DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 103 and 214

[INS No. 1946–98, AG Order No. 2313–2000]

RIN 1115–AF29

Delegation of the Adjudication of Certain Temporary Agricultural Worker (H–2A) Petitions, Appellate and Revocation Authority for Those Petitions to the Secretary of Labor

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This rule amends the Immigration and Naturalization Service (Service) regulations to transfer to the Secretary of Labor the authority to adjudicate petitions for temporary agricultural workers (H–2As), and the authority to decide appeals on those decisions and to make determinations for revocation of petition approvals. This rule does not affect the Service's authority to make determinations at a port-of-entry of an alien's admissibility to the United States, or of an alien's eligibility for change of nonimmigrant status, or for extension of stay. This rule streamlines the existing H–2A petitioning process and makes the process easier and faster for employers of temporary agricultural workers.

DATES: This rule is effective November 13, 2000.

FOR FURTHER INFORMATION CONTACT: Bert Rizzo, Supervisory Immigration Adjudications Officer, Programs Division, Immigration and Naturalization Service, 425 I Street, NW, Room 4213, Washington, DC 20536, telephone (202) 307–8996.

SUPPLEMENTARY INFORMATION:

What Is An H–2A Petition?

The Immigration and Nationality Act (Act) provides for an employer to seek the services of foreign workers to perform temporary or seasonal agricultural services in the United States. These temporary agricultural workers are known as H–2As.

What Are the Department of Labor's (DOL) and Service's Current Roles?

Under present procedures, DOL plays the principal role with respect to employment of H–2A workers since DOL must first consider an employer's application and issue a labor certification for the hiring of temporary agricultural workers. Once DOL issues a labor certification, the employer then files an H–2A petition with the Service and attaches DOL certification.

The Service's role in the process consists mainly of confirming that DOL has issued a labor certification, that the services required are temporary or seasonal (which is also considered by DOL), and that any prior H–2A violations by that employer have been corrected.

Why Is the Service Delegating Authority to the Secretary of Labor?

On December 7, 1998, the Service published a proposed rule in the **Federal Register** at 63 FR 67431 to transfer authority to adjudicate certain temporary agricultural worker petitions (H–2As) to the Secretary of Labor. The initial proposal was to allow DOL to adjudicate all H–2A petitions where the alien beneficiaries were located outside of the United States, while the Service would continue to adjudicate petitions when the alien beneficiaries were located within the United States. As described below, the Service has revised the approach of the proposed rule to effectuate a more comprehensive, one-step process for the adjudication of H–2A petitions by DOL.

This rule is intended to streamline the process and consolidate the H–2A determinations within DOL, the agency having the far greater role in the existing process. Consolidation under DOL is logical because of the Service's minimal role and the ability of DOL to handle the limited additional considerations to adjudicate completely both the labor certification and petition portions of the process.

However, the transfer of authority to DOL is being made only for determinations of the eligibility for classification of alien beneficiaries for H–2A status. The Attorney General is not further delegating to DOL the control of aliens within the United States. Therefore, this rule provides that DOL will forward requests to extend the stay or change the status of alien beneficiaries of H–2A petitions to the Service for adjudication. Since DOL and the Service will conduct the necessary interagency coordination, the petitioners will still have the advantage of a one-stop forum for the filing of all H–2A matters.

What Comments Did the Service Receive on the Proposed Rule?

The Service received eight comments to the proposed rule. The comments were from employer associations and the American Immigration Lawyers Association. The comments generally were divided among six issues. The following is a discussion of the comments and the Service's response:

1. Filing Form

Five of the commenters believed that the Service was not properly planning for its continued role in developing the filing form(s) or the data to be gathered from the petitioner, although they did not offer reasons for this belief. DOL and the Service engaged in extensive discussions on the appropriate filing vehicle for H–2As. The Service has specific data requirements for its management information system, statistical records, and the administration of immigration laws. The Service is ensuring that those data requirements are met through the consultation process and through an interagency agreement outlining all areas of concern in the transfer of this process to DOL.

The agencies will use a single form with multiple pages to capture all the necessary data for both agencies. DOL envisions a scannable form that can be machine read, which will expedite its data input into a new management information system and assist in the adjudication process. Data elements derived from the current DOL Forms ETA–750 and the Service Form I–129 will be combined on a new filing form. The new Form ETA–9079 will be submitted for approval to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995. This rule will not be implemented until that form has received approval under the Paperwork Reduction Act requirements. The new Form ETA–9079, Application for Temporary Agricultural Labor Certification and H–2A Petition, will replace the Service Form I–129 for all H–2A filings, as well as replace DOL Form ETA–750 for this purpose. It will contain separate sections for capturing data on individual aliens named in the new form. The separate section, which is being created through our proposed rule published elsewhere in this **Federal Register**, will require that an alien beneficiary who is present in the United States and seeking an extension of stay or change of status to H–2A sign that section. This will ensure that the alien has taken legal responsibility for the information entered on the form concerning himself or herself and that the alien is a responsible party to the request for extension of stay or change of status.

2. Split Filing Locations

Four commenters believed that the split in required filing location, based upon the location of the beneficiaries

either inside or outside of the United States, would be confusing and would not streamline the process.

The Service believes that the commenters correctly identified a weakness in the proposal and has revised it accordingly. As mentioned earlier, the proposed split in filing between DOL and the Service has been amended to require employers to file all H–2A filings with DOL. DOL will also have authority to approve the H–2A petitions as well as issue labor certifications.

Although all H–2A filings will now be made with DOL, the Service is retaining the authority over requests by individual aliens who are already present in the United States to change their status to H–2A or to extend their H–2A stay. As explained in a new proposed rule to accomplish this published elsewhere in this issue of the **Federal Register**, we are separating the determinations on change of status and extension of stay from the determination on the petition. DOL will forward to the Service the information from the joint application concerning an alien beneficiary in the United States in all cases where change of status or extension of stay is requested. The process will require that after the joint application (Form ETA–9079) is adjudicated by DOL, the Service's management information system would be updated with information indicating whether the labor certification application/petition was approved or denied. With this information, the Service can complete its adjudication of the extension of stay or change of status application (Form ETA–9079W) and notify the individual alien(s) of its determination.

The worker and employer will benefit from complete one-stop filing because all forms and supporting documentation are submitted to a single agency. DOL will determine the correct processing routes needed for all pieces of the one-stop package. The Service will receive data from DOL and the Form(s) ETA–9079W (Named Alien Addendum) to adjudicate. The Service's determination(s) on the Addendum will be based upon the individual alien's eligibility and a final determination by DOL on the Form ETA–9079.

3. Countervailing Evidence

As discussed in the proposed rule, the Service's role in most H–2A petition proceedings is limited. Most H–2A petitions are filed before the petitioner has identified, or named, the H–2A workers (beneficiaries). Currently, the Service's role is limited to a review of the determinations made by DOL that the job offer is for temporary or seasonal agricultural employment, that the petitioner is making a valid job offer, and that any liquidated damages from prior H–2A petition proceedings have been paid. Liquidated damages are assessed to an employer who fails to notify the Service of the departure of workers from the United States or when the employer cannot establish that workers have left the employment for other legal status. In cases with named beneficiaries, the Service judges the ability of the beneficiary to perform the needed services. Additionally, in rare cases, the Service reviews countervailing evidence on the availability of U.S. workers.

Four commenters pointed out that the proposed rule was silent about the countervailing evidence procedure currently provided in regulations. Briefly, this procedure allows a petitioner to seek a review by the Service of DOL determination on the labor certification, if countervailing evidence can be produced to establish that U.S. workers are not in fact available to the petitioner. Only DOL determination concerning the availability of U.S. workers is reviewable by the Service. The Service rarely entertains countervailing evidence on H–2A petitions and almost universally follows the DOL determination because of DOL's expertise. Under this rule change, a separate review of this availability issue is no longer practical or necessary. Because DOL/Employment and Training Administration will be making the determination on the labor certification and petition concurrently, and a fresh review of these determinations is already provided for through appeal to DOL Office of Administrative Law Judges, an additional review is not useful and is removed from this rule.

The Service is establishing a mechanism to notify DOL of any unpaid liquidated damage claims to enable DOL to judge this factor as part of the adjudication process. Finally, in instances in which the petitioner identifies named beneficiaries, DOL has the necessary expertise to review the documentation presented to establish that each beneficiary is qualified to perform the unskilled agricultural labor.

4. DOL Capabilities

Five of the commenters objected to the proposal due to various concerns about the ability of DOL to perform its current functions in a timely fashion and to handle requests for expedited processing of problem cases. The Service believes that the consolidated new process is not highly complex and will allow concurrent adjudication of the petition with the labor certification. The additional determinations to be made by DOL will encompass whether the Service has notified DOL of a failure to pay liquidated damages and whether the worker has the qualifications to perform the stated services. The Service is providing training to DOL personnel on the issues considered by the Service under its present role in the H–2A petition process. The time savings for the average case under the new system should be at least 3 to 6 days, which is normally consumed by mail notification by DOL to the employer and the employer's filing by mail of the petition with the Service, in addition to the time needed to process the petition by the Service (normally 15 to 21 days). The additional work for DOL presented by the combined process should not adversely impact the H–2A process and should result in a combined reduction of 18 to 27 days in the time taken from initial filing with DOL to completion of petition processing by the Service under the current system.

5. Department of State Notification

The proposed rule was silent on how DOL would notify the Department of State (DOS) of its determinations on the new combined application. One commenter was concerned that DOL is unfamiliar with the current notification process and that the process itself needed improvement. Currently, the Service mails the duplicate copy of the petition (Form I–129) to the consulate selected by the petitioner. Occasionally, when warranted, the Service notifies the consulate by telephone or telefax. The three agencies have now agreed that routine telefax notification from DOL to DOS will assist the efforts to streamline the H–2A process. The agencies are finalizing the internal details to ensure that these notifications are secure. This process should result in an additional 2 to 5 day reduction in obtaining workers through the faster notification to DOS. DOL will notify the Service of approvals for any workers not requiring a visa for admission to the United States. Notification will be either to the port-of-entry or to the Nebraska Service Center for extension of stay or change of status cases.

6. Earlier Filing of H–2A Cases

One commenter expressed a desire to be able to file a request for H–2As earlier than the current process permits to allow for determination before the current ''20-day notice in advance of need.'' DOL regulations currently encourage earlier filing of applications for labor certification. DOL has recently

reduced its minimum lead-time for submission of a labor certification request from 60 days to 45 days (64 FR 34958). This minimum is intended to assist employers by reducing the advance filing requirement to allow them to better determine the dates of need for the services to be performed. This also leaves sufficient time for DOL to make determinations at least 20 days in advance of the date of need for the workers. DOL regulations will still encourage earlier filing. However, DOL is only legally required to issue its determination 20 days in advance of the need and cannot guarantee an earlier issuance. Also, the combined process should realize large savings in time from initial filings to final notifications as previously described.

What Other Change Does This Rule Make?

The Service is authorizing DOL to accept Form I–824, Application for Action on an Approved Application or Petition (or its equivalent), and to process the application when DOL has previously processed a request for temporary agricultural workers on the Service's behalf. The Form I–824 is used to request a change in notification to a consulate or port-of-entry after a petition has been approved. DOL will use an addendum to its proposed Form ETA–9079, which is the ETA–9079M, for this purpose.

What Is the Intended Effect of These Changes?

This rule will provide a more streamlined procedure for the processing of temporary agricultural worker cases (H–2As) from initial submission seeking labor certification to notification of either DOS or the Service for issuance of a visa or status changes, respectively. It simplifies employers' points of contact with the Government by requiring all certification and petition filings to occur with the same agency. It also allows for simultaneous adjudication of DOL and the Service portions of the case. Finally, it provides these benefits to all employers needing H–2A workers.

Currently, a number of employers seek labor certification from DOL but do not follow through by filing an H–2A petition with the Service. The Service and DOL believe that these cases represent situations where an employer was using the system as insurance against not obtaining adequate U.S. workers to perform the needed services. The new procedure will require all users of the H–2A process to file for both DOL and Service benefits.

This rule is designed to benefit employers who do need to hire H–2A temporary workers to perform needed services, by providing ease of use and greatly shortened processing times. The new, streamlined one-stop filing procedure allows an employer to access the Government system in a simplified process that requires less burdensome paperwork and provides faster service.

Effective Date of This Rule

We are publishing this as a delayed effective final rule to allow the Service and DOL time to establish the administrative systems needed to accomplish the electronic capture and transfer of data and funds between the agencies. Also, DOL needs to issue a notice of proposed rulemaking to modify its fee collection process and amount of the fee before the new H–2A process can begin. Delay is further justified to allow for clearance of the Form ETA–9079 joint application for labor certification issuance and petition approval. The Service is also making changes to the H–2A program in a new notice of proposed rulemaking included elsewhere in this issue of the **Federal Register**.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities because the regulation is administrative in nature and merely transfers authority to make certain determinations to DOL. Moreover, it does not expand the existing process requirements. Finally, the rule does not involve an increase in fees.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

Executive Order 13132

The rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988

This rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988: Civil Justice Reform.

Paperwork Reduction Act

The information collection requirement addressed in this rule (Form I–129) has been previously approved for use by the Office of Management and Budget (OMB). The OMB control number for this collection is contained in 8 CFR 299.5, Display of control numbers.

Instead of using Form I–129, H–2A petitioners who seek the services of foreign workers must complete Department of Labor Form ETA–9079, Application for Temporary Agricultural Labor Certification and H–2A Petition. The Form ETA–9079 will be submitted by the Department of Labor for OMB approval in accordance with the Paperwork Reduction Act. The effective date of this rule will be adjusted if necessary to make sure that it does not go into effect until that process has been completed.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies).

8 CFR Part 214

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

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 552, 552(a); 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252b, 1304, 1356; 31 U.S.C. 9701; E.O. 12356, 47 FR 14874, 15557, 3 CFR 1982 Comp., p. 166; 8 CFR part 2.

2. Section 103.1 is amended by:

a. Revising paragraph (f)(3)(iii)(J); and by

b. Revising paragraph (f)(3)(iii)(W), to read as follows:

§ 103.1 Delegation of authority.

* * * * *

(f) * * *

(3) * * *

(iii) * * *

(J) Petitions for temporary workers or trainees and fiancees or fiances of U.S. citizens under § 214.2 and § 214.6 of this chapter, except petitions for temporary agricultural workers (H–2As), which are delegated to the Secretary of Labor.

* * * * *

(W) Revoking approval of certain petitions, as provided in § 214.2 and § 214.6 of this chapter, except petitions for temporary agricultural workers (H–2As), which are delegated to the Secretary of Labor.

* * * * *

3. Section 103.7(b)(1) is amended by adding the entry for ''Form ETA–9079'' immediately following ''Form EOIR–42'', to read as follows:

§ 103.7 Fees.

* * * * *

(b) * * * (1) * * *

* * * * *

Form ETA–9079. The fee for filing for a labor certification is designated in 20 CFR 655.100. The fee for filing the Service's petition portion of Form ETA–9079, to classify an agricultural worker as an H–2A nonimmigrant, is $110. The total fee will be the sum of DOL labor certification fee and the Service's fee. There is no additional fee if supplemental Form(s) ETA–9079W is filed with Form ETA–9079. A fee of $120 is required to file supplemental Form ETA–9079M (the equivalent to Form I–824).

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PART 214—NONIMMIGRANT CLASSES

4. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR part 2.

5. Section 214.1 is amended by:

a. Removing the reference to ''H–2A,'' from the first sentence in paragraph (c)(1); and by

b. Adding a new sentence immediately after the first sentence in paragraph (c)(1) to read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(c) * * *

(1) * * * An employer seeking extension of services for an H–2A must petition on Form ETA–9079 and ETA–9079W and file with the Department of Labor. * * *

* * * * *

6. Section 214.2 is amended by:

a. Revising paragraphs (h)(2)(i)(A), (B), (D), and (E);

b. Revising paragraphs (h)(2)(iii), (iv), and (v);

c. Revising paragraphs (h)(5)(i)(A), (B), (C), and (D);

d. Revising paragraph (h)(5)(ii);

e. Revising paragraph (h)(5)(iv)(B);

f. Revising paragraph (h)(5)(v);

g. Revising paragraph (h)(5)(ix);

h. Adding paragraph (h)(9)(i)(C);

i. Revising paragraph (h)(9)(ii)(C);

j. Revising paragraphs (h)(10)(ii) and (iii);

k. Revising paragraph (h)(11)(i);

l. Revising paragraph (h)(11)(ii);

m. Revising paragraph (h)(11)(iii)(A) introductory text and paragraph (h)(11)(iii)(B);

n. Revising paragraph (h)(12)(i);

o. Revising paragraph (h)(13)(i)(A);

p. Revising paragraph (h)(14);

q. Revising paragraph (h)(16)(ii); and by

r. Revising paragraph (h)(18), to read as follows:

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

* * * * *

(h) * * *

(2) * * *

(i) * * *

(A) *General.* Except as provided in this section, even in emergency situations, a United States employer seeking to classify an alien as an H–1B, H–2B, or H–3 temporary employee must file a petition on Form I–129, Petition for Nonimmigrant Worker, with the service center which has jurisdiction in the area where the alien will perform services or receive training. A United States employer seeking to classify an alien as an H–2A worker must file a petition on Department of Labor (DOL) Form ETA–9079, Application for Temporary Agricultural Labor Certification and H–2A Petition, only with the DOL Regional Administrator having jurisdiction in the area where the alien will first perform services (see 20 CFR 655, Subpart B). All petitions for temporary workers, except petitions for temporary agricultural workers (H–2As), in Guam and the Virgin Islands, and petitions involving special filing situations as determined by Service Headquarters, must be filed with the local Service office or a designated Service office. Petitions for temporary agricultural workers (H–2A) in Guam and the Virgin Islands must be filed with the DOL Regional Administrator having jurisdiction. The petitioner may submit a legible photocopy of a document in support of the petition in lieu of the original document. However, the original document must be submitted if requested by the Service.

(B) *Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office that has jurisdiction over petitions in the area where the petitioner is located, or in the case of H–2As, it must be filed with the DOL Regional Administrator having jurisdiction over the location where services will be performed first. The address that the petitioner specifies as its location on the petition must be where the petitioner is located for purposes of this paragraph.

* * * * *

(D) *Change of employers. (1)* If the alien is in the United States and seeks to change employers, the prospective new employer (except in the case of H–2As) must file a petition on Form I–129, with the fee required in § 103.7(b)(1) of this chapter, requesting classification and 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. The

alien is not authorized to begin the employment with the new petitioner until the petition is approved.

(*2*) [Reserved]

(*3*) An H–1A nonimmigrant alien may not change employers.

(E) *Amended or new petition.* The petitioner must file an amended or new petition, with fee, with the Service Center or, in the case of H–2A workers, with the DOL Regional Administrator where the original petition was filed, to reflect any material changes in the terms and conditions of employment or training or the beneficiary's eligibility as specified in the original approved petition. An amended or new H–1A, H–1B, or H–2B petition must be accompanied by a current or new DOL determination. An H–2A petition must be filed with a valid labor certification or an application for the certification. In the case of an H–1B petition, this requirement includes a new labor condition application.

* * * * *

(iii) *Named beneficiaries.* Nonagricultural petitions must include the names of beneficiaries and other required information at the time of filing. Under the H–2B classification, exceptions may be granted in emergency situations involving multiple beneficiaries at the discretion of the Service Center Director, and in special filing situations as determined by the Service's Headquarters. If all of the beneficiaries covered by an H–2B labor certification have not been identified at the time a petition is filed, multiple petitions naming subsequent beneficiaries may be filed at different times with a copy of the same labor certification. Each petition must reference all previously filed petitions for that labor certification. An H–2A petition may contain both named and unnamed beneficiaries and must agree in total number of positions with the labor certification request. The H–2A petition does not need to agree in total number when seeking an extension of stay for H–2A beneficiaries in the United States.

(iv) *Substitution of beneficiaries.* Beneficiaries may be substituted in H–2B petitions that are approved for a group, or H–2B petitions that are approved for unnamed beneficiaries, or approved H–2B petitions where the job offered to the alien(s) does not require any education, training, and/or experience. To request a substitution, the petitioner must, by letter and a copy of the petition approval notice, notify the consular office where the alien will apply for a visa or the port-of-entry where the alien will apply for admission. Where evidence of the qualifications of beneficiaries is required in petitions for unnamed beneficiaries, the petitioner must also submit such evidence to the consular office or port-of-entry prior to issuance of a visa or admission. (See paragraph (h)(5) of this section for substitution of H–2A beneficiaries.)

(v) *H–2A petitions.* Special criteria for admission, extension, maintenance of status, and substitution of beneficiaries apply to H–2A petitions and are specified in paragraph (h)(5) of this section. The other provisions of § 214.2(h) apply to H–2A only to the extent that they do not conflict with the special agricultural provisions in paragraph (h)(5) of this section.

* * * * *

(5) * * *

(i) * * *

(A) *General.* An H–2A petition must be filed on Form ETA–9079 with the DOL Regional Administrator having jurisdiction over the area of employment and be accompanied by the filing fee specified in § 103.7(b)(1) of this chapter. An H–2A petition may be filed by either the employer listed on the certification application, the employer's agent, or the association of United States agricultural producers named as a joint employer on the certification application.

(B) *Multiple beneficiaries.* The total number of beneficiaries of a petition must equal the number of workers indicated on the application for labor certification, except when the petitioner is seeking an extension of stay for H–2A beneficiaries in the United States. A petition can include more than one beneficiary even when all beneficiaries will not obtain a visa at the same consulate or are not required to have a visa and will not apply for admission at the same port-of-entry. A petition may also include beneficiaries seeking change of status or extension of stay.

(C) *Identification of beneficiaries.* The sole beneficiary of an H–2A petition must be named in the petition. All beneficiaries located in the United States must be named in the petition. The total number of unnamed beneficiaries must be shown on the petition. Names of beneficiaries located outside of the United States may be included on the petition, but are not required to be identified until application for visa issuance from the Department of State.

(D) *Evidence.* An H–2A petitioner must show that the proposed employment qualifies as a basis for H–2A status, and that any named beneficiary satisfies any qualifications for that employment. A petition will be automatically denied if filed without the initial evidence required in paragraph (h)(5)(v) of this section for each named beneficiary.

* * * * *

(ii) *Effect of the labor certification process.* The temporary agricultural labor certification process determines whether employment is for a temporary or seasonal 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. In petition proceedings, a petitioner must establish that the employment and beneficiary meet the requirements of paragraph (h)(5) of this section.

* * * * *

(iv) * * *

(B) *Effect of permanent labor certification application.* Employment will be found not to be temporary or seasonal where an application for permanent labor certification has been filed for the same alien, or for another alien to be employed in the same position, by the same employer or by its parent, subsidiary or affiliate. This can be overcome only by the petitioner's demonstration that there will be at least a 6 month interruption of employment in the United States after H–2A status ends.

(v) The beneficiary's qualifications—

(A) *Eligibility requirements.* An H–2A petitioner must establish that any named beneficiary met the stated minimum requirements and was fully able to perform the stated duties when the application for certification was filed. It must be established at the time of application for an H–2A visa, or for admission if a visa is not required, that any unnamed beneficiary either met these requirements when the certification was applied for or passed any certified aptitude test at any time prior to visa issuance, or prior to admission if a visa is not required.

(B) *Initial evidence of employment/job training.* A petition must be filed with evidence that at the time of filing the named beneficiary met the certification's minimum employment and job training requirements. Initial evidence must be in the form of the past employer's detailed statement or actual employment documents, such as company payroll or tax records. Alternately, a petitioner must show that such evidence cannot be obtained, and submit affidavits from people who worked with the beneficiary that demonstrate the claimed employment.

(C) *Initial evidence of education and other training.* A petition must be filed with evidence that at the time of filing each named beneficiary met the certification's minimum post-secondary education and other formal training requirements. Initial evidence must be in the form of documents, issued by the relevant institution or organization, that show periods of attendance, majors, and degrees or certificates accorded.

* * * * *

(ix) *Substitution of beneficiaries after admission.* An H–2A petition may be filed with the DOL Regional Administrator to replace H–2A workers whose employment was terminated early. The petition must be filed with a copy of the labor certification, a copy of the approval notice covering the workers for whom 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 each terminated worker's name, date and country of birth, termination date, and evidence the worker has departed the United States. A petition for a replacement may not be approved when the requirements of paragraph (h)(5)(vi) of this section have not been met. A petition for replacements does not constitute the notice to the Service that an H–2A worker has absconded or has ended authorized employment more than 5 days before the relating certification expires.

* * * * *

(9) * * *

(i) * * *

(C) For H–2As, the Department of Labor will issue a notice of petition approval as part of its notification of labor certification approval. The notice will conform with paragraph (h)(9)(i)(A) of this section.

(ii) * * *

(C) If the period of services or training requested by the petitioner exceeds the limit specified in paragraph (h)(5)(vii), or (h)(9)(iii) of this section, the petition will be approved only up to the limit specified in that paragraph.

* * * * *

(10) * * *

(ii) *Notice of intent to deny.* When an adverse decision is proposed on the basis of derogatory information of which the petitioner is unaware, the director, or the DOL Regional Administrator in the case of H–2A petitions, must notify the petitioner of the intent to deny the petition and the basis for the denial. The petitioner may inspect and rebut the evidence and will be granted a period of 30 days from the date of the notice (7 days for H–2A petitions) in which to do so. All relevant rebuttal material will be considered in making a final decision.

(iii) *Notice of denial.* The petitioner must be notified of the reasons for the petition denial, and of the right to appeal the denial of the petition under 8 CFR part 103, and in the case of H–2A petitions, under the rules established by DOL in 20 CFR 655, subpart B. There is no appeal from a decision to deny a change of status or an extension of stay to the alien.

(11) * * *

(i) *General.*

(A) The petitioner must immediately notify the Service (or the DOL Regional Administrator for H–2As) of any changes in the terms and conditions of employment of a beneficiary that may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An amended petition on Form I–129, or on Form ETA–9079 in the case of H–2A workers, must be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner must send a letter notifying the director or the Regional Administrator who approved the petition.

(B) The director or the Regional Administrator who approved the petition may revoke a petition at any time, even after the expiration of the petition.

(ii) *Automatic revocation.* The approval of any petition is automatically revoked if the petitioner goes out of business or files a written withdrawal of the petition. No notice to the petitioner is required.

(iii) * * *

(A) *Grounds for revocation.* The director (or the DOL Regional Administrator in the case of H–2A workers) must send to the petitioner a notice of intent to revoke the petition, or relevant part of the petition, if he or she finds that:

* * * * *

(B) *Notice and decision.* The notice of intent to revoke must contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director or the DOL Regional Administrator must consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition must remain approved and a revised approval notice must be sent to the petitioner with the revocation notice.

(12) * * *

(i) *Denial.* A petition (other than an H–2A petition) denied in whole or in part by the Service may be appealed under 8 CFR part 103. In the case of an H–2A petition, the appeal must be filed with DOL concurrently with the appeal of the denial of a labor certification (or if the certification was not denied, within 30 days) under the rules established by DOL in 20 CFR 655 subpart B.

* * * * *

(13) * * *

(i) * * *

(A) A beneficiary may 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. (See paragraph (h)(5)(viii) of this section for admission and limits on admission for H–2As.)

* * * * *

(14) *Extension of petition validity.* Except with respect to H–2A petitions, the petitioner must file a request for a petition extension on Form I–129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. Supporting evidence is not required unless requested by the director. A request for a petition extension may be filed only if the validity of the original petition has not expired. (See paragraph (h)(5)(x) of this section for extension requirements for H–2A petitions.)

* * * * *

(16) * * *

(ii) *H–2A, H–2B, and 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, may be a reason, by itself, to deny a petition extension request and the alien's extension of stay.

* * * * *

(18) *Use of approval notice, Form I–797 and DOL notification.* The Service must notify the petitioner on Form I–797 whenever a petition, an extension of a petition, or an alien's extension of stay is approved under the H classification (except with respect to H–2A). DOL must notify the petitioner as part of its certification notice whenever an H–2A petition or an extension of a petition is approved by a Regional Administrator. The beneficiary of an H petition who does not require a nonimmigrant visa may present a copy of the approval notice at a port-of-entry to facilitate entry into the United States. A beneficiary who is required to present a

visa for admission and whose visa will have expired before the date of his or her intended return may use a copy of Form I–797 or DOL notification to apply for a new or revalidated visa during the validity period of the petition. The copy of Form I–797 or DOL notification must be retained by the beneficiary and presented during the validity period of the petition when re-entering the United States to resume the same employment with the same petitioner.

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Dated: July 5, 2000.

Janet Reno,

Attorney General.

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