

DEPARTMENT OF JUSTICE**Immigration and Naturalization Service****8 CFR Parts 103, 214, 248, and 264**

[INS No. 2059-00]

RIN 1115-AF29

Procedures For Processing Temporary Agricultural Worker (H-2A) Petitions by the Secretary of Labor**AGENCY:** Immigration and Naturalization Service, Justice.**ACTION:** Proposed rule.

SUMMARY: This proposed rule will amend the Immigration and Naturalization Service (Service) regulations regarding the temporary agricultural worker (H-2A) program. The proposed rule requires alien workers to sign a petition request for change of status or extension of stay; provides that all petition requests including extension of stay and change of status petitions must be filed with the Department of Labor (DOL); and provides that the current Service petition fee will be collected by DOL as a part of a combined fee. These changes will further streamline the H-2A petitioning process. (See the final rule published elsewhere in this issue of the **FEDERAL REGISTER** in which the Attorney General has delegated the authority to adjudicate petitions for H-2A workers to the Secretary of Labor.)

DATES: Written comments must be submitted on or before August 14, 2000.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW, Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS No. 2059-00 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

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-2A workers.

What Changes Does This Rule Make?

Under this proposed rule, the DOL would accept additional forms and fees associated with the H-2A program on the Service's behalf. The DOL would forward petitions requesting extension of stay or change of status to the Service for adjudication of those portions of the petitions. For example, the DOL would accept Service Forms I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, and Forms I-539, Application to Extend/Change Nonimmigrant Status, that are filed concurrently with the DOL's Form ETA-9079. Service Forms I-102 are sometimes filed by H-2A workers or their dependents to replace a Form I-94, Arrival-Departure Record. Forms I-539 are sometimes filed by accompanying dependents who need a change of nonimmigrant status or extension of stay to remain with the principal H-2A worker. The DOL would accept these forms and fees on the Service's behalf, and would forward them to the Service for adjudication after the ETA-9079 decision is made.

Are There Any Other Requirements Being Imposed?

Yes, the proposed regulation requires an alien worker who seeks a change of status or extension of stay as an H-2A worker to sign the application for this purpose. This requirement demonstrates the alien's assent to his or her benefit request ensuring that the alien has taken the legal responsibility for the information entered on the form concerning the alien, and that the alien is a responsible party to the request for extension of stay or change of nonimmigrant status.

What About Short Term Extensions of Employment?

Where an employer needs a short term extension of the employment period for up to 14 days, the existing procedure allows for the employer to obtain an extension of the petition authorization by filing a Form I-129. The DOL provides an automatic co-extension of the underlying labor certification if the petition is approved. The proposed procedure provides that an automatic grace period of 14 days or the length of the labor certification if issued for less than 14 days, be added to the validity date of the approved labor certification and petition if the H-2A petition is approved. No separate application or fee is required to receive this grace period. Any extension of the employer's need beyond the initially

authorized period (which includes the grace period) requires that a petition and application for labor certification be filed with the DOL along with an application to extend the alien's temporary stay. The Service requests comments on this change.

Is There Any Change in the Fee Required for the Service's Petition Portion of the H-2A Process?

No; the Service will not change the fee requirement for the petition at this time. The current fee charged for the Form I-129 will be charged as part of the combined fee for the DOL's new Form ETA-9079 (\$110 plus the DOL fee). The Service will collect no separate fee for the adjudication of changes of status or extensions of stay at this time. The Service does conduct periodic reviews of its fees in order to ensure that the cost to the Service for adjudication of benefit applications and petitions is recovered. These reviews are scheduled every 2 years. The existing fee will be reevaluated during those periodic reviews and adjusted accordingly.

Is There Any Change in the Requirement to Report Workers Who Depart Before Completing the Services Requested?

The Service has required employers to report alien workers who abscond or leave their employment more than 5 days in advance of the completion of the stated employment period. The employer must make this report within 24 hours, and in order to avoid paying a liquidated damage, must establish that the worker departed from the United States or found other authorized status. The proposed rule requires this same reporting but specifies that the report be made to the Nebraska Service Center. This Center will handle all aspects of the H-2A process for the Service. The Service requires compliance with this reporting requirement in order to provide meaningful data on violations of the H-2A employment program, and to help ensure that employers do everything possible to assist the Service in ensuring the departure of these workers from the United States.

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 of the following factors: The regulation is administrative in nature and merely transfers authority to make certain determinations to the DOL. It does not

expand the existing process requirements. The interim rule does not involve an increase in fees. The number of Form I-129 petitions filed in the past few years has ranged from 1,400 to 4,000.

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 804 of the Small Business Regulatory Enforcement Act of 1996. 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 effective 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 Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

Executive Order 13132

This 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 12132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary statement.

Executive Order 12988: Civil Justice Reform

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

List of Subjects

8 CFR Part 214

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

8 CFR Part 248

Aliens, Reporting and recordkeeping requirements.

8 CFR Part 264

Reporting and recordkeeping requirement.

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

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 would continue to read as follows:

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

Section 214.1 is amended by adding a new sentence at the end of paragraph (c) (2), to read as follows:

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

* * * * *

(c) * * *

(2) * * * A Form I-539 filed for dependents of an H-2A seeking extension(s) of stay must be filed along with the ETA-9079, and ETA-9079W, with the Department of Labor.

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3. Section 214.2 is amended by:

- a. Adding paragraph (h)(2)(i)(D)(2);
- b. Revising paragraph (h)(5)(vi)(A);
- c. Revising paragraphs (h)(5)(vii) and (h)(5)(x);
- d. Revising paragraph (h)(9)(ii)(B);
- e. Revising the parenthetical phrase at the end of paragraph (h)(14); and by
- f. Revising paragraph (h)(15)(ii)(C), to read as follows:

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

* * * * *

(h) * * *

(2) * * *

(i) * * *

(D) * * *

(2) A prospective new employer of H-2A workers must file a petition and a request for labor certification, if needed, on Form ETA-9079, with the appropriate fee specified in § 103.7(b) (1) of this chapter. Each named beneficiary must sign an individual request for extension of stay, if extension of that individual's stay is required, on Form ETA-9079W (Named Alien Addendum), along with the

employer's application to the DOL. The Service fee submitted with the Form ETA-9079 includes processing of the petition for classification as an H-2A agricultural worker and for change(s) of nonimmigrant status to H-2A and extension(s) of stay. There is no separate direct fee for filing Form ETA-9079W (Named Alien Addendum) for change(s) of status and extension(s) of stay.

* * * * *

(5) * * *

(vi) *Petition agreements—*

(A) *Consent and liabilities.* In filing an H-2A petition, a petitioner and each employer consents to allow the Government access to the site where the labor is being performed for the purpose of determining compliance with H-2A requirements. The petitioner further agrees to notify the Nebraska Service Center, by overnight delivery service or overnight mail within 24 hours, if an H-2A worker absconds, or if the authorized employment ends more than 5 days before the relating certification document expires, and to pay liquidated damages of \$10 for each instance where the petitioner cannot demonstrate compliance with this notification requirement. The petitioner also agrees to pay liquidated damages of \$200 for each instance where the petitioner cannot demonstrate that its H-2A worker either departed the United States or obtained other authorized status during the period of admission of within 5 calendar days of early termination that is based upon the expiration date of the labor certification, whichever comes first.

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(vii) *Validity.* An approved H-2A petition is valid through the expiration of the relating certification, plus 14 days (or the length of the labor certification if less than 14 days), for the purpose of allowing a beneficiary to seek issuance of an H-2A nonimmigrant visa, admission, change of status, or an extension of stay for the purpose of engaging in the specific certified employment.

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(x) *Petition extensions.* All employers have received an automatic extension of an H-2A petition for 14 days (or the length of the labor certification if less than 14 days) as part of the initial approval. If the employer requests an extension beyond the initial petition validity, the employer must file a request for an H-2A petition extension with an application for an extension of a labor certification, with the DOL Regional Administrator on Form ETA-9079, including the fee specified in § 103.7(b)(1) of this chapter. For

extensions of stay for individual beneficiaries, see paragraph (h)(15) of this section.

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(9) * * *

(ii) * * *

(B) If a new H petition is approved after the date the petitioner indicates that the services or training will begin, the approved petition and approval notice will show a validity period commencing with the date of approval and ending with the date requested by the petitioner, as long as that date does not exceed either the limits specified by paragraph (h)(5)(vii), or (h)(9)(iii) of this section, or other Service policy.

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(14) * * * (See paragraph (h)(5)(x) of this section for extension requirements for H-2A petitions.)

(15) * * *

(ii) * * *

(C) *H-2A or H-2B extension of stay.*

An extension of stay for an alien in H-2A status must be requested on Form ETA-9079W (Named Alien Addendum). It must be submitted concurrently with a petition filed by the employer on the alien's behalf with the DOL on Form ETA-9079. The DOL will forward the extension requests to the Nebraska Service Center for adjudication. An extension of stay for the beneficiary of an H-2A petition is included in the Form I-129 petition extension request. An extension of stay for the beneficiary of an H-2A or H-2B petition may be authorized for the validity of the labor certification and approved petition or for a period of up to 1 year, except as provided for in paragraph (h)(5)(x) of this section. The alien's total period of stay as an H-2A or H-2B worker may

not exceed 3 years, except in the Virgin Islands where the alien's total period of stay may not exceed 45 days.

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PART 248—CHANGE OF NONIMMIGRANT CLASSIFICATION

4. The authority citation for part 248 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1187, 1258; 8 CFR part 2.

5. Section 248.3 is amended by:

- Removing the reference to "H-2A," from the first sentence in paragraph (a);
- Revising the first sentence of paragraph (b);
- Adding a new sentence immediately after the first sentence of paragraph (b);
- Redesignating paragraph (c) as paragraph (d); and by
- Adding a new paragraph (c), to read as follows:

§ 248.3 Application.

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(b) * * * Any nonimmigrant, except an H-2A, who desires a change of status to any other nonimmigrant classification, other than those listed in paragraph (a) of this section, or to E-1 or E-2 classification as the spouse or child of a principal E-1 or E-2, must apply for a change of status on Form I-539. A Form I-539 application filed by a dependent of an H-2A must be submitted along with the fee specified in § 103.7(b)(1) of this chapter, to the Department of Labor if filed at the same time as an ETA-9079, or submitted to the Nebraska Service Center, if filed at any other time. * * *

(c) *Change of status on Form ETA-9079W.* Any nonimmigrant seeking a

change of status to H-2A must apply for that change on Form ETA-9079W. The application must be filed with the Form ETA-9079 filed by the prospective employer of the nonimmigrant. All Forms ETA 9079 and ETA 9079W are submitted to the Department of Labor, along with the fee specified in § 103.7(b)(1) of this chapter.

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PART 264—REGISTRATION AND FINGERPRINTING OF ALIENS IN THE UNITED STATES

6. The authority citation for part 264 continues to read as follows:

Authority: 8 U.S.C. 1103, 1201, 1201a, 1301-1305.

7. Section 264.6 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§ 264.6 Application for an initial or replacement Form I-94, Nonimmigrant Arrival-Departure Document, or Form I-95, Crewmen's Landing Permit.

(a) * * * An application filed by an H-2A or the dependent of an H-2A must be submitted along with the fee specified in § 103.7(b)(1) of this chapter, to the Department of Labor, if filed at the same time as an ETA-9079, or submitted to the Nebraska Service Center, if filed at any other time.

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Dated: June 9, 2000.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 00-17640 Filed 7-12-00; 8:45 am]

BILLING CODE 4410-10-M