



DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 274a

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RIN 1615-AC55

Temporary Changes to Requirements Affecting H-2A Nonimmigrants due to the COVID-19 National Emergency: Partial Extension of Certain Flexibilities

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

ACTION: Temporary final rule.

SUMMARY: As a result of continued disruptions and uncertainty to the U.S. food agriculture sector during the summer and upcoming fall agricultural season caused by the global novel Coronavirus Disease 2019 (COVID-19) public health emergency, the Department of Homeland Security, U.S. Citizenship and Immigration Services, has decided it is necessary to temporarily extend the amendments to certain regulations regarding temporary and seasonal agricultural workers, and their U.S. employers, within the H-2A nonimmigrant classification. Through this temporary final rule DHS is partially extending some of the provisions of the April 20, 2020, temporary final rule. Namely, the Department will continue to allow H-2A employees whose extension of stay H-2A petitions are supported by valid temporary labor certifications issued by the Department of Labor to begin work with a new employer immediately after the extension of stay petition is received by USCIS. DHS will apply this temporary final rule to H-2A petitions requesting an extension of stay, if they were received on or after August 19, 2020, but no later than December 17, 2020. The temporary extension of these flexibilities will ensure that

agricultural employers have access to the orderly and timely flow of legal foreign workers, thereby protecting the integrity of the nation's food supply chain and decreasing possible reliance on unauthorized aliens, while at the same time encouraging agricultural employers' use of the H-2A program, which protects the rights of U.S. and foreign workers.

DATES: This final rule is effective from August 19, 2020, through August 19, 2023. Employers may request the flexibilities under this rule by filing an H-2A petition on or after August 19, 2020 and through December 17, 2020.

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I. Background

A. Legal Framework

The Secretary of Homeland Security (Secretary) has the authority to amend 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 Immigration and Nationality Act (INA), 8 U.S.C. 1103(a), which authorize the Secretary to administer and enforce the immigration and nationality laws. Under section 101 of the 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.” In addition, section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), provides the Secretary with authority to prescribe the terms and conditions of any alien’s admission to the United States as a nonimmigrant. The INA further requires that “[t]he question of importing any alien as [an H-2A] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS], after consultation with appropriate agencies of the Government [the U.S. Department of Labor and the U.S. Department of Agriculture], upon petition by the importing employer.” INA 214(c)(1), 8 U.S.C. 1184(c)(1). Section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B), states that ““an unauthorized alien’ means . . . that the alien is not at that time . . . authorized to be employed by this chapter or by the [Secretary].”

B. Description of the H-2A Program

The H-2A nonimmigrant classification applies to alien workers seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States on a temporary basis, usually lasting no longer than 1 year, for which U.S. workers are not available. INA 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see also* 8 CFR 214.1(a)(2). As noted in the statute, not only must the alien be coming “temporarily” to the United States, but the agricultural labor or services that the alien is performing must also be “temporary or seasonal.” INA 101(a)(15)(H)(ii)(a). The regulations further define an employer’s temporary need as employment that is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year. 8 CFR 214.2(h)(5)(iv)(A). An employer’s seasonal need is defined as employment that is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels above those necessary for ongoing operations. *Id.*

An employer, agent, or association (“H-2A petitioner”) must submit a petition to U.S. Citizenship and Immigration Services (USCIS) to obtain authorization of temporary workers as H-2A nonimmigrants before the employer may begin employing H-2A workers. INA 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(2)(i). DHS must approve this petition before the alien can be considered eligible for H-2A status or a visa. To qualify for H-2A classification, the H-2A petitioner must, among other things, offer a job that is of a temporary or seasonal nature, and must submit a single, valid temporary labor certification (TLC) from the U.S. Department of Labor (DOL) establishing that there are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work, and that employing H-2A workers will not adversely affect the wages and working conditions of workers in the United States similarly

employed.¹ INA 101(a)(15)(H)(ii)(a) and 218, 8 U.S.C. 1101(a)(15)(H)(ii)(a) and 1188; *see also generally* 8 CFR 214.2(h)(5)(i)(A) and (h)(5)(iv). Aliens who are outside of the United States also must first obtain an H-2A visa from the U.S. Department of State (DOS) at a U.S. Embassy or Consulate abroad, if required, and then seek admission with U.S. Customs and Border Protection (CBP) at a U.S. port of entry prior to commencing employment as an H-2A nonimmigrant. Aliens may be admitted for an additional period of up to one week prior to the employment start date for the purpose of travel to the worksite. 8 CFR 214.2(h)(5)(viii)(B).

i. DOL Temporary Labor Certification (TLC) Procedures

Prior to filing the H-2A petition with DHS, the U.S. employer or agent must obtain a valid TLC from DOL for the job opportunity the employer seeks to fill with an H-2A worker(s). As part of the TLC process, the petitioning employer must have demonstrated to the satisfaction of the Secretary of Labor that (a) there are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition, and (b) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. 1188(a)(1); *see also* 20 CFR 655.100.

To obtain a TLC from DOL, the employer must first submit an agricultural job order, within 75 to 60 calendar days prior to the start date of work, to the State Workforce Agency (SWA) that serves the state where the actual work will be performed. Once it clears the job order, the SWA will place it into intrastate clearance to initiate the recruitment of U.S. workers. 20 CFR 655.121. After review by the SWA, the employer must submit an *Application for*

¹ Under certain emergent circumstances, petitions requesting a continuation of employment with the same employer for 2 weeks or less are exempt from the TLC requirement. *See* 8 CFR 214.2(h)(5)(x).

Temporary Employment Certification with DOL's Office of Foreign Labor Certification (OFLC) no less than 45 calendar days before the start date of work. 20 CFR 655.130. OFLC will review the H-2A application and, if it accepts the application will place a copy of the job order on its electronic job registry. 20 CFR 655.144(a). OFLC will also direct the SWA to place the job order into interstate clearance, may direct the SWA to provide written notice of the job opportunity to relevant organization and physically post the job order in locations workers may gather, and may direct the employer to engage in additional recruitment. 20 CFR 655.143, 655.150, 655.154. As part of its recruitment obligations, an employer must offer the job to any recently laid-off U.S. worker(s) and contact former U.S. workers employed in occupation in the previous year. 20 CFR 655.135(g), 655.153. OFLC will grant certification if the application meets all of the requirements in the Department's regulation, including compliance with all recruitment obligations. 20 CFR 655.161(a). Post-certification, OFLC will keep the job order posted on its electronic registry until 50 percent of the contract period has elapsed, and the SWA must keep the job order on file for the same period of time. 20 CFR 655.144, 655.150. The U.S. employer must also continue to accept referrals of all eligible U.S. workers and must offer employment to any qualified U.S. worker that applies for the job opportunity until 50 percent of the work contract period has elapsed. 20 CFR 655.135(d).

ii. DHS Petition Procedures

After receiving a valid TLC from DOL, the employer listed on the TLC, an employer's agent, or the association of United States agricultural producers named as a joint employer on the TLC ("H-2A petitioner") may file the H-2A petition with the appropriate USCIS office. INA 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(2)(i), (h)(5)(i)(A). The H-2A petitioner may petition for one or more named or unnamed H-2A workers, but the total number of workers may

not exceed the number of positions indicated on the TLC.² 8 CFR 214.2(h)(2)(iii) and (h)(5)(i)(B). H-2A petitioners must name the H-2A worker if the worker is in the United States or if the H-2A worker is a national of a country that is not designated as an H-2A participating country. 8 CFR 214.2(h)(2)(iii). USCIS recommends that petitioners submit a separate H-2A petition when requesting a worker(s) who is a national of a country that is not designated as an H-2A participating country. *See* 8 CFR 214.2(h)(5)(i)(F); *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 for such aliens must submit evidence demonstrating the factors by which the request for H-2A workers serves the U.S. national interest. 8 CFR 214.2(h)(5)(i)(F)(1)(ii). USCIS will review each petition naming a national from a country not on the list and all supporting documentation and make a determination on a case-by-case basis.

A U.S. employer or U.S. agent generally may submit a new H-2A petition, with a new, valid TLC, to USCIS to request an extension of H-2A nonimmigrant status for a period of up to 1 year. 8 CFR 214.2(h)(15)(ii)(C). The H-2A petitioner must name the worker on the Form I-129, Petition for Nonimmigrant Worker,³ since the H-2A worker is in the United States and requesting an extension of stay. In the event of an emergency circumstance, however, the petitioner may request an extension not to exceed 14 days without first having to obtain an

² Note, however, that effective October 2, 2020, H-2A petitions will be limited to 25 named beneficiaries per H-2A petition. *See* DHS Final Rule, “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,” 85 FR 46788, 46916 (Aug. 3, 2020).

³ Effective October 2, 2020, the petitioner will submit the new Form I-129H2A, Petition for Nonimmigrant Worker: H-2A Classification. H-2A petitions will be limited to 25 named beneficiaries per H-2A petition. *See* DHS Final Rule, “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,” 85 FR 46788, 46916 (Aug. 3, 2020).

additional approved TLC from DOL if certain criteria are met, by simply submitting the new H-2A petition. *See* 8 CFR 214.2(h)(5)(x).

In 2008, USCIS promulgated regulations allowing H-2A workers to begin work with a new petitioning employer upon the filing of an H-2A petition, before petition approval, provided that the new employer is a participant in good standing in the E-Verify program.⁴ 8 CFR 214.2(h)(2)(i)(D) and 8 CFR 274a.12(b)(21). In such a case, the H-2A worker's employment authorization continues for a period not to exceed 120 days beginning on the "Received Date" on the Form I-797, Notice of Action, which acknowledges the receipt of the new H-2A extension petition. With the exception of the new employer and worksite, the employment authorization extension remains subject to the same conditions and limitations indicated on the initial H-2A petition. The continued employment authorization extension will terminate automatically if the new employer fails to remain a participant in good standing in the E-Verify program, as determined by USCIS in its discretion.

iii. Admission and Limitations of Stay

Upon USCIS approval of the H-2A petition, the U.S. employer or agent may hire the H-2A workers to fill the job opening. USCIS will generally grant the workers H-2A classification for up to the period of time authorized on the valid TLC. H-2A workers who are outside of the United States may apply for a visa with DOS at a U.S. Embassy or Consulate abroad, if required, and seek admission to the United States with CBP at a U.S. port of entry. Spouses and children of H-2A workers may request H-4 nonimmigrant status to accompany the principal H-2A worker. The spouse and children of an H nonimmigrant, if they are accompanying or following to join such H nonimmigrant in the United States, may be admitted, if otherwise admissible, as

⁴ *See* "Changes to Requirements Affecting H-2A Nonimmigrants," 73 FR 76891, 76905 (Dec. 8, 2008).

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 these H-2A 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-2A beneficiary.

An alien's H-2A status is limited by the validity dates on the approved H-2A petition, which must be less than 1 year. 8 CFR 214.2(h)(5)(viii)(C). H-2A workers may be admitted into the United States for a period of up to 1 week prior to the beginning validity date listed on the approved H-2A petition so that they may travel to their worksites, but may not begin work until the beginning validity date. H-2A workers may also remain in the United States 30 days beyond the expiration date of the approved H-2A petition to prepare for departure or to seek an extension or change of nonimmigrant status. 8 CFR 214.2(h)(5)(viii)(B). H-2A workers do not have employment authorization outside of the validity period listed on the approved petition unless otherwise authorized. 8 CFR 214.2(h)(5)(viii)(B).

The maximum period of stay for an alien in H-2A classification is 3 years. 8 CFR 214.2(h)(5)(viii)(C). Once an alien has held H-2A 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-2A nonimmigrant.⁵ 8 CFR 214.2(h)(5)(viii)(C).

C. COVID-19 National Emergency

On January 31, 2020, the Secretary of the U.S. Department of Health and Human Services (HHS) declared a public health emergency dating back to January 27, 2020, under

⁵ But see, 8 CFR 214.2(h)(21)(ii) expiring on August 18, 2020, which allows USCIS to approve an H-2A petition seeking an extension of stay, submitted with a valid temporary agricultural labor certification, even if any of the aliens requested in the H-2A petition have exhausted the otherwise 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.

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 to control the spread of the virus in the United States.⁷ The President's proclamation declared that the emergency began on March 1, 2020. In response to the Mexican government's call to increase social distancing, 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, 2020.⁸ 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-2A visas as mission critical, however, and announced that U.S. Embassies and Consulates have continued to process H-2A cases to the extent possible and implemented a change in its procedures, to include interview waivers.¹⁰ In addition, DHS has identified occupations in food and agriculture as critical to the U.S. public health and safety and economy.¹¹

To address disruptions caused by COVID-19 to the U.S. food agriculture sector during the summer growing season, DHS temporarily amended its H-2A regulations to provide certain

⁶ HHS, *Determination of Public Health Emergency*, 85 FR 7316 (Feb. 7, 2020).

⁷ 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 <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last visited Aug. 16, 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).

¹¹ DHS, *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf> (Mar. 19, 2020). DHS, *Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, https://www.cisa.gov/sites/default/files/publications/Version_3.1_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_0.pdf (May 19, 2020).

flexibilities to temporary and seasonal agricultural workers and their U.S. employers. On April 20, 2020, DHS issued a temporary final rule (the “April 20 TFR”), *Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency*, which allowed H-2A workers to begin work with new H-2A employers, who have valid TLCs issued by DOL, for a period not to exceed 45 days immediately after the H-2A extension of stay petition is received by USCIS. The April 20 TFR also allowed petitioners to employ H-2A workers seeking an extension of stay beyond the 3-year total limitation of stay. In the April 20 TFR, DHS indicated that it would issue a new temporary final rule to extend its termination date in the event DHS determined that economic circumstances related to our food supply demonstrated a continued need for these temporary changes to the regulatory requirements involving H-2A agricultural employers and workers. The April 20 TFR has been effective from April 20, 2020 through August 18, 2020. 85 FR 21739.

As discussed in more detail below, due to the continuing health and economic crisis caused by COVID-19, DHS has determined that the public health emergency and economic circumstances resulting from COVID 19 are necessitating the continuation of some of the flexibilities implemented through the April 20 TFR, namely the ability of H-2A workers to change employers and begin work before USCIS approves the new H-2A petition. Therefore, DHS is issuing this TFR to extend those flexibilities for an additional 120 days, i.e. through December 17, 2020. This timeframe differs from the most recent renewal of a determination of the public health emergency¹² because DHS believes that the COVID-19 pandemic may have a more lasting impact on the U.S. agricultural food sector beyond the 90 days. As a result, DHS

¹² See HHS Renewal of Determination That A Public Health Emergency Exists, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-23June2020.aspx> (Jul. 23, 2020).

will continue to monitor the evolving health crisis caused by COVID-19 and may address it in future rules.

II. Discussion

A. Temporary Changes to DHS Requirements for H-2A Change of Employer Requests during the COVID-19 National Emergency

DHS is committed to both protecting U.S. workers and to helping U.S. businesses receive the legal and work-authorized labor for temporary or seasonal agricultural labor or services that they need.

On July 23, 2020, HHS Secretary Alex Azar signed a renewal of determination, effective July 25, that extends the current COVID-19 public health emergency by up to 90 days.¹³ This determination that a public health emergency exists and has existed since January 27, 2020, nationwide, was previously renewed on April 21, 2020. The renewal of determination signals that the United States is facing continued consequences of the COVID-19 National Emergency, which corresponds to the volume of COVID-19 cases reported by the U.S. Centers for Disease Control and Prevention - 5,228,817 as of August 14, 2020.

The COVID-19 pandemic continues to cause disruptions in the domestic food supply chain.¹⁴ As of July 31, 2020, USDA's Economic Research Service reported that "[t]he coronavirus (COVID-19) pandemic has widely impacted the U.S. economy, including the farm sector and farm households. Farm businesses have experienced disruptions to production due to

¹³ See HHS Renewal of Determination That A Public Health Emergency Exists, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-23June2020.aspx> (Jul. 23, 2020).

¹⁴ See, e.g. *Food Security and COVID-19*, <https://www.worldbank.org/en/topic/agriculture/brief/food-security-and-covid-19> (last visited Aug. 14, 2020).

lowered availability of labor and other inputs . . . [r]eductions in available labor affect crop and livestock production, as well as processing capacity for crop and animal products that leave the farm. Reduced processing capacity results in lower consumption of certain agricultural commodities.”¹⁵ The H-2A program has been crucial to assuring the continued viability of the nation’s food supply chain.¹⁶ Notwithstanding the availability of the H-2A program, U.S. farmers are continuing to experience labor shortages as fewer workers are able to get to the United States. Media outlets in the United States have continued to report on these shortages. For example, a farmer in North Dakota who typically hires the same eight farmhands from South Africa to tend his crops was short half of his crew this year due to COVID-19.¹⁷

As the public health emergency and economic consequences of it continue, DHS has determined it is necessary to issue a new temporary final rule to extend certain flexibilities implemented through the April 20 TFR because DHS has determined that there is a continued need for them. This TFR extends certain amendments made by the April 20 TFR, to help U.S. agricultural employers reduce disruptions in lawful agricultural-related employment, protect the nation’s food supply chain, and lessen impacts from the COVID-19 pandemic and related economic effects, consistent with the declaration of the National Emergency. Due to the continued travel restrictions and visa processing limitations as a result of actions taken to mitigate the spread of COVID-19, as well as the possibility that some H-2A workers may

¹⁵ “Farms and Farm Households During the COVID-19 Pandemic,” <https://www.ers.usda.gov/covid-19/farms-and-farm-households/> (last visited Aug. 15, 2020).

¹⁶ The Washington Post, “How one visa program keeps America fed,” https://www.washingtonpost.com/video/national/how-one-visa-program-keeps-america-fed/2020/06/17/ac3be98d-1ed1-4d4c-8dc7-85cbbeecb5fc_video.html (last visited Aug. 15, 2020).

¹⁷ Bloomberg, “Global Food Output Runs Into Migrant Worker Woes,” Aug. 7, 2020, <https://www.bloomberg.com/news/newsletters/2020-08-07/supply-chains-latest-migrant-worker-shortages-hit-food-output> (last visited Aug. 15, 2020).

become unavailable due to COVID-19 related illness,¹⁸ U.S. employers who have approved H-2A petitions or who will be filing H-2A petitions might not receive all of the workers requested to fill the temporary positions, and similarly, employers that currently employ H-2A workers may lose the services of workers due to COVID-19 related illness.

Under this temporary final rule, any H-2A petitioner with a valid TLC, i.e. one who has already tested the U.S. labor market and was unable to find able, willing, and qualified U.S. workers to perform temporary or seasonal agricultural services or labor, can start employing H-2A workers who are currently in the United States and in valid H-2A status and who have been complying with the terms of their H-2A status immediately after receiving notice that USCIS has received the H-2A petition, but no earlier than the start date of employment listed on the petition. This will allow H-2A workers to move to a new employer to meet urgent temporary or seasonal agricultural needs before USCIS approves the new employer's petition. DHS believes this continued flexibility will help address the challenges faced by U.S. employers due to COVID-19 as the busy fall harvest season approaches. *See* new 8 CFR 214.2(h)(21) and 8 CFR 274a.12(b)(26). However, nothing in this TFR changes the existing DOL requirements for obtaining a TLC which an employer must comply with before filing an H-2A petition with USCIS.

Unlike the permanent regulation at 8 CFR 274a.12(b)(21), which allows the H-2A worker(s) to immediately work for a new H-2A employer in good standing in E-Verify upon the filing of an H-2A extension of stay petition, this TFR, like the April 20 TFR, allows the H-2A

¹⁸ Patch, "Newsom Opens Hotel Rooms For Farmworkers Exposed To Coronavirus," Jul. 29, 2020, <https://patch.com/california/santamonica/s/h6xix/newsom-opens-hotel-rooms-farmworkers-exposed-coronavirus> (last visited Aug. 15, 2020). U.S. News & World Report, "Nearly 190 Farmworkers Contract Virus in Southern California," Jul. 6, 2020, <https://www.usnews.com/news/best-states/california/articles/2020-07-06/nearly-190-farmworkers-contract-virus-in-southern-california> (last visited Aug. 15, 2020).

worker(s) to immediately work for any new H-2A employer, but no earlier than the start date of employment listed on the H-2A petition, upon the filing of an H-2A extension of stay petition during the COVID-19 National Emergency only.

The Department remains committed to promoting the use of E-Verify to ensure a legal workforce. E-Verify is free, user friendly, and over 98% accurate.¹⁹ Notwithstanding the numerous benefits E-Verify offers to ensure all employers only employ a legal workforce, the Department has determined that it is necessary to temporarily amend its regulations affecting H-2A workers to mitigate the impact on the agricultural industry due to COVID-19. These H-2A petitioners will have completed a test of the U.S. labor market, and DOL will have determined that there are no qualified U.S. workers available to fill these temporary positions. The Department believes that granting H-2A workers the option to begin employment with any new H-2A petitioner as soon as the H-2A petition is received by USCIS will also benefit U.S. agricultural employers and help provide stability to the U.S. food supply chain during the unique challenges the country faces because of COVID-19.

Upon further consideration, DHS has determined that a need exists to strike a balance between providing stability to the U.S. food supply chain, addressing the urgent needs of U.S. agricultural producers, and ensuring that those aliens admitted into the United States as temporary workers in the H-2A nonimmigrant classification in fact remain in this country on a temporary basis, as required by the Act. 8 U.S.C. 1101(a)(15)(H)(ii)(a). Therefore, DHS is not extending the April 20 TFR temporary exceptions to its regulations at 8 CFR 214.2(h)(5)(viii)(C), (h)(13)(i)(B), and (h)(15)(ii)(C) that had allowed aliens to extend their H-2A period of stay beyond the 3-year limitation, without first requiring them to remain outside of

¹⁹ See <https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-performance> (last updated Jul. 15, 2020).

the United States for an uninterrupted period of 3 months. Consequently, USCIS will apply the 3-year limit reflected in permanent DHS regulations to any H-2A petition that is received on or after August 19, 2020. These permanent regulations specifically provide, with certain very narrow exceptions, that an H-2A worker's total period of stay in H-2 classification may not exceed 3 years, before he or she must depart from the United States for a minimum of 3 months. 8 CFR 214.2(h)(15)(ii)(C). Petitioners seeking H-2A temporary workers who fill a permanent need or who will remain in the United States permanently, must comply with the requirements applicable to permanent positions. *See, e.g.,* 8 U.S.C. 1153(b)(3).

To be approved under this final rule, an H-2A petition for an extension of stay with a new employer must have been received on or after August 19, 2020, but no later than the last day that this final rule is in effect (i.e., December 17, 2020). If the new petition is approved, the H-2A worker's extension of stay may be granted for the validity of the approved petition, and for a period not to exceed the validity period of the TLC. In addition, the temporary provisions being extended by this rule are the same as the April 20 TFR provisions but differ from the permanent regulatory provisions in that they grant employment authorization for 45 days from the date of the receipt notice. The 45-day employment authorization associated with the filed petition will automatically terminate 15 days after the date of denial or withdrawal if USCIS denies the petition, or if the petition is withdrawn.

To provide greater certainty to the market for the duration of the remainder of the summer and fall agricultural seasons, the changes made by this final rule will automatically terminate on December 17, 2020. DHS will continue to monitor the rapidly evolving situation surrounding the COVID-19 pandemic and associated economic consequences and will determine whether continued flexibilities are needed beyond the 120 days. USCIS will continue to

adjudicate H-2A petitions received no later than December 17, 2020 under the provisions of this rule. Any H-2A petition received after the termination of this final rule will be adjudicated in accordance with the existing permanent provisions. *See* 8 CFR 214.2(h)(2)(i)(D) and 274a.12(b)(21).

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 sections 553(b) and (d) of the Administrative Procedure Act (APA). 5 U.S.C. 551 *et seq.*

1. Good Cause to Forgo Notice and Comment Rulemaking

The APA, 5 U.S.C. 553(b)(B), 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.” 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, dating back to January 27, 2020, under section 319 of the Public Health Service Act in response to COVID-19.²⁰ On March 13, 2020,

²⁰ *Determination of Public Health Emergency.*

President Trump declared a National Emergency concerning the COVID-19 outbreak, dated back to March 1, 2020, to control the spread of the virus in the United States.²¹ 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, 2020.²² DOS expanded the temporary suspension of routine immigrant and nonimmigrant visa services at all U.S. Embassies and Consulates on March 20, 2020.²³ On July 23, 2020, the U.S. Department of Health and Human Services (HHS) Secretary Alex Azar signed a renewal of determination, effective July 25, that extends the current COVID-19 public health emergency by up to 90 days.²⁴ This determination that a public health emergency exists and has existed since January 27, 2020, nationwide, was previously renewed on April 21, 2020.

DOS designated H-2A 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.²⁵ In addition, DHS identified occupations in food and agriculture as critical to the U.S. public health and safety and economy.²⁶ Due to extended travel restrictions, the limited resumption of routine visa services, as well as the possibility that some U.S. and H-2A workers may become unavailable due to illness related to the spread of COVID-19, U.S. employers who have approved temporary agricultural labor certifications

²¹ Proclamation 9994.

²² *Status of U.S. Consular Operations in Mexico in Light of COVID-19.*

²³ *Suspension of Routine Visa Services.*

²⁴ See HHS Renewal of Determination That A Public Health Emergency Exists, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-23June2020.aspx> (Jul. 23, 2020).

²⁵ *Important Announcement on H2 Visas.*

²⁶ *DHS Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response.* *DHS Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID_10 Response.*

and/or who will be filing H-2A petitions might not receive, or be able to continuously employ, all of the workers requested to fill all of their DHS-approved temporary or seasonal agricultural positions. Due to these anticipated labor shortages, these employers may continue to experience adverse economic impacts to their agricultural operations. Finally, COVID-19 continues to cause disruptions in domestic food supply chains which has led to food insecurity on a global level.²⁷ To partially address these concerns, DHS is acting expeditiously to put in place rules that will facilitate the continued employment of H-2A workers already present in the United States. This action will reduce labor disruptions that could affect business operations of U.S. employers for the upcoming labor-intensive fall harvest, and continue to support the critical U.S. food supply network.

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 would likely 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 has bypassed notice and comment to facilitate the employment of H-2A workers already in the United States, and prevent potential economic harms to H-2A agricultural employers and

²⁷ See, e.g. *Food Security and COVID-19*, <https://www.worldbank.org/en/topic/agriculture/brief/food-security-and-covid-19> (last visited Aug. 15, 2020). See also, “Farms and Farm Households During the COVID-19 Pandemic” <https://www.ers.usda.gov/covid-19/farms-and-farm-households/> (last visited Aug. 15, 2020) indicating that “Farm businesses have experienced disruptions to production due to lowered availability of labor and other inputs . . . [r]eductions in available labor affect crop and livestock production, as well as processing capacity for crop and animal products that leave the farm. Reduced processing capacity results in lower consumption of certain agricultural commodities.”

downstream employers engaged in the processing of agricultural products, as well as potential harms to the American economy and people that could result from ongoing uncertainty over the availability of H-2A agricultural workers, and potential associated negative impacts on food security in the United States. *See Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1285 & n.12 (N.D. Fla. 2016). This action is temporary in nature, and includes appropriate conditions to ensure that it is narrowly tailored to the National Emergency caused by COVID-19.

2. Good Cause to Proceed with an Immediate Effective Date

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 in the agricultural industry caused by unavailability of workers due to COVID-19, and to ensure food stability for the American people.

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 labor for our food supply.

This rule will help U.S. employers fill critically necessary agricultural job openings, protect their economic investments in their agricultural operations, and contribute to U.S. food security. In addition, it will benefit H-2A workers already in the United States by making it easier for employers to hire them. As this rule helps fill critical labor needs for agricultural employers, DHS believes this rule will help ensure a continual food supply chain in the United States.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (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 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, Pub. L. 104-4, 2 U.S.C. 1501, et seq. (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 final rule is not a “major rule” as defined by 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 et seq.

H. National Environmental Policy Act

DHS analyzes actions to determine whether the National Environmental Policy Act, Pub. L. 91–190, 42 U.S.C. 4231, et seq. (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-2A nonimmigrant visa program to facilitate the

continued employment of H-2A nonimmigrants in the United States by allowing them to change employers in the United States and begin working in the same visa classification for a period not to exceed 45 days before the nonimmigrant visa petition is approved, due to the National Emergency caused by the COVID-19 global pandemic. This rule does not change the number of H-2A workers that may be employed by U.S. employers as there is not an established statutory limit. It also does not change rules for where H-2A nonimmigrants may be employed; only employers with approved temporary labor certifications for workers to perform temporary or seasonal agricultural work may be allowed to employ H-2A workers under these temporary provisions. Generally, DHS believes NEPA does not apply to a rule intended to make it easier for H-2A employers to hire workers who are already in the United States in addition to, or instead of, also hiring H-2A 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-2A workers already in the United States will be employed by different employers, as opposed to how many petitions would have been filed for H-2A workers employed under normal circumstances. DHS has no reason to believe that the temporary amendments to H-2A 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 food supply chain. 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. 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 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Pub. L. 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115-218.

2. Amend § 214.2 by adding paragraph (h)(21) to read as follows:

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

* * * * *

(h) * * *

(21) Change of employers during COVID-19 National Emergency. (i) If an H-2A nonimmigrant who is physically present in the United States seeks to change employers during the COVID-19 National Emergency, the prospective new H-2A employer may file an H-2A petition on Form I-129 or Form I-129H2A, accompanied by a valid temporary agricultural labor certification, requesting an extension of the alien's stay in the United States. To be approved under this paragraph (h)(21), an H-2A petition must be received on or after August 19, 2020 but no later than December 17, 2020. 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 agricultural labor certification. Notwithstanding paragraph (h)(2)(i)(D) of this section and 8 CFR 274a.12(b)(21), an alien in valid H-2A nonimmigrant status on August 19, 2020, or lawfully obtaining such status thereafter pursuant to this paragraph (h)(21), is authorized to begin employment with the new petitioner after the petition described in this paragraph (h)(21) is received by USCIS, but no earlier than the start date of employment,

indicated in the H-2A petition. The H-2A worker is authorized to commence employment with the petitioner before the petition is approved and subject to the requirements of 8 CFR 274a.12(b)(26) for a period of up to 45 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, 45 days beginning on the start date of employment indicated in the H-2A petition. If USCIS adjudicates the petition prior to the expiration of this 45-day period and denies the petition for extension of stay, or if the petition is withdrawn by the petitioner before the expiration of the 45-day period, the employment authorization associated with the filing of that petition under 8 CFR 274a.12(b)(26) will automatically terminate 15 days after the date of the denial decision or the date on which the petition is withdrawn.

(ii) Authorization to initiate employment changes pursuant to this paragraph (h)(21) begins at 12 a.m. on August 19, 2020, and ends at the end of December 17, 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)(26) to read as follows:

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

* * * * *

(b) * * *

(26)(i) Pursuant to 8 CFR 214.2(h)(21) and notwithstanding 8 CFR 214.2(h)(2)(i)(D) and paragraph (b)(21) of this section, an alien is authorized to be employed, but no earlier than the start date of employment indicated in the H-2A petition, by a new employer that has filed an H-2A petition naming the alien as a beneficiary and requesting an extension of stay for the alien, for a period not to exceed 45 days beginning from the “Received Date” on Form I-797 (Notice of Action) acknowledging receipt of the petition requesting an extension of stay, or 45 days beginning on the start date of employment if the start date of employment indicated in the H-2A petition occurs after the filing. The length of the period (up to 45 days) is to be determined by USCIS in its discretion. However, if USCIS adjudicates the petition prior to the expiration of this 45-day period and denies the petition for extension of stay, or if the petitioner withdraws the petition before the expiration of the 45-day period, the employment authorization under this paragraph (b)(26) will automatically terminate upon 15 days after the date of the denial decision or the date on which the petition is withdrawn.

(ii) Authorization to initiate employment changes pursuant to 8 CFR 214.2(h)(21) and paragraph (b)(26)(i) of this section begins at 12 a.m. on August 19, 2020, and ends at the end of December 17, 2020.

* * * * *

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