



DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 274a

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RIN 1615-AC58

Temporary Changes to Requirements Affecting H-2B Nonimmigrants Due to the COVID-19 National Emergency

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

ACTION: Temporary final rule.

SUMMARY: As a result of disruptions and uncertainty to the U.S. economy and international travel caused by the global novel Coronavirus Disease 2019 (COVID-19) public health emergency, the Department of Homeland Security (the Department or DHS), U.S. Citizenship and Immigration Services (USCIS), has decided to temporarily amend the regulations regarding certain temporary nonagricultural workers, and their U.S. employers, within the H-2B nonimmigrant classification. The Department is temporarily removing certain limitations on employers or U.S. agents seeking to hire certain H-2B workers already in the United States to provide temporary labor or services essential to the U.S. food supply chain, and certain H-2B workers, who are essential to the U.S. food supply chain, seeking to extend their stay.

DATES: This final rule is effective from May 14, 2020, through May 15, 2023. Employers may request the flexibilities under this rule by filing an H-2B petition, including the new attestation and all required evidence, on or after the effective date of this rule and until 120 days thereafter. Employers with H-2B petitions that are pending on the effective date of this rule may

request the flexibilities made available under this rule by submitting a new attestation during that same 120-day period thereafter, and before the H-2B petition is adjudicated.

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Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

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I. Background

A. Legal Authority

The Immigration and Nationality Act (INA), as amended, establishes the H-2B nonimmigrant classification for a nonagricultural temporary worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). Employers or U.S. agents must petition DHS for classification of prospective temporary workers as H-2B nonimmigrants. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). DHS must approve this petition before the beneficiary can be considered eligible for an H-2B visa. *Id.* Finally, the INA requires that “[t]he question of importing any alien as [an H-2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS],¹ after consultation with appropriate agencies of the Government.” *Id.*

DHS regulations provide that an H-2B petition for temporary employment in the United States must be accompanied by an approved temporary labor certification (TLC) from the Department of Labor (DOL), issued pursuant to regulations established at 20 CFR part 655. 8 CFR 214.2(h)(6)(iii)(A), (C)–(E), (iv)(A); *see also* INA section 214(a) and (c), 8 U.S.C. 1184(a) and (c); INA section 103(a)(6), 8 U.S.C. 1103(a)(6). The TLC serves as DHS’s consultation with DOL as to whether a qualified U.S. worker is available to fill the petitioning employer’s job opportunity and whether a foreign worker’s employment in the job opportunity

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

will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D).

The INA generally charges the Secretary of Homeland Security (Secretary) with the administration and enforcement of the immigration laws, and provides that the Secretary “shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority” under the INA. INA section 103(a)(3), 8 U.S.C. 1103(a)(3). In addition, the Secretary has the authority to issue this regulation under section 102 of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 112, and section 103(a) of the INA, 8 U.S.C. 1103(a), which authorize the Secretary to administer and enforce the immigration and nationality laws. *See also* 6 U.S.C. 202(4) (charging the Secretary with “[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States”). With respect to nonimmigrants, in particular, the INA provides that “[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe.” INA section 214(a)(1), 8 U.S.C. 1184(a)(1); *see also* INA section 274A(h)(3), 8 U.S.C. 1324a(h)(3). Finally, under section 101 of HSA, 6 U.S.C. 111(b)(1)(F), a primary mission of the Department 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.”

B. Description of the H-2B Program

The H-2B nonimmigrant classification applies to alien workers “coming temporarily to the United States to perform temporary [nonagricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” INA

101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); *see also* 8 CFR 214.1(a)(2). The 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).

The INA sets the annual number of aliens who may be issued H-2B visas or otherwise provided H-2B nonimmigrant status to perform temporary nonagricultural work at 66,000, to be distributed semi-annually beginning in October and April. *See* INA sections 214(g)(1)(B) and 214(g)(10), 8 U.S.C. 1184(g)(1)(B) and 1184(g)(10). Up to 33,000 aliens may be issued H-2B visas or provided H-2B nonimmigrant status during the first 6 months of a fiscal year, and the remaining annual allocation is left available for employers seeking to hire H-2B workers during the remaining 6 months of the fiscal year.² If insufficient petitions are approved to use all H-2B numbers in a given fiscal year, the unused numbers cannot be carried over for petition approvals in the next fiscal year. An H-2B worker who is seeking an extension of H-2B status will not be counted against the H-2B numerical limitation. 8 CFR 214.2(h)(8)(ii)(A).

i. Temporary Labor Certification (TLC) Procedures

As noted above, before filing the H-2B petition with DHS, the petitioning employer or U.S. agent must obtain an approved TLC from DOL for the job opportunity the employer seeks to fill with an H-2B worker(s). To obtain a TLC from DOL, the employer must concurrently submit, at least 75 calendar days but not more than 90 calendar days before the start date of work, an *Application for Temporary Employment Certification* (H-2B application) to DOL's

² The Federal Government's fiscal year runs from October 1 of the budget's prior year through September 30 of the year being described. For example, fiscal year 2020 is from October 1, 2019, through September 30, 2020.

Office of Foreign Labor Certification (OFLC) and a nonagricultural job order to the State Workforce Agency (SWA) that serves the State where the actual work will be performed. 20 CFR 655.15(b), and 20 CFR 655.16(a) (requiring the filing of a job order at the SWA). OFLC reviews the H-2B application and job order and, if they are complete and meet the requirements of 20 CFR part 655, subpart A, issues a Notice of Acceptance, which directs the employer to engage in the recruitment of U.S. workers. 20 CFR 655.15, 655.30, 655.31, 655.32, 655.33. The SWA also reviews the job order and, upon OFLC's acceptance of the H-2B application, initiates the intrastate and interstate recruitment of U.S. workers. 20 CFR 655.16(b), (c). Upon completion of the post-acceptance requirements, including employer-conducted recruitment, OFLC issues the TLC. 20 CFR 655.40–655.46, 655.48, 655.50–655.52.

As noted above, in granting the TLC, DOL certifies that there are no U.S. workers who are qualified and available to fill the temporary position, and that the employment of H-2B workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 CFR 214.2(h)(6)(iii)(A). The employer must comply with applicable regulations, including, but not limited to, contacting former U.S. workers, including any laid-off U.S. workers, who were employed in the job opportunity identified on the TLC during the previous year and soliciting their return to the job. 20 CFR 655.20(w) and 29 CFR 503.16(w). The employer also must continue to accept referrals of all eligible U.S. workers who apply for the job opportunity until 21 days before the start date of need. *See* 20 CFR 655.20(t) and 29 CFR 503.16(t). Finally, as part of the TLC process, the H-2B employer must agree to abide by certain conditions, including the condition that the H-2B employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the TLC in the area of intended employment within the period beginning 120 calendar days before

the date of need through the end of the period of certification, except for lawful job-related reasons such as lack of work at the end of a season if all H-2B workers are laid off before any U.S. worker in corresponding employment. 20 CFR 655.20(v) and 29 CFR 503.16(v).³

ii. Petition Procedures

After receiving an approved TLC from DOL, the employer listed on the TLC or the employer's U.S. agent ("H-2B petitioner") may file the H-2B petition with the appropriate USCIS office. 8 CFR 214.2(h)(2)(i), (h)(6)(iii)(E), and (h)(6)(vi). The H-2B petitioner may petition for one or more named or unnamed H-2B workers, but the total number of workers may not exceed the number of positions indicated on the TLC. 8 CFR 214.2(h)(2)(ii) and (h)(6)(viii). An H-2B petitioner must name an H-2B worker if the worker is in the United States or if that H-2B worker is a national of a country that is not designated as an H-2B participating country. 8 CFR 214.2(h)(2)(iii). USCIS recommends that petitioners submit a separate H-2B petition when requesting a worker(s) who is a national of a country that is not designated as an H-2B participating country. *See* 8 CFR 214.2(h)(2)(ii); *see also Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, Notice, 85 FR 3067 (Jan. 17, 2020). Petitioners of such aliens must submit evidence demonstrating the factors by which the request for H-2B workers serves the U.S. national interest. 8 CFR 214.2(h)(6)(i)(E)(2). USCIS will review each petition naming a national from a

³ The Department of Labor Appropriations Act, 2016, Division H, Title I of Public Law 114-113 ("2016 DOL Appropriations Act"), prohibited DOL from using any funds to enforce the definition of corresponding employment found in 20 CFR 655.5, or any reference thereto. *See* Sec. 113. This appropriations rider has been included in each subsequent DOL Appropriations Act or relevant continuing resolution since 2016, well as in the Further Consolidated Appropriations Act, 2020, Division A, Title I of Public Law 116-94. Therefore, in order to comply, DOL has removed references to these provisions from the Form ETA-9142B – Appendix B. However, the DOL Appropriations Act and relevant continuing resolutions did not vacate these regulatory provisions, and they remain in effect, thus imposing a legal duty on H-2B employers, even though DOL will not use any funds to enforce them until such time as the appropriations rider may be lifted.

country not on the list and all supporting documentation and make a determination on a case-by-case basis.

The employer or U.S. agent generally may submit a new H-2B petition, with a new, approved TLC, to USCIS to request an extension of H-2B nonimmigrant status for the validity of the TLC or for a period of up to 1 year. 8 CFR 214.2(h)(15)(ii)(C). The H-2B petitioner must name the worker on the Form I-129, Petition for Nonimmigrant Worker, since the H-2B worker is in the United States and requesting an extension of stay. Except for certain professional athletes being traded among organizations, H-2B workers seeking to extend their status with a new employer may not begin employment with the new employer until the new H-2B petition is approved. 8 CFR 214.2(h)(2)(i)(D), (h)(6)(vii), 274a.12(b)(9).

iii. Admission and Limitations of Stay

Upon USCIS approval of the H-2B petition, the employer or U.S. agent may hire H-2B worker(s) to fill the job opening. USCIS generally will grant the workers H-2B classification for up to the period of time authorized on the approved TLC. H-2B workers who are outside of the United States may apply for a visa with U.S. Department of State (DOS) at a U.S. Embassy or Consulate abroad, if required, and seek admission to the United States with U.S. Customs and Border Protection (CBP) at a U.S. port of entry. Spouses and children of H-2B workers may request H-4 nonimmigrant status to accompany the principal H-2B workers. The spouse and children of an H nonimmigrant, if they are accompanying or following to join such an H-2B nonimmigrant, may be admitted into the United States, if otherwise admissible, as H-4 nonimmigrants for the same period of admission or extension as the principal spouse or parent. 8 CFR 214.2(h)(9)(iv). Thus, H-4 dependents of H-2B workers are subject to the same

limitations on stay, and permission to remain in the country during the pendency of the new employer's petition, as the H-2B beneficiary.

H-2B workers may be admitted into the United States up to 10 days before the beginning validity date listed on the approved H-2B petition so that they may travel to their worksites, but they may not begin work until the beginning validity date on the petition. H-2B workers also may remain in the United States 10 days beyond the expiration date of the approved H-2B petition to prepare for departure or to seek an extension or change of nonimmigrant status. 8 CFR 214.2(h)(13)(i)(A). Under current regulations, with limited exception, H-2B workers do not have employment authorization outside of the validity period listed on the approved petition unless otherwise authorized, and the workers are limited to employment with the H-2B petitioner.⁴ *See* 8 CFR 214.2(h)(6)(vii), 274a.12(b)(9).

Also under current regulations, the maximum period of stay for an alien in H-2B classification is 3 years. 8 CFR 214.2(h)(13)(iv) and (h)(15)(C). Generally, once an alien has held H-2B nonimmigrant status for a total of 3 years, the alien must depart and remain outside of the United States for an uninterrupted period of 3 months before seeking readmission as an H-2B nonimmigrant.⁵ 8 CFR 214.2(h)(13)(iv).

C. COVID-19 National Emergency

⁴ In the case of a traded 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 acquisition by the new organization, within which time the new organization is expected to file a new H-2B petition. If a new H-2B petition is not filed within 30 days, employment authorization will cease. If a new H-2B petition is filed within 30 days, the professional athlete's employment authorization will continue until the petition is adjudicated. If the new petition is denied, employment authorization will cease. 8 CFR 214.2(h)(6)(vii) and 8 CFR 274a.12(b)(9).

⁵ If the H-2B worker's accumulated stay is 18 months or less, an absence of at least 45 days will interrupt the 3-year limitation on admission. *See* 8 CFR 214.2(h)(13)(v) (also excepting from the limitations under 8 CFR 214.2(h)(13)(iii) through (iv), with respect to H-2B beneficiaries, 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, as well as aliens who reside abroad and regularly commute to the United States to engage in part-time employment).

On January 31, 2020, the Secretary of the U.S. Department of Health and Human Services (HHS) declared a public health emergency under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to the Coronavirus Disease 2019 (COVID-19).⁶ On March 13, 2020, President Trump declared a National Emergency concerning the COVID-19 outbreak.⁷ The President's proclamation declared that the emergency began on March 1, 2020. DOS announced the temporary suspension of routine immigrant and nonimmigrant visa services at the U.S. Embassy in Mexico City and all U.S. consulates in Mexico beginning on March 18, 2020.⁸ DOS expanded the temporary suspension of routine immigrant and nonimmigrant visa services to all U.S. Embassies and Consulates on March 20, 2020.⁹ DOS designated H-2 visas as mission critical, however, and announced that U.S. Embassies and Consulates will continue to process H-2B cases to the extent possible and implemented a change in its procedures, to include interview waivers, in certain categories of cases.¹⁰

II. Discussion

A. Temporary Changes to DHS Requirements for H-2B Change of Employer Requests and H-2B Maximum Period of Stay Exception During the COVID-19 National Emergency

⁶ HHS, *Determination that a Public Health Emergency Exists*, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (last reviewed Jan. 31, 2020). See also HHS, *Determination of Public Health Emergency*, 85 FR 7316 (Feb. 7, 2020).

⁷ President of the United States, Proclamation 9994 of March 13, 2020, *Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak*, 85 FR 15337 (Mar. 18, 2020).

⁸ DOS, *Status of U.S. Consular Operations in Mexico in Light of COVID-19*, <https://mx.usembassy.gov/status-of-u-s-consular-operations-in-mexico-in-light-of-covid-19/> (last updated Apr. 13, 2020).

⁹ DOS, *Suspension of Routine Visa Services*, <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html> (last updated Mar. 20, 2020).

¹⁰ See DOS website, *Important Announcement on H2 Visas*, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-h2-visas.html> (last updated Mar. 26, 2020).

DHS is committed both to protecting U.S. workers and to helping U.S. businesses receive the documented and work-authorized workers to perform temporary nonagricultural services or labor that they need to mitigate the adverse impact of COVID-19 on the U.S. food supply chain. Due to travel restrictions and limitations on visa services as a result of actions taken to mitigate the spread of COVID-19, as well as the possibility that some U.S. and H-2B workers may become unavailable to work due to COVID-19-related illness, employers or U.S. agents who have approved H-2B petitions or who will be filing H-2B petitions on or after the effective date of this rule might not receive all of the workers requested to fill the temporary positions. Similarly, employers who currently employ U.S. and H-2B workers may lose the services of these workers due to COVID-19-related illness.

On April 20, 2020, the Department published a temporary final rule in the Federal Register to amend certain H-2A requirements to help U.S. agricultural employers avoid disruptions in lawful agricultural-related employment, protect the nation's food supply chain, and lessen impacts from the COVID-19 public health emergency on the availability of food in the United States. 85 FR 21739 (Apr. 20, 2020). Under the H-2A temporary final rule, for a period of 120 days after the publication of that rule in the Federal Register, all H-2A petitioners with a valid TLC can start employing certain foreign workers who currently are in the United States and in valid H-2A status immediately after USCIS receives the H-2A petition filed by the new employer, but no earlier than the start date of employment listed on the H-2A petition. Additionally, the H-2A temporary final rule allows H-2A workers to extend their stay in the United States beyond the 3-year maximum allowable period.

The Department believes that it is necessary to extend similar flexibilities to H-2B petitioners seeking workers to perform temporary nonagricultural services or labor essential to

the U.S. food supply chain that would not qualify for the H-2A temporary agricultural visa classification.¹¹ Work essential to the U.S. food supply chain includes a variety of industries and occupations where the H-2B worker is performing temporary nonagricultural services or labor, including but not limited to work related to the processing, manufacturing, and packaging of human and animal food; transporting human and animal food from farms, or manufacturing or processing plants, to distributors and end sellers; and the selling of human and animal food through a variety of sellers or retail establishments, including restaurants.

These workers ensure continuity of functions critical to public health and safety, as well as economic and national security and resilience of the nation's critical infrastructure.¹² In the wake of uncertainty inherent in confronting and responding to a public health emergency of this magnitude, DHS is taking steps to ensure that employers who have needs for temporary nonagricultural workers who provide stability to the nation's food supply chain have greater certainty and flexibility to minimize gaps in the flow of H-2B workers. Therefore, through September 11, 2020, the Department is providing H-2B petitioners with opportunity to request the flexibilities discussed herein.

¹¹ DHS recognizes that H-2B employers may also employ workers for purposes other than food supply chain matters that are nonetheless critical to public health and safety, or the economic and national security and resilience of the nation's critical infrastructure. DHS will continue to monitor the situation and assess employer needs and those of the U.S. population. For now, however, DHS believes that it is critical to offer the flexibilities announced in this rule to at least the employers described herein.

¹² The Cybersecurity and Infrastructure Security Agency (CISA) within DHS has issued guidance regarding essential critical infrastructure workers, including workers that perform essential food supply chain-related functions. See, e.g., DHS, *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_4.pdf (Apr. 17, 2020). This list is generally advisory in nature, and is not produced for purposes related to immigration programs. USCIS nonetheless intends to consult the list as it administers this rule and interprets the scope of the flexibilities provided in this rule.

First, the Department is amending its regulations to temporarily permit certain flexibilities for H-2B petitioners seeking workers to perform work essential to the U.S. food supply chain. Under this rule, aliens subject to such petitions may start working upon USCIS' receipt of the new H-2B petitions, accompanied by an attestation to USCIS stating that the alien qualifies for the flexibilities in this rule. The employment authorization begins no earlier than the start date of employment listed on the H-2B petition accompanied by the attestation or no earlier than the date on which USCIS acknowledges in writing the receipt of the H-2B petition, including the properly filed attestation. *See* new 8 CFR 214.2(h)(23) and 8 CFR 274a.12(b)(27).

This temporary provision grants employment authorization to the H-2B worker for 60 days from the date of the receipt notice for the H-2B petition filed by the new employer or 60 days from the start date of employment indicated in the H-2B petition, whichever is later. Employment is not authorized under this temporary final rule if an H-2B petition, which must include a valid TLC and attestation, is not received by USCIS as indicated by Form I-797 (Notice of Action). The 60-day employment authorization associated with the filed petition will automatically terminate 15 days after the date of denial if USCIS denies the petition, or 15 days after the date on which the petition is withdrawn.

USCIS will also apply this rule to any petition that was filed with USCIS on or after March 1, 2020, and remains pending as of May 14, 2020, beginning on the date that USCIS acknowledges the receipt of the aforementioned attestation. USCIS will acknowledge the receipt of the attestation in writing in order for the alien to begin employment before the H-2B petition is approved. The 60-day clock will begin to run as of the date USCIS acknowledges receipt of the attestation in writing. The 15-day termination provision described in the preceding paragraph will also apply in this case. It is the separate responsibility of an H-2B employer and H-2B

worker to maintain appropriate records to establish that each has met the requirements outlined in 8 CFR 214.2(h)(23) and 8 CFR 274a.12(b)(27) if questions arise in future proceedings.

Since every H-2B petition must be accompanied by an approved TLC, all H-2B petitioners must have completed a test of the U.S. labor market, as a result of which DOL determined that there were no qualified U.S. workers available to fill these temporary positions. The Department believes that granting H-2B workers already in the United States the option to begin employment with new H-2B petitioners as soon as the H-2B petitions are received by USCIS will benefit employers in the United States and provide stability to the nation's food supply chain during the unique challenges the country faces because of COVID-19.

Second, the Department has determined that it is necessary to create a temporary exception to its regulations at 8 CFR 214.2(h)(13)(i)(B), (h)(13)(iv), (h)(13)(v), and (h)(15)(ii)(C), to allow the aforementioned aliens to extend their H-2B period of stay beyond the 3-year limitation, without first requiring them to remain outside of the United States for an uninterrupted period of 3 months.¹³ This flexibility with respect to the 3-year limitation applies both to extensions of stay with the same employer as well as extensions of stay with a new employer.

Again, in order to use these flexibilities, H-2B employers in the United States must conduct (or must have conducted) a test of the U.S. labor market and be unable to find qualified, available U.S. workers to fill the positions. This is because this temporary final rule does not change applicable regulations pursuant to which employers in the United States must recruit U.S. workers before filing an H-2B petition with USCIS. In addition, beyond the flexibilities

¹³ If the H-2B worker's accumulated stay is 18 months or less, an absence of at least 45 days will interrupt the 3-year limitation on admission. *See* 8 CFR 214.2(h)(13)(v).

identified in this temporary final rule, DHS is not changing any other H-2B petition requirements or the adjudication process, including the requirement that the H-2B position qualify as temporary services or labor as defined in 8 CFR 214.2(h)(6)(ii).¹⁴ This flexibility also is limited to aliens who are and have been complying with the terms of their H-2B status.

In addition to meeting all applicable substantive eligibility requirements, to be approved under this temporary final rule, the H-2B nonimmigrant must have been in the United States in valid nonimmigrant status on or after March 1, 2020.¹⁵ In addition, an H-2B petition for an extension of stay must have been received on or after March 1, 2020, and remain pending as of the effective date of this rule, or received on or after the effective date of this rule and no later than September 11, 2020. However, for purposes of extensions of stay with a new employer or U.S. agent, employment with the new H-2B petitioner without an approved petition cannot begin before the effective date of this rule and before the start date of employment listed in the H-2B petition. If the new petition is approved, the H-2B worker's extension of stay may be granted for the validity of the approved petition for a period not to exceed the validity period of the TLC.

To ensure H-2B petitioners' continued access to workers who provide temporary labor or services essential to the stability of the nation's food supply chain during the National Emergency, the ability of H-2B petitioners and H-2B workers to take advantage of the flexibilities in this temporary final rule will automatically terminate at the end of September 11,

¹⁴ The temporary flexibility DHS is granting for the aforementioned H-2B aliens to remain in the United States beyond the 3-year limitation described in 8 CFR 214.2(h)(13)(i)(B), (h)(13)(iv), (h)(13)(v), and (h)(15)(ii)(C) to address the need to secure the U.S. food supply chain does not modify the requisite nature of the petitioner's need for the temporary services or labor as described in 8 CFR 214.2(h)(6)(ii).

¹⁵ DHS notes that in circumstances when an extension of stay is considered timely filed under 8 CFR 214.1(c)(4), the H-2B worker must still meet the requirements listed in that provision, including requirements that the H-2B worker has not violated his or her status by, for example, engaging in unauthorized employment.

2020. USCIS will apply the provisions of this rule to H-2B petitions received on or before September 11, 2020, even if such petitions remain pending after the expiration of this rule.

At this time, DHS believes that 120 days is sufficient to address the needs of employers engaged in nonagricultural services or labor essential to the U.S. food supply chain, such as those described above, who need to hire H-2B workers after having obtained a TLC demonstrating that they have been unable to find available, qualified U.S. workers to fill these positions. DHS has determined that a 120-day filing period is appropriate as it provides immediate relief to these H-2B petitioners who have been impacted by the disruptions and uncertainties caused by the COVID-19 public health emergency and is a reasonable period of time for DHS to implement the flexibilities described in this rule. The 120-day filing period does not affect or change the H-2B petitioner's validity period requested on the H-2B petition. In addition, the 120-day filing period is consistent with the 120-day filing period provided in a similar DHS temporary final rule, *Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency*.¹⁶ The H-2A temporary final rule also addressed the need to secure the U.S. food supply chain, given the current economic conditions in the United States. However, after the publication of this temporary final rule, DHS will continue to monitor the rapidly evolving circumstances surrounding the public health emergency, and may issue a new temporary final rule to extend its applicability in the event DHS determines that economic circumstances demonstrate a continued need for these temporary changes to the regulatory requirements involving H-2B nonagricultural employers and workers essential to the nation's food supply chain.

¹⁶ 85 FR 21739 (Apr. 20, 2020).

Any H-2B petition received after the termination of this temporary final rule will be adjudicated in accordance with the existing permanent regulatory requirements. *See* 8 CFR 214.2(h)(2)(i)(D).

III. Statutory and Regulatory Requirements

A. Administrative Procedure Act

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

1. Good Cause to Forgo Notice and Comment Rulemaking

The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(B). The good-cause exception for forgoing notice-and-comment rulemaking “excuses notice and comment in emergency situations, or where delay could result in serious harm.” *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). Although the good cause exception is “narrowly construed and only reluctantly countenanced,” *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992), the Department has appropriately invoked the exception in this case, for the reasons set forth below.

As also discussed earlier in this preamble, on January 31, 2020, the Secretary of Health and Human Services declared a public health emergency under section 319 of the Public Health

Service Act in response to COVID-19.¹⁷ On March 13, 2020, President Trump declared a National Emergency concerning the COVID-19 outbreak, retroactive to March 1, 2020, to control the spread of the virus in the United States.¹⁸ In response to the Mexican government's call to increase social distancing in that country, DOS announced the temporary suspension of routine immigrant and nonimmigrant visa services processed at the U.S. Embassy in Mexico City and all U.S. consulates in Mexico beginning on March 18, 2020.¹⁹ DOS expanded the temporary suspension of routine immigrant and nonimmigrant visa services at all U.S. Embassies and Consulates on March 20, 2020.²⁰

DOS designated H-2 visas as mission critical, and announced that U.S. Embassies and Consulates will continue to process H-2 cases to the extent possible and implemented a change in its procedures, to include interview waivers.²¹ Due to travel restrictions, limitations on visa services as a result of actions taken to mitigate the spread of COVID-19, as well as the possibility that some U.S. and H-2B workers may become unavailable due to illness related to the spread of COVID-19, U.S. employers engaged in services or labor essential to the U.S. food supply chain, and who have approved TLCs and either approved H-2B petitions or who will be filing H-2B petitions on or after the effective date of this temporary final rule, might not receive,

¹⁷ HHS, *Determination that a Public Health Emergency Exists*, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (last reviewed Jan. 31, 2020). See also HHS, *Determination of Public Health Emergency*, 85 FR 7316 (Feb. 7, 2020).

¹⁸ Proclamation 9994 of March 13, 2020, *Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak*, 85 FR 15337 (Mar. 18, 2020). See also White House, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last visited May 4, 2020).

¹⁹ DOS, *Status of U.S. Consular Operations in Mexico in Light of COVID-19*, <https://mx.usembassy.gov/status-of-u-s-consular-operations-in-mexico-in-light-of-covid-19/> (last updated Apr. 13, 2020).

²⁰ DOS, *Suspension of Routine Visa Services*, <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html> (last updated Mar. 20, 2020).

²¹ See DOS website, *Important Announcement on H2 Visas*, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-h2-visas.html> (last updated Mar. 26, 2020).

or be able to continuously employ, any or all of the workers requested to fill all of their DHS-approved temporary nonagricultural positions. Due to these potential labor shortages, employers who serve essential functions in the U.S. food supply chain may experience adverse economic impacts to their operations. To address these concerns, DHS is acting expeditiously to put in place rules that will facilitate the continued employment of H-2B workers already present in the United States. This action will help employers fill these critically necessary nonagricultural job openings, protect U.S. businesses' economic investments in their operations, and contribute to the stability of the nation's food supply chain.

Courts have found “good cause” under the APA when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. Courts have held that an agency may use the good-cause exception to address “a serious threat to the financial stability of [a government] benefit program,” *Nat’l Fed’n of Fed. Emps. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982), or to avoid “economic harm and disruption” to a given industry, which likely would result in higher consumer prices, *Am. Fed’n of Gov’t Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). Consistent with the above authorities, the Department is bypassing notice and comment to expeditiously and, on a temporary basis, facilitate the employment of certain H-2B workers already in the United States who will perform temporary nonagricultural work that is essential to the U.S. food supply chain, and prevent potential economic harms to H-2B nonagricultural employers, as well as other potential downstream effects. *See Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1285 & n.12 (N.D. Fla. 2016).

2. Good Cause to Proceed with an Immediate Effective Date

The APA requires a 30-day delayed effective date for a substantive rule, but contains an exception for “a substantive rule which grants or recognizes an exemption or relieves a

restriction.” 5 U.S.C. 553(d)(1). This is such a rule; therefore, no delayed effective date is required. The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause, instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). The good-cause exception to the 30-day effective date requirement is easier to meet than the good-cause exception for forgoing notice and comment rulemaking. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992); *Am. Fed’n of Gov’t Emps., AFL–CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289–90 (7th Cir. 1979). An agency can show good cause for eliminating the 30-day delayed effective date when it demonstrates urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp.*, 605 F.2d at 290; *United States v. Gavrilovic*, 511 F.2d 1099, 1104 (8th Cir. 1977). For the same reasons set forth above, we also conclude that the Department has good cause to dispense with the 30-day effective date requirement given that this rule is necessary to prevent serious economic harms to U.S. employers caused by unavailability of workers due to COVID-19.

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

Executive Orders (E.O.) 12866 and 13563 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule is designated a significant regulatory action under E.O. 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation. DHS, however, is proceeding

under the emergency provision of Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously during the current public health emergency to secure temporary labor for businesses that contribute to the stability of the nation's food supply chain.

This rule will help employers fill critically necessary nonagricultural job openings and protect U.S. businesses that contribute to the stability of the nation's food supply chain. DHS believes this benefit to employers and businesses outweighs any additional impacts imposed by the new requirement to file an attestation form with DHS. In addition, this rule will benefit certain H-2B workers already in the United States by making it easier for employers to hire them, and allowing them to remain employed, if applicable, longer than the 3-year maximum limitation on their stay.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 through 612 (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the APA. *See* 5 U.S.C. 603(a), 604(a). This temporary final rule is exempt from notice and comment requirements for the reasons stated above in Part III.A. Therefore, the requirements of the RFA applicable to final rules, 5 U.S.C. 604, do not apply to this final rule. Accordingly, the Department is not required to either certify that the final rule would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law 104-4, 2 U.S.C. 1501 through 1571 (UMRA), is intended, among other things, to curb the practice of imposing unfunded

Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule that includes any Federal mandate that may result in \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. 2 U.S.C. 1532. This rule does not contain such a mandate. The requirements of Title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA.

E. Executive Order 13132 (Federalism)

This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of E.O. 13132, 64 FR 43255, 43258 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

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

G. Congressional Review Act

The Office of Information and Regulatory Affairs, of the Office of Management and Budget, has determined that this temporary final rule is not a “major rule” as defined by the applicable section of the Congressional Review Act, 5 U.S.C. 804(2), and thus is not subject to a

60-day delay in the rule becoming effective. DHS will send this temporary final rule to Congress and to the Comptroller General under the Congressional Review Act, 5 U.S.C. 801 through 808.

H. National Environmental Policy Act

DHS analyzes actions to determine whether the National Environmental Policy Act, Public Law 91–190, 42 U.S.C. 4231 through 4347 (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) establish the policies and procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500–1508.

The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(2)(ii), 1508.4. Categorical exclusions established by DHS are set forth in Appendix A of the Instruction Manual. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual section V.B(2)(a)–(c). This rule temporarily amends regulations governing the H-2B nonimmigrant visa program to facilitate the continued employment of certain H-2B nonimmigrants in the United States, who are essential to

the U.S. food supply chain, by allowing them to change employers in the United States and begin working in the same visa classification for a period not to exceed 60 days before the nonimmigrant visa petition is approved, due to the National Emergency caused by the COVID-19 global pandemic. It also establishes a temporary exception from the 3-year limit on the maximum period of stay for H-2B workers. This rule does not change the number of H-2B workers that may be employed by U.S. employers as H-2B workers seeking extensions of status are generally exempt from the annual statutory limit. It also does not change rules for where H-2B nonimmigrants may be employed; only employers with approved TLCs for workers to perform certain temporary nonagricultural work may be allowed to employ H-2B workers under these temporary provisions. Generally, DHS believes NEPA does not apply to a rule intended to make it easier for H-2B employers to hire workers who are already in the United States in addition to, or instead of, also hiring H-2B workers from abroad because any attempt to analyze its potential impacts would be largely speculative, if not completely so. DHS cannot reasonably estimate how many petitions will be filed under these temporary provisions, and therefore how many H-2B workers already in the United States will be employed by different employers, or be employed with current or new employers beyond 3 years, as opposed to how many petitions would have been filed for H-2B workers employed under normal circumstances. DHS has no reason to believe that the temporary amendments to H-2B regulations would change the environmental effect, if any, of the existing regulations. Therefore, DHS has determined that even if NEPA were to apply to this action, this rule clearly fits within categorical exclusion A3(d) in the Instruction Manual, which provides an exclusion for “promulgation of rules . . . that amend an existing regulation without changing its environmental effect.”

This rule maintains the current human environment by helping to prevent irreparable harm to certain U.S. businesses and to prevent significant adverse effects on the human environment that would likely result from loss of jobs or income, or disruption of the nation's economy. This rule is not a part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

I. Paperwork Reduction Act (PRA)

Under the PRA, 44 U.S.C. 3501 et seq., USCIS generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. USCIS has submitted the Information Collection Request (ICR) contained in this rule to OMB using emergency clearance procedures outlined at 5 CFR 1320.13. That review is ongoing, and USCIS will publish a notice announcing the results of that review.

This rule includes a new form, Form ATT-H2B, Attestation for Employers Seeking To Employ H-2B Nonimmigrant Workers Essential to the U.S. Food Supply Chain, that petitioners will file with DHS. Petitioners will use this form to make the attestation described above. While USCIS will provide a more specific burden estimate in the package submitted to OMB, for the purposes of this TFR DHS notes that such an estimate is difficult to provide with any certainty. For more information on this collection, please see reginfo.gov.

Overview of information collection:

(1) Type of Information Collection: New Collection.

(2) Title of the Form/Collection: Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Essential to the U.S. Food Supply Chain.

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: Form ATT-H2B; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract:
Primary: Business or other for-profit. As of the effective date of this temporary final rule, employers who submitted or are submitting Form I-129, Petition for a Nonimmigrant Worker to request an extension of stay and a change of employer and/or an extension of stay beyond the maximum 3 years (including with the same employer) pursuant to 8 CFR 214.2(h)(23), will be able to submit the Attestation to affirm that the workers named in the petition will be performing temporary nonagricultural services or labor that are essential to the U.S. food supply chain as described in 8 CFR 214.2(h)(23)(i). Receipt of the H-2B petition and Attestation, or just Attestation for H-2B petitioners whose petitions were pending on the effective date of this rule, triggers the flexibilities under this temporary final rule.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: USCIS is not able to estimate the total number of respondents for the information collection Form ATT-H2B because it cannot reasonably predict how many H-2B petitioners will file an H-2B petition for an extension of stay during the 120 days after the publication of this temporary final rule, or how many of those employers will be requesting the flexibilities under this temporary final rule and able to attest that H-2B workers will be

performing temporary nonagricultural services or labor essential to the U.S. food supply chain. The estimated hour burden per response is 0.167 hours (10 minutes).

(6) An estimate of the total public burden (in hours) associated with the collection: because USCIS cannot reasonably estimate the number of H-2B petitioners who will be able to attest that H-2B workers will be performing temporary nonagricultural services or labor essential to the U.S. food supply chain, USCIS is not able to provide a total estimated annual hour burden associated with this collection of information.

(7) An estimate of the total public burden (in cost) associated with the collection: USCIS is not able to estimate the total annual cost burden associated with this collection of information because it is not able to predict how many H-2B petitioners will be able to attest that H-2B workers will be performing temporary nonagricultural services or labor essential to the U.S. food supply chain, and thus the number of respondents for this information collection.

J. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the Federal Register.

List of Subjects

8 CFR Part 214

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

8 CFR Part 274a

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

Accordingly, DHS amends 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, 1221, 1281, 1282, 1301-1305, 1356, and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Public Law 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.

2. Amend § 214.2 by adding paragraph (h)(23) to read as follows:

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

* * * * *

(h) * * *

(23) Change of employers and extensions beyond 3 years during COVID-19 National Emergency for H-2B aliens essential to the U.S. food supply chain. (i) This paragraph (h)(23) relates to certain H-2B workers providing temporary nonagricultural services or labor essential to the U.S. food supply chain.

(ii) A prospective new H-2B employer or U.S. agent who is seeking to employ an H-2B alien to provide temporary nonagricultural services or labor essential to the U.S. food supply

chain under this paragraph (h)(23) may file an H-2B petition on Form I-129, accompanied by an approved temporary labor certification and attestation described in paragraph (h)(23)(v)(A) of this section, requesting 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 for a period not to exceed the validity period of the temporary labor certification. Notwithstanding paragraph (h)(2)(i)(D) of this section, an alien in valid H-2B nonimmigrant status on or after March 1, 2020:

(A) Whose new petitioner files an H-2B petition on or after May 14, 2020, is authorized to begin employment with the new petitioner to perform work that is essential to the U.S. food supply chain after the petition described in this paragraph (h)(23), including the attestation described in paragraph (h)(23)(v)(A) of this section, is received by USCIS and before the H-2B petition is approved, but no earlier than the start date of employment indicated in the H-2B petition; or

(B) Whose new petitioner filed an H-2B petition on or after March 1, 2020 and the petition was pending on or after May 14, 2020, is authorized to begin employment with the new petitioner to perform work that is essential to the U.S. food supply chain after the attestation described in paragraph (h)(23)(v)(A) is received by USCIS and before the H-2B petition is approved.

(iii)(A) With respect to a petition described in paragraph (h)(23)(ii)(A) of this section, and subject to the requirements of 8 CFR 274a.12(b)(27), the new period of employment described in paragraph (h)(23)(ii) may last for up to 60 days beginning on the Received Date on Form I-797 (Notice of Action) or, if the start date of employment occurs after the I-797 Received Date, for a period of up to 60 days beginning on the start date of employment indicated in the H-

2B petition. Employment is not authorized under this paragraph (h)(23) if USCIS does not receive the attestation described in paragraph (h)(23)(v)(A) of this section.

(B) With respect to a petition described in paragraph (h)(23)(ii)(B) of this section, the new period of employment described in paragraph (h)(23)(ii) may last for up to 60 days beginning on the date that USCIS acknowledges in writing the receipt of a properly filed attestation described paragraph (h)(23)(v). Employment under this paragraph (h)(23) is not authorized if USCIS does not receive the attestation described in paragraph (h)(23)(v)(A) of this section.

(C) With respect to either type of petition, if USCIS adjudicates the petition prior to the expiration of this 60-day period and denies the petition for extension of stay, or if the petition is withdrawn by the petitioner before the expiration of the 60-day period, the employment authorization associated with the filing of that petition under 8 CFR 274a.12(b)(27) will automatically terminate 15 days after the date of the denial decision or 15 days after the date on which the petition is withdrawn. Nothing in this paragraph (h)(23) is intended to alter the availability of employment authorization related to professional H-2B athletes who are traded between organizations pursuant to paragraph (h)(6)(vii) of this section and 8 CFR 274a.12(b)(9).

(iv) Notwithstanding paragraphs (h)(13)(i)(B), (h)(13)(iv) and (v), and (h)(15)(ii)(C) of this section, an H-2B petition seeking an extension of stay for H-2B aliens who are essential to the U.S. food supply chain to work, and submitted with an approved temporary labor certification, may be approved on the basis of this paragraph (h)(23), even if any of the aliens requested in the H-2B petition have otherwise exhausted the applicable 3-year maximum period of stay in the United States and have not thereafter been absent from the United States for an

uninterrupted period of 3 months, or if any such aliens would exceed the 3-year limit as a consequence of the approval of the extension.

(v) In addition to meeting all other requirements for the H-2B classification, to commence employment and be approved under this paragraph (h)(23):

(A) The H-2B petitioner must submit an attestation indicating that the H-2B alien will be performing work that is essential to the U.S. food supply chain;

(B) The alien must have been in valid H-2B nonimmigrant status on or after March 1, 2020; and

(C) The H-2B petition must have been—

(1) Received on or after March 1, 2020, and pending as of May 14, 2020, so long as the H-2B worker did not begin work with the new employer before May 14, 2020, or

(2) Received on or after May 14, 2020, but no later than September 11, 2020.

(vi) Authorization to initiate employment changes pursuant to paragraphs (h)(23)(ii) and (iii) of this section, or be approved for employment exceeding 3 years in duration pursuant to paragraph (h)(23)(iv) of this section, begins on May 14, 2020, and ends at the end of September 11, 2020.

* * * * *

PART 274a – CONTROL OF EMPLOYMENT OF ALIENS

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

Authority: 8 U.S.C. 1101, 1103, 1324a; Title VII of Pub. L. 110-229; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 114-74, 129 Stat. 599; Pub. L. 115-218.

4. Amend § 274a.12 by adding paragraph (b)(27) to read as follows:

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

* * * * *

(b) * * *

(27)(i) Pursuant to 8 CFR 214.2(h)(23) and notwithstanding 8 CFR 214.2(h)(2)(i)(D) and the second sentence of 8 CFR 274a.12(b)(9), an alien is authorized to be employed, beginning no earlier than the start date of employment indicated in the H-2B petition and no earlier than May 14, 2020, by a new employer that has filed an H-2B petition, which includes the attestation described in 8 CFR 214.2(h)(23)(v)(A) naming the alien as a beneficiary and requesting an extension of stay for the alien. The authorization is for a period not to exceed 60 days beginning on the later of the following three dates: the “Received Date” on Form I-797 (Notice of Action) acknowledging receipt of the petition requesting the extension of stay, which includes the attestation described in 8 CFR 214.2(h)(23)(v)(A); the date on which USCIS acknowledges in writing the receipt of the properly filed attestation described in 8 CFR 214.2(h)(23)(v)(A) submitted while the H-2B petition is pending; or the start date of employment if the start date of employment indicated in the H-2B petition occurs after the filing. However, if USCIS adjudicates the petition prior to the expiration of this 60-day period and denies the petition for extension of stay, or if the petitioner withdraws the petition before the expiration of the 60-day period, the employment authorization under this paragraph (b)(27) will automatically terminate 15 days after the date of the denial decision or 15 days after the date on which the petition is withdrawn. Nothing in this section is intended to alter the availability of employment authorization related to professional H-2B athletes who are traded between organizations pursuant to paragraph (b)(9) of this section and 8 CFR 214.2(h)(6)(vii).

(ii) Authorization to initiate employment changes pursuant to 8 CFR

214.2(h)(23)(ii) and (iii) and this paragraph (b)(27) begins at 12 a.m. on May 14, 2020, and ends at the end of September 11, 2020.

* * * * *

Chad R. Mizelle,
Senior Official Performing the Duties of the
General Counsel,
U.S. Department of Homeland Security.

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