Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

[INS No. 1946–98; AG Order No. 2194–98]

RIN 1115–AF29

Delegation of the Adjudication of Certain H–2A Petitions to the Department of Labor

AGENCY: Immigration and Naturalization Service, Department of Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the Immigration and Naturalization Service's (Service) regulations by delegating to the United States Department of Labor (DOL) the adjudication of certain petitions for aliens coming temporarily to the United States to perform agricultural labor or services (H–2A petition). The H–2A petitions affected by this action would involve only petitions filed for initial H–2A employment where the alien is not physically present in the United States and petitions to replace H–2A workers who were terminated before the end of their authorized stays with workers from outside the United States. This rule would not affect the Service's authority to make determinations at the port-of-entry of an alien's admissibility to the United States or to adjudicate other petitions. The Service has proposed these changes in order to streamline the existing H–2A petitioning process for certain foreign agricultural workers, and the proposals are intended to make it easier and less burdensome for United States employers to file petitions for such workers.

DATES: Written comments must be submitted on or before February 5, 1999.

ADDRESSES: Please submit the original and two copies of written comments to the Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, N.W., Room 5307, Washington, DC 20536. To ensure proper handling, please reference the INS No. 1946–98 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: John W. Brown, Adjudications Officer, Programs Division, Immigration and Naturalization Service, 425 I Street, N.W., Room 3214, Washington, DC 20536, telephone (202) 514–4754.

SUPPLEMENTARY INFORMATION:

Background

What Is an H–2A Agricultural Worker?

Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (Act) defines an H–2A worker as an alien ''having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services * * * of a temporary or seasonal nature.'' 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1188(i)(2).

What Is the Current Procedure for Hiring an H–2A Agriculture Worker?

Section 218 of the Act provides the statutory framework for the H–2A nonimmigrant program. 8 U.S.C. 1188. The current procedures for filing an H–2A petition to hire an alien to perform temporary or seasonal agricultural labor or services are described at 8 CFR 214.2(h)(5). A United States employer that desires to hire an H–2A agricultural worker must first obtain a labor certification from the DOL. The procedures for obtaining a labor certification are contained in the DOL regulations at 20 CFR part 655, subpart B. Briefly, the prospective United States employer must establish, among other things, that there are not sufficient available United States workers for the position and that the employer will pay the foreign worker in accordance with the regulations of the DOL and the United States Department of Agriculture (USDA). If the United States employer and the proposed employment of the H–2A worker meet all of the DOL requirements, the DOL will issue a labor certification. If the application for a labor certification is denied, an employer may obtain review of the denial by an administrative law judge within the DOL. After obtaining a labor certification from the DOL, the employer is required to file a Form I–129, Petition for nonimmigration Worker, with the Service. The Service reviews the Form I–129 and supporting documentation and, if approved, forwards notice of the approved petition to a consular post or port-of-entry. The foreign workers are then identified and either apply for a nonimmigrant visa at a United States consular post or for admission to the United States if exempt from the nonimmigrant visa requirements. If an H–2A petition is denied by the Service, the employer may appeal the denial of the petition to the Administrative Appeals Office (AAO). See 8 CFR 103.3, 214.2(h)(12).

Why Is the Service Making These Changes?

The Administration, including the Department of State (DOS), the DOL, the USDA, and the Service, has, for some time, been considering possible changes to the H–2A program to help streamline it, improve its operation, and address complaints by some users of the program, without weakening the program's worker protections. The General Accounting Office and the DOL's Office of Inspector General have recently completed in-depth reviews of the H–2A program, providing useful analysis and findings and making several recommendations for program changes, many of which have been accepted by the administering agencies. This rulemaking represents an attempt by the Service to simplify the petitioning process for United States employers seeking to employ foreign agricultural workers. The DOL published corresponding, proposed regulations in the **Federal Register** on October 2, 1998, 63 FR 53244–53249.

The Service's current role in the adjudication of H–2A petitions generally is limited to reviewing the Form I–129 filed by the United States employer to determine if the job offered to the foreign worker is temporary and if the United States employer has obtained a labor certification from the DOL. Moreover, the labor certification issued by the DOL is normally accepted by the Service as evidence that the position is temporary and that the United States employer has met all of the DOL's requirements with respect to the H–2A classification. Although the Service currently is authorized to approve a H–2A petition in spite of the DOL's denial of a labor certificate, it can

do so only if the petitioner overcomes the DOL's finding that qualified domestic labor is available. 8 CFR 214.2(h)(5)(ii). The Service, however, accords great weight to the DOL's findings and rarely overturns them. In addition, most Form I–129 petitions are filed for unnamed beneficiaries; the vast majority of United States employers, due to the nature of the agricultural industry, identify only the number of positions that they want to fill, not the names of the specific foreign workers. The foreign workers are identified only after the petition is approved by the Service and before visas are issued. Thus, as a practical matter, the Service's role in the processing of H–2A petitions for aliens outside of the United States generally is limited to a review of the Form I–129 petition to determine if it is accompanied by a labor certificate. Given its minimal role in this process, the Service has determined that the interests in streamlining the H–2A process outweigh those of retaining jurisdiction over the adjudication of H–2A petitions filed on behalf of aliens outside of the country.

Explanation of Changes

What Changes Are We Making to the Regulations?

The control of aliens admitted to the United States as nonimmigrants is solely the responsibility of the Attorney General. 8 U.S.C. 1103(a). Under section 103(a)(6) of the Act, however, the Attorney General has the authority ''to confer or impose upon any employee of the United States * * * any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Service.'' 8 U.S.C. 1103(a)(6). Pursuant to this section of the Act, the Attorney General proposes to amend the Service's regulations by delegating to the Secretary of Labor her authority to adjudicate H–2A petitions where the beneficiary is not physically present in the United States.

This rule proposes to implement this delegation to the Secretary of Labor by amending 8 CFR 214.2(h)(5)(i). The rule would further advise potential United States employers to refer to the DOL regulations for information regarding the filing requirements for petitions for H–2A agricultural workers who are not physically present in the United States.

This proposed rule also would amend 8 CFR 214.2(h)(5)(ix) to delegate authority to the DOL to adjudicate a petition filed to replace an H–2A worker whose employment has been terminated early with a worker from outside of the United States. The Service, however, would retain its authority to adjudicate petitions where the substitute worker is physically present in the United States. The Service would also retain authority to adjudicate extensions of stay and petitions filed in connection with applications to change an alien's nonimmigrant status to H–2A nonimmigrant status.

What Portions of the H–2A Program Are Not Being Changed by This Rule?

As noted above, the Service does not propose to delegate its authority to adjudicate extensions of temporary stay and changes of nonimmigrant status to an H–2A nonimmigrant. The Service proposes to retain its authority in these two areas because the decisions to change nonimmigrant status and to extend an alien's period of temporary stay require complex determinations as to whether the alien is maintaining a valid nonimmigrant status and is eligible for other benefits under the Act. In addition, it would be burdensome on the DOL, whose mission does not include direct control over aliens, to make these determinations. For these reasons, the Service will not remove itself entirely from the H–2A program, but will retain a certain amount of control over the program in order to ensure that both the employer and the foreign agricultural worker remain in compliance with the Act.

Under the proposed regulation, extensions of stay would continue to be filed with the Service in accordance with 8 CFR 214.1 and 8 CFR 214.2(h)(15)(ii)(C). In addition, requests for a change of nonimmigrant status to H–2A nonimmigrant classification would continue to be filed with the Service pursuant to 8 CFR part 248. The Service also would retain its authority to adjudicate petitions filed for a change of United States employers under this proposed regulation.

The Service also intends to retain its right to adjudicate appeals of denied H–2A petitions. See 8 CFR 103.3, 214.2(h)(12). Petitions denied by the DOL would, therefore, continue to be appealed to the AAO. In this regard, the proposed regulation clarifies that, as a condition to delegation of authority, the DOL has agreed to provide notice to the petitioner of the reasons for denial and of the right to appeal to the AAO. The Service's retention of its appeal authority ensures that United States employers can obtain an independent, second-agency review of a petition denied by the DOL. This is not to be confused with the DOL's decision with respect to an application for a labor certification. Under this proposed rule, the DOL will be rendering two decisions, one on the application for a labor certification and one on the H–2A petition itself. Appeals from the denial of a labor certification will continue to be handled by the DOL.

The Service also intends to retain its authority, described in 8 CFR 214.2(h)(11), to revoke an H–2A petition approved by the DOL.

This proposed rule also would not alter the petitioner's responsibilities, set forth in 8 CFR 214.2(h)(5)(vi), to notify the Service if an H–2A alien absconds or the alien's employment ends more than 5 days before the labor certification expires. Similarly, the proposed rule would not change the provisions in 8 CFR 214.2(h)(5)(vi) requiring the petitioner to pay liquidated damages for violating its notification obligations. Further, this proposed rule would not alter 8 CFR 214.2(h)(5)(viii), which sets forth the period of an H–2A nonimmigrant admission to the United States.

In addition, the delegation of the authority to adjudicate certain H–2A petitions would not, in any way, affect the Service's responsibilities with respect to the employer sanctions provisions contained at 8 CFR part 274a, including the limitation that an H–2A worker may be employed only by the petitioning employer, as described at 8 CFR 274a.12(b)(9).

This rule also would not delegate authority to make determinations of admissibility to the United States. The Service would retain sole authority to make such determinations at the time an alien makes an application for admission at a designated port-of-entry. The delegation in this rule would only involve the approval of petitions for H–2A nonimmigrant classification. The H–2A workers would still be required to obtain a nonimmigrant visa abroad, where applicable, and make application for admission to the United States.

Finally, the Service will continue to issue Form I–94, Arrival-Departure Record, to the foreign worker at the time the alien is admitted to the United States. The Service will also continue to issue replacement Form I–94s.

What Is the Effect of These Proposed Changes?

These proposed changes will make it easier for United States employers to file petitions for H–2A agricultural workers located outside of the United States. Under this proposed rule, these employers generally will be required to file petition-related documents with only one agency—the DOL—instead of the current two agencies. This proposed change should shorten the time required for these employers to obtain the

services of H–2A workers located outside of the United States because it generally will remove the Service from the H–2A petition approval process, thereby eliminating the time and mailing costs associated with the submission of the petition package to the Service.

What Issues Will Remain After These Proposed Changes Are Made?

The adoption of the changes proposed in this rule will create a number of issues to be resolved among the Service, the DOL, and the DOS. These issues will require further discussion between the agencies and, possibly, further rulemaking. An example of one such issue is whether the DOL should use the Service's Form I–129 or create its own form to capture the information required to determine eligibility for the H–2A classification. Another issue is whether, if the DOL devises its own form, it should gather the same information that the Service currently captures on Form I–129. A further example is the issue of how to notify consular posts and ports-of-entry after a petition is approved. In this regard, the DOL could continue to use the Service's Form I–797, Notice of Action, or devise another mechanism to notify the appropriate parties of its actions. The Service, the DOL, and the DOS will continue to discuss and to work collaboratively on these issues, and others, as they arise in order to determine the best procedures to implement the delegation described in this rule. Such procedures will be addressed by the agencies in their respective regulations through the rulemaking process.

What Types of Comments Does the Service Wish to Receive From the Public?

In addition to comments directly addressing the changes proposed in this rule, the Service would appreciate comments from the public on other pertinent issues associated with this proposed delegation of authority. The Service does not wish to adopt changes that would have an adverse impact on the users of the H–2A program.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule and, by approving it, certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Service is issuing this rule to reduce the impact on small entities that petition for agricultural workers who are not physically present in the United States. This change is intended to reduce the amount of time required to petition for an H–2A worker and should ease the paperwork burden on prospective United States employers.

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 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 to be a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

Executive Order 12612

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 Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988: Civil Justice Reform

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

List of Subjects in 8 CFR Part 214

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

Accordingly, part 214 of 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 continues to read as follows:

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

2. Section 214.2 is amended by:

a. Removing the reference to ''H–2A,'' from the first sentence in paragraph (h)(2)(i)(A);

b. Revising paragraph (h)(5)(i);

c. Revising paragraph (h)(5)(ix); and by

d. Revising paragraph (h)(10)(iii) to read as follows:

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

* * * * *

(h) * * *

(5) * * *

(i) *Petition for alien to perform agricultural labor or services of a temporary or seasonal nature (H–2A)*—(A) *Filing a petition on behalf of an alien who is not physically present in the United States.* Pursuant to section 103 of the Act, the Attorney General has delegated the authority to adjudicate H–2A petitions where the beneficiary is outside of the United States to the Secretary of Labor. Therefore, an H–2A petition for a foreign agricultural worker who is not physically present in the United States shall be filed with the United States Department of Labor pursuant to its regulations at 20 CFR part 655, subpart B.

(B) *H–2A petitions filed for an alien who is in the United States or for a change of nonimmigrant status to an H–2A nonimmigrant alien.*—*(1) General.* An H–2A petition filed by a United States employer for an alien currently in the United States, or an H–2A petition requesting a change of an alien's nonimmigrant status to that of an H–2A nonimmigrant alien, must be filed with the Service on Form I–129. The petition must be filed with a single valid temporary agricultural labor certification. However, if a certification is denied, domestic labor subsequently fails to appear at the worksite, and the Department of Labor denies an appeal under section 218(e)(2) of the Act, the written denial of appeal shall be considered a certification for this purpose if filed with evidence that establishes that qualified domestic labor is unavailable. An H–2A petition may

be filed by either the employer listed on the certification, the employer's agent, or the association of United States agricultural producers named as a joint employer on the certification.

(*2*) *Multiple beneficiaries not present in the United States.* The total number of beneficiaries of a petition or series of petitions based on the same certification may not exceed the number of workers indicated on that document. A single petition can include more than one beneficiary if the total number does not exceed the number of positions indicated on the relating certification, and all beneficiaries will obtain a visa at the same consulate or not required to have a visa and will apply for admission at the same port-of-entry.

(*3*) *Unnamed beneficiaries not present in the United States.* The sole beneficiary of an H–2A petition must be named in the petition. In a petition for multiple beneficiaries, each beneficiary must be named unless he or she is not named in the certification and is outside the United States. Unnamed beneficiaries must be shown on the petition by total number.

(*4*) *Evidence supporting H–2A petitions filed with the Service.* An H–2A petitioner must show that the proposed employment qualifies as a basis for H–2A status, and that any named beneficiary qualifies for that employment. A petition will be automatically denied if filed without the certification evidence required in paragraph (h)(5)(i)(B)(*1*) of this section and, for each named beneficiary, without the initial evidence required in paragraph (h)(5)(v) of this section.

(*5*) *Special filing requirements for H–2A petitions filed with the Service.* Where a certification shows joint employers, a petition must be filed with an attachment showing that each employer has agreed to the conditions of H–2A eligibility. A petition filed by an agent must be filed with an attachment in which the employer has authorized the agent to act on its behalf, has assumed full responsibility for all representations made by the agent on its behalf, and has agreed to the conditions of H–2A eligibility.

(C) *Petitions for H–2A nonimmigrant aliens requesting an extension of temporary stay.* An H–2A petition requesting an extension of the beneficiary's temporary stay shall be filed on Form I–129 with the Service pursuant to paragraph (h)(15)(ii)(C) of this section.

* * * * *

(ix) *Substitution of beneficiaries who are terminated prior to the completion of their authorized stay in H–2A classification.* An H–2A petition may be filed to replace an H–2A worker whose employment has been terminated prior to the completion of the alien's authorized stay. In cases where the worker replacing the terminated H–2A worker is located outside the United States, the authority to adjudicate the H–2A petition is delegated to the Department of Labor. In such cases, the petition must be filed pursuant to the Department of Labor's regulations at 20 CFR part 655, subpart B. In cases where the worker who will replace the terminated H–2A worker is physically present in the United States, the H–2A petition for the substitute worker must be filed with the Service.

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(iii) *Notice of denial.* The petitioner shall be notified of the reasons for the denial and of his or her right to appeal the denial of the petition under 8 CFR part 103. In cases where the Department of Labor has adjudicated an H–2A petition, the Department of Labor will notify the petitioner of the reasons for the denial and of his or her right to file an appeal with the Administrative Appeals Office pursuant to 8 CFR part 103. There is no appeal from a decision to deny an extension of stay to the alien.

* * * * *

Dated: December 1, 1998.

Janet Reno,

Attorney General.

[FR Doc. 98–32396 Filed 12–4–98; 8:45 am]

BILLING CODE 4410–10–M

FEDERAL RESERVE SYSTEM

12 CFR Part 213

[Regulation M; Docket No. R–1028]

Consumer Leasing

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; official staff commentary.

SUMMARY: The Board is publishing for comment proposed revisions to the official staff commentary to Regulation M, which implements the Consumer Leasing Act. The commentary applies and interprets the requirements of the regulation. The proposed update would provide guidance on disclosures for lease advertisements, multiple-item leases, renegotiations and extensions and estimates of official fees and taxes.

DATES: Comments should be received by January 22, 1999.

ADDRESSES: Comments should refer to Docket No. R–1028, may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551. Comments addressed to Ms. Johnson may also be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m., and to the security control room at all other times. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments may be inspected in room MP–500 between 9:00 a.m. and 5:00 p.m., in accordance with §§ 261.12 and 261.14, of the Board's Rules Regarding the Availability of Information. 12 CFR 261.12 and 261.14.

FOR FURTHER INFORMATION CONTACT: Kyung Cho-Miller, Staff Attorney, or Jane Ahrens, Senior Counsel, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667. For users of Telecommunications Device for the Deaf (TDD) only, Diane Jenkins at (202) 452–3544.

SUPPLEMENTARY INFORMATION:

I. Background

The Consumer Leasing Act (CLA), 15 U.S.C. 1667–1667e, was enacted into law in 1976 as an amendment to the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.* The Board's Regulation M (12 CFR part 213) implements the Act. The CLA requires lessors to provide consumers with uniform cost and other disclosures about consumer lease transactions. The act generally applies to consumer leases of personal property in which the contractual obligation does not exceed $25,000 and has a term of more than four months. An automobile lease is the most common type of consumer lease covered by the Act.

The commentary (12 CFR Part 213 (Supp. I)) is a substitute for individual written staff interpretations; it is updated annually, as necessary, to address significant questions that arise. This is the first update since the January 1, 1998 compliance date for the revised regulation. The Board expects to adopt revisions to the commentary in final form in March 1999. To the extent the revisions require changes in lessors' compliance procedures, the effective date for mandatory compliance is October 1, 1999.

II. Proposed Revisions

Section 213.3—General Disclosure Requirements

3(d) Use of Estimates

Comment 3(d)(1)–1(i) provides an example for estimating official fees and