period for the purpose of travel to the worksite, and up to 30 days subject to the 3-year limitation in paragraph (h)(5)(viii)(C) of this section following the expiration of the H–2A petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period of the petition.

(C) *Limits on an individual's stay.* Except as provided in paragraph (h)(5)(viii)(B) of this section, an alien's stay as an H–2A nonimmigrant is limited by the period of time stated in an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H–2A or H–2B status for a total of 3 years may not again be granted H–2A status until such time as they remain outside the United States for an uninterrupted period of at least 60 days. Eligibility under this paragraph (h)(5)(viii)(C) will be determined during adjudication of a request for admission, change of status or extension. An alien found eligible for a shorter period of H–2A status than that indicated by the petition due to the application of this paragraph (h)(5)(viii)(C) will only be admitted for that shorter period.

(D) *Period of absence.* An absence from the United States for an uninterrupted period of at least 60 days at any time will result in the alien becoming eligible for a new 3-year maximum period of H–2 stay. To qualify, the petitioner must provide evidence documenting the alien's relevant absence(s) from the United States, such as, but not limited to, arrival and departure records, copies of tax returns, and records of employment abroad.

(ix) *Substitution of beneficiaries after admission.* An H–2A petition may be filed to replace H–2A workers whose employment was terminated earlier than the end date stated on the H–2A petition and before the completion of work; who do not report for work within 5 workdays of the employment start date on the H–2A petition or within 5 workdays of the start date established by their employer, whichever is later; or who do not report for work for a period of 5 consecutive workdays without the consent of the employer. The petition must be filed with a copy of the temporary labor certification, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (h)(5)(i)(D) of this section. It must also be filed with a statement giving the name, date and country of birth, termination date, and the reason for termination, if applicable, for such worker and the date that USCIS was notified that the worker was terminated or did not report for work for a period of 5 consecutive workdays without the consent of the employer. A petition for a replacement will not be approved where the requirements of paragraph (h)(5)(vi) of this section have not been met. A petition for replacements does not constitute the notification required by paragraph (h)(5)(vi)(B)(1) of this section.

* * * * *

(xi) *Treatment of petitions and alien beneficiaries upon a determination that fees were collected from alien beneficiaries*—(A) *Denial or revocation of petition for prohibited fees.* As a condition of approval of an H–2A petition, no job placement fee, fee or penalty for breach of contract, or other fee, penalty, or compensation (either direct or indirect), related to the H–2A employment (collectively, ''prohibited fees'') may be collected at any time from a beneficiary of an H–2A petition or any person acting on the beneficiary's behalf by a petitioner, a petitioner's employee, agent, attorney, facilitator, recruiter, or similar employment service, or by any employer (if different from the petitioner) or any joint employer, including a member employer if the petitioner is an association of U.S. agricultural producers. The term ''similar employment service'' refers to any person or entity that recruits or solicits prospective beneficiaries of the H–2A petition. The passing of a cost to the beneficiary that, by statute or applicable regulations, is the responsibility of the petitioner, constitutes the collection of a prohibited fee. This provision does not prohibit petitioners (including their employees), employers or any joint employers, agents, attorneys, facilitators, recruiters, or similar employment services from receiving reimbursement from the beneficiary for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees. This provision does not prohibit employers from allowing workers to initially incur fees or expenses that the employers are required to subsequently reimburse, where such arrangement is specifically permitted by, and performed in compliance with statute or regulations governing the H–2A program.

(*1*) If USCIS determines that the petitioner or any of its employees, whether before or after the filing of the H–2A petition, has collected, or entered into an agreement to collect, a prohibited fee related to the H–2A employment, USCIS will deny or revoke the H–2A petition filed on or after January 17, 2025 on notice unless the petitioner demonstrates through clear and convincing evidence that: the petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by its employees throughout the recruitment, hiring, and employment process; extraordinary circumstances beyond the petitioner's control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees; the petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; and the petitioner fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, it fully reimbursed the beneficiaries' designees.

(*2*) If USCIS determines that the beneficiary has paid or agreed to pay a prohibited fee related to the H–2A employment, whether before or after the filing of the H–2A petition, to any agent, attorney, employer, facilitator, recruiter, or similar employment service, or any joint employer, including a member employer if the petitioner is an association of U.S. agricultural producers, USCIS will deny or revoke the H–2A petition filed on or after January 17, 2025 on notice unless the petitioner demonstrates to USCIS through clear and convincing evidence that: the petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement by such parties throughout the recruitment, hiring, and employment process; the petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; and that all affected beneficiaries, or their designees only if such beneficiaries cannot be located or are deceased, have been fully reimbursed. A written contract between the petitioner and the agent, attorney, facilitator, recruiter, similar employment service, or member employer stating that such fees were prohibited will not, by itself, be sufficient to meet this standard of proof.

(*3*) For purposes of paragraph (h)(5)(xi) of this section, a designee must be an individual or entity for whom the beneficiary has provided the petitioner or its successor in interest prior written authorization to receive such reimbursement, as long as the petitioner or its successor in interest, or its agent, employer, or any joint employer, attorney, facilitator, recruiter, or similar employment service would not act as such designee or derive any financial benefit, either directly or indirectly, from the reimbursement.

(B) *One-year denial period of subsequent H–2A petitions.* USCIS will deny any H–2A petition filed by the same petitioner or a successor in interest within 1 year after the decision denying or revoking on notice an H–2B or H–2A petition on the basis of paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), respectively, of this section, provided that the denied or revoked petition was filed on or after January 17, 2025. In addition, USCIS will deny any H–2A petition filed by the same petitioner or successor in interest within 1 year after withdrawal of an H–2A or H–2B petition filed on or after January 17, 2025, that was withdrawn following USCIS issuance of a request for evidence or notice of intent to deny or revoke the petition on the basis of paragraph (h)(5)(xi)(A) or (h)(6)(i)(B), respectively, of this section.

(C) *Reimbursement as condition of approval of future H–2A petitions*—(*1*) *Additional 3-year denial period of subsequent H–2A petitions.* For an additional 3 years after the 1-year period described in paragraph (h)(5)(xi)(B) of this section, USCIS will deny any H–2A petition filed by the same petitioner or successor in interest, unless the petitioner or successor in interest demonstrates to USCIS that the petitioner, successor in interest, or the petitioner's or successor in interest's agent, facilitator, recruiter, or similar employment service, or any joint employer, including a member employer if the petitioner is an association of U.S. agricultural producers, reimbursed in full each beneficiary, or the beneficiary's designee only if such beneficiary cannot be located or is deceased, of the denied or revoked petition from whom a prohibited fee was collected. USCIS will deny H–2A petitions under this provision based on the denial or revocation decision(s) issued pursuant to paragraph (h)(5)(xi)(A) or (h)(6)(i)(B) of this section on a prior petition filed on or after January 17, 2025.

(*2*) *Successor in interest.* For the purposes of paragraphs (h)(5)(xi)(B) and (C) of this section, successor in interest means an employer that is controlling and carrying on the business of a previous employer regardless of whether such successor in interest has succeeded to all of the rights and liabilities of the predecessor entity. The following factors may be considered by USCIS in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(*i*) Substantial continuity of the same business operations;

(*ii*) Use of the same facilities;

(*iii*) Substantial continuity of the work force;

(*iv*) Similarity of jobs and working conditions;

(*v*) Similarity of supervisory personnel;

(*vi*) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(*vii*) Similarity in machinery, equipment, production methods, or assets required to conduct business;

(*viii*) Similarity of products and services;

(*ix*) Familial or close personal relationships between predecessor and successor owners of the entity; and

(*x*) Use of the same or related remittance sources for business payments.

(6) * * *

(i) *Petition*—(A) *H–2B nonagricultural temporary worker.* An H–2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform such services or labor and whose employment is not adversely affecting the wages and working conditions of United States workers.

(B) *Denial or revocation of petition for prohibited fees.* As a condition of approval of an H–2B petition, no job placement fee, fee or penalty for breach of contract, or other fee, penalty, or compensation (either direct or indirect), related to the H–2B employment (collectively, ''prohibited fees'') may be collected at any time from a beneficiary of an H–2B petition or any person acting on the beneficiary's behalf by a petitioner, a petitioner's employee, agent, attorney, facilitator, recruiter, or similar employment service, or any employer (if different from the petitioner). The term ''similar employment service'' refers to any person or entity that recruits or solicits prospective beneficiaries of the H–2B petition. The passing of a cost to the beneficiary that, by statute or applicable regulations is the responsibility of the petitioner, constitutes the collection of a prohibited fee. This provision does not prohibit petitioners (including their employees), employers, agents, attorneys, facilitators, recruiters, or similar employment services from receiving reimbursement from the beneficiary for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees. This provision does not prohibit employers from allowing workers to initially incur fees or expenses that the employers are required to subsequently reimburse, where such arrangement is specifically permitted by, and performed in compliance with, statute or regulations governing the H–2B program.

(*1*) If USCIS determines that the petitioner or any of its employees, whether before or after the filing of the H–2B petition, has collected or entered into an agreement to collect a prohibited fee related to the H–2B employment, USCIS will deny or revoke the H–2B petition filed on or after January 17, 2025 on notice unless the petitioner demonstrates through clear and convincing evidence that: the petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee collection or agreement throughout the recruitment, hiring, and employment process; extraordinary circumstances beyond the petitioner's control resulted in its failure to prevent collection or entry into agreement for collection of prohibited fees; the petitioner took immediate remedial action as soon as it became aware of the payment of or agreement to pay the prohibited fee; and the petitioner fully reimbursed all affected beneficiaries or, only if such beneficiaries cannot be located or are deceased, it fully reimbursed their designees.

(*2*) If USCIS determines that the beneficiary has paid or agreed to pay any employer, agent, attorney, facilitator, recruiter, or similar employment service a prohibited fee related to the H–2B employment, whether before or after the filing of the H–2B petition, USCIS will deny or revoke the H–2B petition filed on or after January 17, 2025 on notice unless the petitioner demonstrates to USCIS through clear and convincing evidence that: the petitioner made ongoing, good faith, reasonable efforts to prevent and learn of the prohibited fee(s) collection or agreement by such parties throughout the recruitment, hiring, and employment process; the petitioner took immediate remedial action as soon as it became aware of the payment of the prohibited fee or agreement; and all affected beneficiaries, or their designees only if such beneficiaries cannot be located or are deceased, have been fully reimbursed. A written contract between the petitioner and the facilitator, recruiter, or similar employment service stating that such fees were prohibited will not, by itself, be sufficient to meet this standard of proof.

(*3*) For purposes of paragraph (h)(6)(i) of this section, a designee must be an individual or entity for whom the beneficiary has provided the petitioner or its successor in interest prior written authorization to receive such reimbursement, as long as the petitioner or its successor in interest, or its agent, employer, attorney, facilitator, recruiter, or similar employment service would not act as such designee or derive any financial benefit, either directly or indirectly, from the reimbursement.

(C) *One-year denial period of subsequent H–2B petitions.* USCIS will deny any H–2B petition filed by the same petitioner or a successor in interest within 1 year after the decision denying or revoking on notice an H–2B or H–2A petition on the basis of paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), respectively, of this section, provided that the denied or revoked petition was filed on or after January 17, 2025. In addition, USCIS will deny any H–2B petition filed by the same petitioner or successor in interest within 1 year after withdrawal of an H–2B or H–2A petition filed on or after January 17, 2025, that was withdrawn following USCIS issuance of a request for evidence or notice of intent to deny or revoke the petition on the basis of paragraph (h)(6)(i)(B) or (h)(5)(xi)(A), respectively, of this section.

(D) *Reimbursement as condition of approval of future H–2B petitions*—(*1*) *Additional 3-year denial period of subsequent H–2B petitions.* For an additional 3 years after the 1-year period described in paragraph (h)(6)(i)(C) of this section, USCIS will deny any H–2B petition filed by the same petitioner or successor in interest, unless the petitioner or successor in interest demonstrates to USCIS that the petitioner or successor in interest, or the petitioner's or successor in interest's agent, facilitator, recruiter, or similar employment service, reimbursed in full each beneficiary, or the beneficiary's designee only if such beneficiary cannot be located or is deceased, of the denied or revoked petition from whom a prohibited fee was collected. USCIS will deny H–2B petitions under this provision based on the denial or revocation decision(s) issued pursuant to paragraph (h)(6)(i)(B) or (h)(5)(xi)(A) of this section on a prior petition filed on or after January 17, 2025.

(*2*) *Successor in interest.* For the purposes of paragraphs (h)(6)(i)(C) and (D) of this section, successor in interest means an employer that is controlling and carrying on the business of a previous employer regardless of whether such successor in interest has succeeded to all of the rights and liabilities of the predecessor entity. The following factors may be considered by USCIS in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(*i*) Substantial continuity of the same business operations;

(*ii*) Use of the same facilities;

(*iii*) Substantial continuity of the work force;

(*iv*) Similarity of jobs and working conditions;

(*v*) Similarity of supervisory personnel;

(*vi*) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(*vii*) Similarity in machinery, equipment, production methods, or assets required to conduct business;

(*viii*) Similarity of products and services;

(*ix*) Familial or close personal relationships between predecessor and successor owners of the entity; and

(*x*) Use of the same or related remittance sources for business payments.

(E) [Reserved]

(F) *Petitioner agreements and notification requirements*—(*1*) *Agreements.* The petitioner must notify DHS, within 2 workdays, and beginning on a date and in a manner specified in a notice published in the **Federal Register** if: An H–2B worker does not report for work within 5 workdays after the employment start date stated on the petition; the nonagricultural labor or services for which H–2B workers were hired were completed more than 30 days early; or an H–2B worker does not report for work for a period of 5 consecutive workdays without the consent of the employer or is terminated prior to the completion of the nonagricultural labor or services for which they were hired. The petitioner must also retain evidence of such notification and make it available for inspection by DHS officers for a 1-year period beginning on the date of the notification.

(*2*) *Consent.* In filing an H–2B petition, the petitioner and each employer (if different from the petitioner) consent to allow Government access to all sites where the labor is being or will be performed and agrees to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by USCIS, including an on-site inspection of the employer's facilities, review of the employer's records related to the compliance with immigration laws and regulations, and interview of the employer's employees and any other individuals possessing pertinent information, which may be conducted in the absence of the employer or the employer's representatives, as a condition for the approval of the petition. The interviews may be conducted on the employer's property, or as feasible, at a neutral location agreed to by the employee and USCIS away from the employer's property. If USCIS is unable to verify facts, including due to the failure or refusal of the petitioner or employer to cooperate in an inspection or other compliance review, then such inability to verify facts, including due to failure or refusal to cooperate, may result in denial or revocation of any H–2B petition for H–2B workers performing services at the location or locations that are a subject of inspection or compliance review.

* * * * *

(vii) *Admission*—(A) *Period of admission.* An alien admissible as an H–2B nonimmigrant will be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to 10 days before the beginning of the approved period for the purpose of travel to the worksite, and up to 30 days subject to the 3-year limitation in paragraph (h)(6)(vii)(B) of this section following the expiration of the H–2B petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period of the petition.

(B) *Limits on an individual's stay.* Except as provided in paragraph (h)(6)(vii)(A) of this section, an alien's stay as an H–2B nonimmigrant is limited by the period of time stated in an approved petition. An alien may remain longer to engage in other qualifying temporary nonagricultural employment by obtaining an extension of stay. However, an individual who has held H–2A or H–2B status for a total of 3 years may not again be granted H–2B status until such time as they remain outside the United States for an uninterrupted period of at least 60 days. Eligibility under this paragraph (h)(6)(vii)(B) will be determined during adjudication of a request for admission, change of status or extension of stay. An alien found eligible for a shorter period of H–2B status than that indicated by the petition due to the application of this paragraph (h)(6)(vii)(B) will only be admitted for that shorter period.

(C) *Period of absence.* An absence from the United States for an uninterrupted period of at least 60 days at any time will result in the alien becoming eligible for a new 3-year maximum period of H–2 stay. The limitation in paragraph (h)(6)(vii)(B) of this section will not apply to H–2B aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitation in paragraph (h)(6)(vii)(B) of this section will not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify, the petitioner must provide evidence documenting the alien's relevant absence(s) from the United States, such as, but not limited to, arrival and departure records, copies of tax returns, and records of employment abroad.

(D) *Traded professional H–2B athletes.* In the case of a professional H–2B athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after the player's acquisition by the new organization, within which time the new organization is expected to file a new application or petition for H–2B nonimmigrant classification. If a new application or petition is not filed within 30 days, employment authorization will cease. If a new application or petition is filed within 30 days, the professional athlete will be deemed to be in valid H–2B status, and employment will continue to be authorized, until the petition is adjudicated. If the new petition is denied, employment authorization will cease.

* * * * *

(10) * * *

(iv) *H–2A and H–2B violators.* (A) USCIS will deny any H–2A or H–2B petition filed by a petitioner, or the successor in interest of a petitioner as defined in paragraphs (h)(5)(xi)(C)(*2*) and (h)(6)(i)(D)(*2*) of this section, that has been the subject of one or more of the following actions:

(*1*) A final administrative determination by the Secretary of Labor under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503 debarring the petitioner from filing or receiving a future labor certification, or a final administrative determination by the Governor of Guam debarring the petitioner from issuance of future labor certifications under applicable Guam regulations and rules, if the petition is filed on or after January 17, 2025 and during the debarment period, or if the debarment occurs during the pendency of the petition filed on or after January 17, 2025, and the final administrative determination debarring the petitioner is made on or after January 17, 2025; or

(*2*) A final USCIS denial or revocation decision issued during the pendency of the petition or within 3 years prior to filing the petition that includes a finding of fraud or willful misrepresentation of a material fact with respect to a previously filed H–2A or H–2B petition. This provision will only apply if the final denial or revocation decision was issued on a petition filed on or after January 17, 2025; or

(*3*) A final determination of violation(s) under section 274(a) of the Act during the pendency of the petition or within 3 years prior to filing the petition if the final determination of violation(s) under section 274(a) of the Act is made on or after January 17, 2025 and the petition is filed on or after January 17, 2025.

(B) Except as provided in paragraph (h)(10)(iv)(A) of this section, USCIS may deny any H–2A or H–2B petition filed by a petitioner, or the successor in interest of a petitioner as defined in paragraphs (h)(5)(xi)(C)(*2*) and (h)(6)(i)(D)(*2*) of this section on or after January 17, 2025, that has been the subject of one or more of the following actions during the pendency of the petition or within 3 years prior to filing the petition, regardless of whether the action(s) or underlying violation(s) occurred before, on, or after January 17, 2025. USCIS may deny such a petition if it determines that the petitioner or successor has not established its intention and/or ability to comply with H–2A or H–2B program requirements. The violation(s) underlying the following actions that may call into question a petitioner's or successor's intention and/or ability to comply include:

(*1*) A final administrative determination by the Secretary of Labor or the Governor of Guam with respect to a prior H–2A or H–2B temporary labor certification that includes:

(*i*) Revocation of an approved temporary labor certification under 20 CFR part 655, subpart A or B, or applicable Guam regulations and rules;

(*ii*) Debarment under 20 CFR part 655, subpart A or B, or 29 CFR part 501 or 503, or applicable Guam regulations and rules, if the debarment period has concluded prior to filing the petition; or

(*iii*) Any other administrative sanction or remedy under 29 CFR part 501 or 503, or applicable Guam regulations and rules, including assessment of civil money penalties as described in those parts.

(*2*) A final USCIS decision revoking the approval of a prior petition that includes one or more of the following findings: the beneficiary was not employed by the petitioner in the capacity specified in the petition; the statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, or was inaccurate; the petitioner violated terms and conditions of the approved petition; or the petitioner violated requirements of section 101(a)(15)(H) of the Act or this paragraph (h); or

(*3*) Any final administrative or judicial determination (other than one described in paragraph (h)(10)(iv)(A) of this section) that the petitioner violated any applicable employment-related laws or regulations, including health and safety laws or regulations.

(C) In determining whether the underlying violation(s) in paragraph (h)(10)(iv)(B) of this section calls into question the intention and/or ability of the petitioner or its successor in interest to comply with H–2A or H–2B program requirements, USCIS will consider all relevant factors, including, but not limited to:

(*1*) The recency and number of violations;

(*2*) The egregiousness of the violation(s), including how many workers were affected, and whether it involved a risk to the health or safety of workers;

(*3*) Overall history or pattern of prior violations;

(*4*) The severity or monetary amount of any penalties imposed;

(*5*) Whether the final determination, decision, or conviction included a finding of willfulness;

(*6*) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential financial injury to the workers;

(*7*) Timely compliance with all penalties and remedies ordered under the final determination(s), decision(s), or conviction(s); and

(*8*) Other corrective actions taken by the petitioner or its successor in interest to cure its violation(s) or prevent future violations.

(D) For purposes of paragraph (h)(10)(iv) of this section, a criminal conviction or final administrative or judicial determination against any one of the following individuals will be treated as a conviction or final administrative or judicial determination against the petitioner or successor in interest:

(*1*) An individual acting on behalf of the petitioning entity, which could include, among others, the petitioner's owner, employee, or contractor; or

(*2*) With respect to paragraph (h)(10)(iv)(B) of this section, an employee of the petitioning entity who a reasonable person in the H–2A or H–2B worker's position would believe is acting on behalf of the petitioning entity.

(E)(*1*) With respect to denials under paragraph (h)(10)(iv)(A) of this section, USCIS will inform the petitioner of the right to appeal the denial under 8 CFR 103.3, and indicate in the denial notice that the mandatory ground of denial will also apply in the adjudication of any other pending or future H–2 petition filed by the petitioner or a successor in interest during the applicable time period.

(*2*) With respect to denials under paragraph (h)(10)(iv)(B) of this section, USCIS will inform the petitioner of the right to appeal the denial under 8 CFR 103.3, and indicate in the denial notice that the discretionary ground of denial may also apply in the adjudication of any other pending or future H–2 petition filed by the petitioner or a successor in interest during the applicable time period.

(F) If USCIS has determined in the course of a prior adjudication that a petitioner (or the preceding entity, if the petitioner is a successor in interest) has established its intention and ability to comply with H–2A or H–2B program requirements notwithstanding relevant violation determination(s) under paragraph (h)(10)(iv)(B) of this section, USCIS will not seek to deny a subsequent petition under paragraph (h)(10)(iv)(B) based on the same previous violation determination(s) unless USCIS becomes aware of a new material fact or finds that its previous determination was based on a material error of law.

(11) * * *

(iv) *Effect of H–2A or H–2B petition revocation.* Upon revocation of the approval of an employer's H–2A or H–2B petition, the beneficiary and their dependents will not be considered to have failed to maintain nonimmigrant status, and will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)), solely on the basis of the petition revocation for a 60-day period following the date of the revocation, or until the end of the authorized period of admission, whichever is shorter. During such a period, the alien may only work as otherwise authorized under 8 CFR 274a.12. The employer will be liable for the alien beneficiary's reasonable costs of return transportation to their last place of foreign residence abroad, unless such alien obtains an extension of stay based on an approved petition in the same classification filed by a different employer.

* * * * *

(13) * * *

(i) *General.* (A) An H–3 beneficiary will be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition.

(B) When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under section 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count toward fulfillment of the required time abroad. A certain period of absence from the United States of H–2A and H–2B aliens, as set forth in 8 CFR 214.2(h)(5)(viii)(D) and 8 CFR 214.2(h)(6)(vii)(C), respectively, will provide a new total of 3 years that H–2A or H–2B status may be granted. The petitioner must provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to reside abroad.

(C) An alien admitted or otherwise provided status in H–2A or H–2B classification and their dependents will not be considered to have failed to maintain nonimmigrant status, and will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)), solely on the basis of a cessation of the employment on which the alien's classification was based, for 60 consecutive days or until the end of the authorized period of admission, whichever is shorter, once during each authorized period of admission. During such a period, the alien may only work as otherwise authorized under 8 CFR 274a.12.

(D) An alien in any authorized period described in paragraph (C) of this section may apply for and be granted an extension of stay under 8 CFR 214.1(c)(4) or change of status under 8 CFR 248.1, if otherwise eligible.

* * * * *

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

(v) *Exceptions.* The limitations in paragraphs (h)(13)(iii) and (iv) of this section will not apply to H–1B and H–3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitations will not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

* * * * *

(16) * * *

(ii) *H–2A or H–2B classification.* The approval of a permanent labor certification, the filing of an immediate relative or preference petition for or by an alien or a diversity visa petition with the Department of State, or an application by an alien to seek lawful permanent residence or an immigrant visa, will not, standing alone, be the basis for denying an H–2 petition, a request to extend such a petition, or an application for admission in, change of status to, or extension of stay in H–2 status. The approval of a permanent labor certification, filing of an immediate relative petition, preference petition, or diversity visa petition, or filing of an application for adjustment of status or an immigrant visa will be considered, together with all other facts presented, in determining whether the H–2 nonimmigrant is maintaining his or her H–2 status and whether the alien has a residence in a foreign country which he or she has no intention of abandoning.

(iii) *H–3 classification.* The approval of a permanent labor certification, or the filing of a preference petition for an alien currently employed by or in a training position with the same petitioner, will be a reason, by itself, to deny the alien's extension of stay.

* * * * *

(20) *Retaliatory action claims.* (i) If credible documentary evidence is provided in support of a petition seeking an extension of H–1B stay in or change of status to another classification indicating that the beneficiary faced retaliatory action from their employer based on a report regarding a violation of that employer's labor condition application obligations under section 212(n)(2)(C)(iv) of the Act, USCIS may consider a loss or failure to maintain H–1B status by the beneficiary related to such violation as due to, and commensurate with, ''extraordinary circumstances'' as defined by 8 CFR 214.1(c)(4) and 8 CFR 248.1(b).

(ii) If credible documentary evidence is provided in support of a petition seeking an extension of H–2A or H–2B stay in or change of status to another classification indicating that the beneficiary faced retaliatory action from their employer based on a reasonable claim of a violation or potential violation of any applicable program requirements or based on engagement in another protected activity, USCIS may consider a loss or failure to maintain H–2A or H–2B status by the beneficiary related to such violation as due to, and commensurate with, ''extraordinary circumstances'' as defined by 8 CFR 214.1(c)(4) and 8 CFR 248.1(b). USCIS will determine the reasonableness of any claim from the perspective of a reasonable person in the H–2A or H–2B worker's position.

* * * * *

(30) *Severability.* The Department intends that should any of the revisions effective on January 17, 2025, to provisions in paragraphs (h)(2), (5), (6), (10), (11), (13), (16) and (20) of this section or to the provision in 8 CFR 274a.12(b)(21) be held to be invalid or unenforceable by their terms or as applied to any person or circumstance they should nevertheless be construed so as to continue to give the maximum effect to the provision(s) permitted by law, unless any such provision is held to be wholly invalid and unenforceable, in which event the provision(s) should be severed from the remainder of the provisions and the holding should not affect the other provisions or the application of those other provisions to persons not similarly situated or to dissimilar circumstances.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

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

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599; Title VII of Pub. L. 110–229, 122 Stat. 754; Pub. L. 115–218, 132 Stat. 1547; 8 CFR part 2.

■ 4. Section 274a.12 is amended by revising paragraph (b)(21) to read as follows:

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

* * * * *

(b) * * *

(21) A nonimmigrant alien within the class of aliens described in 8 CFR 214.2(h)(1)(ii)(C) or 8 CFR

214.2(h)(1)(ii)(D) for whom a nonfrivolous petition requesting an extension of stay is properly filed pursuant to 8 CFR 214.2 and 8 CFR 103.2(a) requesting the same classification that the nonimmigrant alien currently holds. Pursuant to 8 CFR 214.2(h)(2)(i)(I), such alien is authorized to start new employment upon the proper filing of the nonfrivolous petition requesting an extension of stay in the same classification, or as of the requested start date, whichever is later. The employment authorization under this paragraph (b)(21) automatically ceases upon the adjudication or withdrawal of the H–2A or H–2B petition;

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Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

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