

American Immigration Lawyers Association

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Via email: rfs.regs@dhs.gov; H2b.comments@dol.gov

Director, Regulatory Management Division
Department of Homeland Security
U.S. Citizenship & Immigration Services
Attn: Richard Sloan, Director
111 Massachusetts Ave., N.W., 3rd floor
Washington, D.C. 20529

Assistant Secretary, Employment and Training Administration
U.S. Department of Labor
Attn: William Carlson, Chief, Division of Foreign Labor Certification
200 Constitution Ave., NW, Room C-4312
Washington DC 20210

Re: RIN 1615-AA82 or DHS 2004-0033; Comments to Proposed Rule “Petitions for Aliens To Perform Temporary Nonagricultural Services or Labor (H-2B)” (70 Fed. Reg. 3984 (January 27, 2005))
&
RIN 1205-AB36; Comments to Proposed Rule, “Post-Adjudication Audits of H-2B petitions in All Occupations Other than Excepted Occupations in the United States” (70 Fed. Reg. 3993 (January 27, 2005))

Dear Sir/Madam:

The American Immigration Lawyers Association (AILA) submits the following comments on proposed regulations published in the Federal Register on January 27, 2005, that would modify the H-2B temporary nonagricultural worker program.

AILA is a voluntary bar association of approximately 9,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA takes a very broad view on immigration matters because our member attorneys represent thousands of U.S. businesses and industries that sponsor highly skilled foreign professionals as well as essential workers seeking to enter the United States on a temporary or permanent basis. AILA members also represent tens of thousands of U.S. families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States. Our members also represent asylum seekers, often on a pro bono basis, as well as athletes, entertainers, and foreign students.

AILA strongly supports revision of the current H-2B program to make it more efficient and accessible to U.S. employers. This program is the only available legal channel by which U.S. employers may hire foreign nationals for short-term and seasonal work. Employers across the U.S. depend on this visa category to augment their domestic workforce when no U.S. workers are available. Yet, a restrictive numerical cap, unfair bureaucratic restrictions limiting when employers may file petitions, and a cumbersome and archaic application process make this program inefficient and difficult for employers to use. While we have several concerns with the proposed regulations, AILA applauds the positive steps that would ameliorate some of the H-2B program's current inefficiencies. Unfortunately, we are equally disturbed that the proposed regulations not only fail to remedy but actually would exacerbate the current unfair timing restrictions that prohibit spring and summer employers from having an opportunity to obtain needed workers.

Elimination of Labor Certification; Revision to Form I-129H Supplement

AILA commends the proposals by the Department of Homeland Security and the Department of Labor to replace the current labor certification requirement for most H-2B filings with a streamlined labor attestation requirement, and to eliminate in many instances the need to apply through two different agencies. Such modification to the H-2B program recognizes the need to replace outdated, inefficient procedures with new procedures that take into account real-world business practices. AILA applauds the use of an attestation format, which the DHS has indicated is similar in format to the Labor Condition application currently used by the H-1B program, to accomplish this goal.

The proposed DOL regulation discusses the six attestations that will be included in the proposed Form I-129 H Supplement. However, neither set of proposed regulations included a copy of the proposed revised Form I-129 H Supplement, nor was the proposed attestation language included in the proposed regulations. AILA requests that the proposed revised I-129 H Supplement, or at least the proposed attestation language, be published with an opportunity for comment prior to the effectiveness of any regulation on this matter. Without an opportunity to review the proposed form, or at least the specific attestation language, it is not possible to provide fully informed comments.

Even without the specific language of the attestations, AILA does have concerns with the how the general information provided on the six attestation requirements describes the determination of the prevailing wage and the requirement that employers notify the DHS upon termination of H-2B workers. AILA also is particularly concerned about the proposal to introduce debarment as an enforcement mechanism in this context.

Debarment Based on DOL Finding

The Department of Labor proposes to debar employers for up to three years for misrepresentation of a material fact or fraudulent statement in the attestations, for failure to comply with the attestations, or for failure to cooperate in the audit process. (See proposed regulation 20 C.F.R. 655.13) Once the DOL has issued a final debarment order, it would notify the Department of Homeland Security. The Department of Homeland Security then would not approve the employer for the time period recommended by DOL or for a longer period for immigrant

petitions under Section 204 of the Act or for nonimmigrant petitions under Section 214(c) of the Act. (See proposed regulation 8 C.F.R. 214.2(h)(20)).

Neither the DOL nor the DHS has the statutory authority to impose this penalty. Congress legislated debarment in the H-1B program. 8 U.S.C. 1182 (n)(2)(C). It created a form of debarment in the H-2A program. 8 U.S.C. 1188(b)(2)(A). No similar authority exists for debarment in the H-2B program.

Because the DOL lacks Congressional authorization for imposing the debarment penalty, the proposed debarment system is unlawful. But, even if the DOL did have the authority, its approach here is misguided. Congress, in establishing the debarment penalty in other H programs, carefully delineated when the penalty could or could not be imposed, and was careful to ensure that a minimum set of standards were initiated that made the penalty commensurate with the violation. Neither the DOL nor the DHS propose any form of standards for imposing the severe sanction of debarment. The absence of such standards will result in an arbitrary and capricious application of the law. Thus, an erroneous statement on an I-129 or H supplement could result in debarment of all certifications for one employer for three years while a similar error by another employer could result in no debarment or else debarment for a much shorter period. In the H-1B program, Congress thoughtfully distinguished types of misrepresentation or harm as determinants of debarment sanctions. 8 U.S.C. 1182(n)(2)(C). None of this exists in the proposed debarment regulation.

Surely, before debarment would arise, the misrepresentation not only must be material but it also should be knowingly and willfully effected. Otherwise, it lacks equivalency to a “fraudulent statement” and essentially punishes innocent mistakes of material fact. Also, the failure to comply with the attestations ought to require, at a minimum, a substantial failure to comply. For instance, if the employer placed a recruitment ad in a trade journal that the DOL deemed inappropriate for the position, the DOL could find that the employer did not comply with its recruitment attestation even though the employer listed the position with America’s Job Bank and advertised in a trade journal it believe appropriate. In the absence of any requirement that non-compliance with the attestation be substantial, the DOL could recommend debarment of this employer for up to three years and the DHS could extend the debarment period even further.

AILA understands the need for an enforcement mechanism if the government is to move to an attestation-based system, but imposition of an unauthorized and unbalanced debarment penalty is not the right mechanism. Rather than trying, without lawful authority, to borrow from the H-1B process (particularly when not borrowing the checks and balances of that process), AILA urges that the Departments instead borrow from the new PERM process for permanent labor certification, and use a system of audits, revocation, and selected directed recruitment to guard against abuse in the program.

USCIS “Self-Initiated” Debarment

The DHS seeks comments on its proposal to develop a self-initiated debarment process. In particular, it asks for suggestions on the type of administrative process and procedures that should be adopted for determining whether a petitioner should be debarred, the appellate process, and whether all immigrant and nonimmigrant petitions should be subject to debarment. It also solicits comments as to whether debarment should extend to an entity related to the U.S. employer (e.g. an affiliate or successor entity).

Inasmuch as the agency does not have the authority to impose a debarment penalty in the H-2B process, this request for comment is inappropriate. As discussed above, Congress has already designated those programs and violations for which it deems debarment an appropriate penalty. To reach into other programs and other process errors with this severe penalty is beyond the agency's authority.

Prevailing Wage

The DOL's proposed rule provides that an employer must attest it is offering to pay H-2B workers no less than the prevailing wage as determined by the OES survey. However, OES frequently states that "no wage is available" for an occupation in a given location. DOL states that it has been its practice "to treat prevailing wage determinations the same under the H-2B program as under the permanent labor certification program." (p. 3994) and specifically asks for comments on this issue. Given the existing practice, and the lack of OES data for certain occupations, AILA suggests that the DOL include in its final regulation a provision allowing the prevailing wage to be determined by the OES survey or the appropriate State Workforce Agency.

Further, in step with the efforts made to streamline and modernize the H-2B process, alternative authoritative wage sources, such as those allowed in the H-1B context, should be permitted to determine prevailing wage.

The DOL's proposed regulations also state that the employer is required to pay the prevailing wage "for the entire period of authorized employment." This requirement is ambiguous. If the OES survey shows a change to the prevailing wage during the period of authorized employment, must the employer change its wages to reflect the new OES prevailing wage? Or, is the attestation satisfied if the employer pays the prevailing wage, as determined at the outset of employment, throughout the period of employment? AILA would object to the former interpretation. First, the law precludes such an interpretation. The INA does not require H-2B employers to modify the wage paid to match prevailing wage changes during the period of employment. If this were the interpretation, the DOL would exceed its implementing authority by imposing burdens not contemplated by the statute. "[S]tatutes granting power to administrative agencies should be strictly construed as conferring only those powers granted expressly or by necessary implication." *Walker v. Luther*, 830 F.2d 1208, 1211 (2d. Cir. 1987). An agency cannot add to the statute "something which is not there" through regulation. *United States v. Calamaro*, 354 U.S. 351, 359 (1957). In other words, a regulation cannot amend or add to a statute. See *California Cosmetology Commission v. Riley*, 871 F. Supp. 1263, 1270 (C.D. Cal 1994).

Secondly, requiring the employer to modify the H-2B worker's wages to reflect changes in the OES prevailing wage would certainly result in constant analysis of OES wage data as well as an H-2B worker's abilities and performance that would be out of step with other employees' compensation and performance review. Also, if this were the interpretation, the DOL would need to address the economic and paperwork impact of this significant change. A similar proposed provision with respect to H-1Bs was included in the proposed PERM regulations and, with good reason, retracted in the final regulations.

Notification of DHS Upon Termination of Employment

AILA opposes the proposed attestation requirement that employers notify the US Citizenship and Immigration Services within 30 days of the date that employment terminates (other than in cases of expiration of authorized admission as an H nonimmigrant).

Notably, the regulations requiring that an employer notify the USCIS of termination of employment of other categories of H nonimmigrants under 8 C.F.R. Sec. 214.2(h)(11)(i)(A) have no analogous provision that the employer would violate a required attestation if it does not provide notice within 30 days.

The DHS states that the purpose of the proposed notification requirement is to ensure that an approved H-2B petition is “closed out” and that the USCIS is made aware of a change in employment status. (p. 3985). However, the proposed rule specifies that such “notification shall include the name of the petitioner and beneficiary, the receipt number for the approved petition, whether the beneficiary began employment with the petitioner, the dates the beneficiary was employed by the petitioner, if applicable, and a statement of the reason the beneficiary is no longer employed by the petitioner.” (p. 3992) This information is not only unnecessary for DHS’s stated objective of “closing out” an approval and being advised of a change in employment status, but is also unduly burdensome to the employer and prejudicial to the alien.

In some situations of termination of employment, the separation may not be amicable and the employer may have motivation to provide false information. Or, the employer may provide no advance notice of termination to the alien, and effectively simultaneously notify the alien that he or she is out of status. The only protection an alien would have from such potential abuse would be for the DHS to provide for a grace period subsequent to such notification to maintain lawful status while departing the United States.

The DHS and DOL do not define termination of employment with sufficient clarity. Must an employer notify CIS of termination of employment if an alien participates in a labor dispute involving work stoppage? What if an alien goes on a leave of absence? What if the alien becomes seriously ill or suffers an accident, and does not notify the employer within 30 days? Similarly, the DHS and DOL do not provide for a mechanism to undo an erroneous notification. What if there are two beneficiaries with the same name working for the same employer and listed on the same petition number, and the USCIS “closes out” the record for the wrong individual? What if the alien who became seriously ill or suffered an accident appears for work on the 31st day, after the employer has notified the USCIS of termination of employment?

Requiring such notification as a condition to participation in the H-2B program is unduly burdensome to employers. As this requirement is incorporated as a DOL attestation, an employer’s failure to comply with the notification requirement could involve serious penalties including debarment. The fact is, the immigration process is not a central procedure for the business operations of most employers. Businesses use nonimmigrant visas on a “fill-in” basis when they cannot obtain sufficient qualified workers among the U.S. workforce. Inadvertent paperwork errors are common when it comes to government compliance, and failing to submit the paperwork for an employee who is no longer employed is the easiest to overlook. Such accidental errors should not be met with the severe penalty of debarment, as discussed further above.

Indeed, the current system for notification of departure of H-1B employees highlights how easy it is for such requirements to be overlooked, even by the enforcing agency. The USCIS currently has no system, other than “general correspondence” for receiving the notification that its regulations require. It can take months or years for the notification to reach the relevant file, and it is not unusual for the notification to never be matched with the file. Surely if an agency like the USCIS, whose only business is immigration compliance, cannot find a system for processing these notifications, employers whose core business is anything but immigration should not be severely punished for overlooking such a requirement.

Finally, the detailed notification requirement is an “information collection requirement” that is subject to OMB review under the Paperwork Reduction Act. No such review has been undertaken.

AILA urges that the DHS and DOL delete notification of termination of employment as an attestation necessary for filing an H-2B petition. Alternatively, AILA suggests that if DHS and DOL include this attestation requirement, they must develop an employment termination notification system that clearly defines the situations where notification is required, allows for both paper and e-filed notification, requires only the basic statement that an alien’s employment has terminated, provides the alien with a grace period subsequent to notification, and provides for an opportunity to correct an erroneous notification.

DOL Audit

The Department of Labor would require employers to retain all documents supporting their attestations for three years from the dates of filing. While it is implicit in that requirement that an audit would not be conducted beyond that time, AILA believes that the DOL should explicitly provide by regulation that it will not initiate an audit of attestations more than three years subsequent to the filing. Otherwise, it would appear that an employer may have purged its file of the supporting documents more than three years after it has filed its H-2B petition and yet be subject to an audit wherein production of the documents becomes critical.

Petitioning for Unnamed Beneficiaries

AILA supports the USCIS’ proposed amendment to 8 CFR 214.2(h)(2)(iii), which would allow an employer to file a petition for unnamed beneficiaries. Currently, an employer is required to name all the beneficiaries in the petition at the time of filing, unless the employer can demonstrate the existence of emergent circumstances “due to circumstances which the petitioner could not anticipate or could not control.” The elimination of this limitation will facilitate an employer’s ability to timely file the petition even though all the foreign nationals have not been identified at that time. Furthermore, this process should facilitate the adjudication of the I-129 by streamlining the number of security checks that the agency must process. Once the beneficiaries are identified, the Department of State will run the necessary security checks pursuant to visa issuance. AILA applauds the agency’s efforts to unite efficient petition processing with effective security.

Partial Approval of Petitions

AILA commends the DHS and agrees with its proposed amendment to 214.2(h)(9)(i)(A) to create a process to allow for issuance of a partial approval notice to allow an employer to receive authorization to employ the remainder of H-2B workers when a security check generates adverse information regarding a beneficiary. This situation applies to employers who submit applications for change of status, or extension of status or a petition that requests named workers. This amendment would codify the Operating Instructions at 214.2(h)(8)(i), which state:

(i) Partially approved.

The regulations provide that an H petition for more than one beneficiary may be approved in whole or in part. Whenever part of the petition is approved, the action on the entire petitions shall be counted as an approval for reporting purposes. This avoids counting two actions for one receipt. The petitioner may appeal the decision to deny classification to one or more of the beneficiaries or file a new petition in their behalf.

Mandatory E-Filing

AILA welcomes the expansion of filing method options to including e-filing. However, AILA *strongly* opposes making e-filing mandatory for most H-2B petitions and supports instead making e-filing optional for employers. Optional e-filing is in keeping with DHS current practice with respect to all other forms that may be e-filed.

Requiring internet access should not be a de facto precondition of use of the H-2B program. Many H-2B users are small businesses—restaurateurs, landscapers, timber and seafood processors to name a few—that may lack internet capabilities. Other enterprises are not adept at internet form filing and payment and have little confidence in their ability to e-file.

In addition to the barrier to access faced by small businesses and some industry sectors, there are other instances in which traditional filing may be preferable to e-filing. For example, 8 CFR Sec. 214.2(h)(6)(vi)(C) requires supporting documents in H-2B cases where the education, training, skill or experience of the worker is at issue. Since the current e-filing practice of the USCIS calls for the filing of supporting documents by mail, the mandated H-2B e-filer would have to effect a mailing as well as an e-filing if the filer had supporting documents. It is more efficient and less cumbersome to effect a mailed filing if documents are required, and filers would have more confidence in the process. Based on experience, there is considerable wariness of the ability of USCIS offices to match items submitted separately to existing files.

The DHS suggests that e-filing will “ensure expeditious processing.” (p. 3985) However, this assurance appears unwarranted, given actual USCIS processing times for e-filed applications. Available statistics indicate that e-filed applications are not processed more expeditiously by the USCIS and reports from AILA members indicate no noticeable difference in processing. Indeed, it is our understanding that, while filing is electronic, processing is not. Thus, there would be no appreciable efficiency gains in imposing this requirement on employers.

The DHS also states that it is mandating e-filing of the Form I-129 and I-129 H Supplement to “ensure that all required elements of the attestation are completed before USCIS adjudicates the petition.” (p. 3987) Whether an application is filed on paper or electronically, the USCIS has the

options of rejecting the application as incomplete, or issuing a Request for Evidence or Notice of Intent to Deny, if the required initial information is not provided.

The DHS states that its motivation in requiring e-filing partially stems from its desire to capture statistics more effectively and analyze data to identify areas that need improvement as well as fraud or abuse. While such increased efficiency is laudable, it should not come at the expense of employers desiring to petition for H-2B nonimmigrants.

Furthermore, the spirit of the Government Paperwork Elimination Act (“GPEA”) seeks not to restrict access to government programs but to enhance access. The Act requires federal agencies to allow entities that deal with an agency the “option” (GPEA section 1704) to submit information or perform transactions with an agency electronically, “when practicable,” and encourages use of a range of electronic signature alternatives. Notably, this legislation directs agencies to provide additional submission or transaction options, and not to restrict its acceptance to only electronic submissions or transactions.

The DHS also proposes the use of Public Key Infrastructure (PKI) to enhance safeguards of the e-filing process. A PKI may be premature until the agency has resolved critical issues such as whether to outsource or establish its own “Certification Authority”, maintenance of the new databases of information which may be protected under the Privacy Act, and interoperability issues of different PKI systems. In the event that DHS proposes to introduce a PKI for e-filing, it should publish a separate proposed rule.

Unsuccessful Recruitment of U.S. Workers; USCIS Limitation to 60 Day Pre-Filing Period, DOL Limitation to 60 Day Pre-Recruitment Period

Despite the positive steps in the proposed regulations toward streamlining the H-2B program, AILA is very disappointed that the proposed regulations would not eliminate the restrictive rule that limits when an employer may file an H-2B petition.

The DOL requires that the employer conduct recruitment within 60 days but no less than 20 days prior to filing, in effect providing a 40 day window to complete all recruitment. The DHS requires that an H-2B petition may not be filed more than 60 days prior to the date of actual need. In fiscal year 2004, the cap of 66,000 H-2B visas was reached in March, halfway through the year. In the current fiscal year, the cap was reached in January, one third of the way through the year. Thus, those employers with seasonal needs beginning April 1 and ending September 30 could not start recruitment and filing earlier than February 1 of the year. Given the current use of the H-2B visa which now reaches the cap of 66,000 before February 1, those employers needing seasonal spring, summer and early fall workers have no opportunity for H-2B employees. This seriously impacts firefighters, resort owners, landscapers, tree planters, crabmeat processors, summertime hospitality enterprises, and non-winter construction trades. In light of the cap, it is arbitrary for the Department of Labor and the Department of Homeland Security to develop time limitations that it knows from practice will freeze out large sectors of seasonal employers.

Until Congress speaks to the issue of the impact of the H-2B cap on its seasonal non-agricultural worker program, AILA recommends that the DOL and DHS adopt no time limitation period for recruitment of temporary workers and filing of the H-2B petition. Should Congress adopt the

equivalent of Section 5 of the currently pending "Save Our Small and Seasonal Businesses Act of 2005" which allocates 33,000 of the 66,000 H-2B visas annually to the first half of the fiscal year and the balance to the last half, then a reasonable time limitation on recruitment and filing would not be so objectionable.

The proposed maximum period of sixty days for recruitment and filing prior to the date of need is not reasonable. The current processing times for H-2Bs at the four Service Centers ranges from 50 to 90 days. We have seen even greater delays in the past. While we have heard promises of faster processing times, we've heard such promises in the past. When those promises have been met, they have not lasted for long. Based on experience, we are not optimistic about the USCIS' ability to maintain a fast processing time. Certainly something as critical as H-2B timing should not be built around a promise that is not yet consistently realized.

Nothing in the proposed regulations indicate how the Service Centers will be able to reduce their current processing times. We realize that an employer could use premium processing to assure itself of faster service. However, it is highly inappropriate for the government to establish a time limitation that is so short as to compel virtually all employers to spend an additional \$1,000.00 in filing fees for some assurance that they would have H-2B workers on their payrolls by their dates of need.

Moreover, the proposed 60 day recruiting and filing limitation is not realistic when it comes to recruiting and consular processing. Recruiting at a minimum will take 15 days to test the labor market. Most newspapers require 5 days lead time in the placement of an ad for Sunday, and the employer needs to allow a minimum of 10 days following the ad for responses.

Consular processing takes even more time. Once the employer receives the H-2B approval notice from the Service Center, it then notifies the foreign worker to arrange his or her appointment at the appropriate United States Consulate for the visa. Depending on the post and the number of beneficiaries, an interview will be scheduled according to the Post's scheduling guidelines. In some countries, H-2B interviews are not scheduled for 4 – 6 weeks. Prior to the appointment, the worker has to prepare the DS156 and 157 forms, pay the consulate fee, obtain photos, and have all required supporting documents. In addition, it frequently takes most beneficiaries a minimum of two days to get to the Post. After the appointment and receipt of the visa, the worker then has to arrange for his or her travel to the United States and to enter. Frequently, 30 days or more elapse from the time of H-2B approval until the worker is in the United States ready to commence employment.

8 C.F.R. 214.2(h)(9)(i)(B) allows all H petitions, including those for seasonal or temporary agricultural workers, to be filed six months in advance of the date of need. We see no reason to distinguish the temporary agricultural worker from the temporary non-agricultural worker in terms of the filing limitation. If the agricultural employer can seek a seasonal or temporary agricultural worker six months in advance of need, then the non-agricultural employer should be able to seek a seasonal or temporary worker six months in advance of need. Of course, as discussed above, until Congress addresses the cap issue in the H-2B program, we believe there should be no filing limitation on the H-2B worker as all limitations short of one year discriminate against the employers with temporary or seasonal needs late in the fiscal year.

AILA opposes the requirement that recruitment must state the rate of pay, especially given the narrow window of time provided to conduct recruitment, and the possibility that OES will not

provide wage information. As we are currently seeing in the PERM context, the states have become quite slow in producing prevailing wage determinations.

Location of Employment

The DHS states that a separate H Supplement must be submitted for each metropolitan statistical area in which a beneficiary will be employed. (p. 3991) AILA seeks clarification that employment involving multiple locations does not require separate recruitment for each area (e.g., one Sunday advertisement in a newspaper of general circulation specifying the multiple geographic areas will be sufficient).

Prohibition on Filings by Agents

AILA opposes the DHS' proposal to eliminate the filing of H-2B petitions by agents. DHS states that the change is necessary "in light of the transition from a labor-certification process to an attestation-based petition process In order to ensure the integrity of the H-2B attestation process, attestations must be made by an employer not a by a recruiting agent."

First of all, it is impossible to know whether the integrity of the attestation process is in jeopardy without knowing what that attestation looks like, what its requirements are; and to what the employer will be required to attest. Therefore, it is impossible to comment on an attestation that does not yet exist.

Second, the existing regulations do not define an agent as a "recruiting agent". Recruiting agents are generally those that recruit and find workers in the foreign country on behalf of an employer. This is not the definition under existing regulations. AILA agrees that a recruiting agent does not stand in the shoes of the employer. However, that is not what is contemplated in the regulations. See below.

Third, under agency principles, an agent stands in the shoes of the employer and any actions by an agent are attributable to the employer. DHS states that "it will be easier for USCIS to take action against an employing petitioner, who is making the attestations required under the DOL regulations at 20 CFR 655, Part A, than against an agent". The employer is required to make a series of declarations regarding conditions of employment. Following those declarations, the form states: "By virtue of my signature below, I HEREBY CERTIFY the following conditions of employment." At the bottom, the employer signs the declaration.

The ETA 750 creates the agent/employer relationship a binding commitment by the employer to the actions of the agent. There is a box that states: "AUTHORIZATION OF AGENT OF EMPLOYER: I HEREBY DESIGNATE the agent below to represent me for the purposes of labor certification and I TAKE FULL RESPONSIBILITY for accuracy of any representations made by my agent."

Under the DOL process, an agent is held accountable for all the information on the Application. The Application contains the declarations of the employer. The employer takes "full responsibility" for any representations made by agent. The agent is never referred to as a recruiting agent. Furthermore, the regulations go into some length regarding the circumstances

under which an agent can sign on behalf of the petitioner. The fact that it may be easier to for USCIS to take action against an employing petitioner than an agent is irrelevant and is outweighed by the interests of employers, foreign employers, US companies, and individuals to have the ability to compete in their respective industries through the use of agents, as long as the employer takes full responsibility for their actions.

Again, it is difficult to see why it would be any more difficult to ensure the integrity of the attestation process, when it is based on the DOL regulations which already permit an employer to designate an agent.

Definition of Agent

Agents have long been recognized under both the H-2A and H-2B nonimmigrant visa categories. They are not defined as recruiting agents. Current regulations state at 8 CFR section 214.2(h)(6)(ii)(B):

(B) An H-2B petitioner shall be a United States employer, a United States agent, or a foreign employer filing through a United States agent. For purposes of paragraph (h) of this section, a foreign employer is any employer who is not amendable to service of process in the United States. A foreign employer may not directly petition for an H-2B nonimmigrant but must use the services of a United States agent to file a petition for an H-2B nonimmigrant. A United States agent petitioning on behalf of a foreign employer *must be authorized to file the petition, and to accept service of process in the United States in proceedings under section 274A of the Act, on behalf of the employer. The petitioning employer shall consider available United States workers for the temporary services or labor, and shall offer terms and conditions of employment which are consistent with the nature of the occupation, activity, and industry in the United States.*

The responsibilities of agents does not stop with this definition. Additional requirements are attached to 8 CFR 214.2(h)(2)(i)(F), which state:

(1) An agent performing the function of an employer **must guarantee the wages and other terms and conditions of employment** by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

(2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

(3) A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

These regulations make it clear that the agent stands in the shoes of the employer. Current regulations require the employer to have “an established agent” in the US, with a location in the United States, and the agent must have hiring authority” to file the petition.

As established agent, for purposes of filing an H petition, is a person who or an agency which is in business as an agent and regularly acts on behalf of its clients to arrange employment opportunities. Petitions filed by agents will usually be for employers and beneficiaries in the arts, cultural, entertainment, and professional sports fields, and involve short-term employment. As the petitioner, the agent is acting on behalf of multiple employers and the beneficiary(ies).

If agents are not permitted to file petitions, foreign employers will not be allowed to hire foreign workers to complete projects in the United States. Let us take the example of a construction company from Canada that is hired to build a resort in the United States. If the Canadian company can not find enough laborers in the US to work on the project during their peak period, they must be able to find them elsewhere. Their bid for the project is based on the assumption that there will be an adequate work force in the US. If the company is not able to hire foreign nationals to work during the peak load period, then they cannot finish the work on time to the detriment of the resort, the economy and the US workers already employed at the site. The only way they can bring in foreign nationals to help out during their peak load need is through a designated agent. The abolition of agents effectively interferes with an employer’s ability to enter into contracts and will do more to chill a company’s ability to grow and prosper than any other single proposal in these proposed regulations.

Agents also are frequently required when Services are to be provided in more than one location and are of short term duration. If employers are not allowed to continue using agents, employers will have to file separate petitions in order for the temporary workers to work part-time for multiple employers. This would be extremely burdensome for the employer and would increase the work load of the Service. “This arises most frequently where the employment is in the arts, cultural, or entertainment filed, ***but can be in other fields***. Such petitions are usually filed by an agent who is representing numerous employers in various locations, or by one employer which has work to be performed by the beneficiary in more than one location. A detailed itinerary is required to accompany the petition. The procedure where each employer must file a separate petition in order for the alien to work part-time for multiple employers does not apply in petitions filed by agents.” OI 214.2(h)(2)(iii)

The use of H-2A agents in the H-2A context has not been problematic. Under the H-2A regulations, an authorized agent, whether an individual (e.g., an attorney) or an entity (e.g., an association), may file an application on behalf of an employer. Associations may file master applications on behalf of their members.

DHS Must Maintain an Accurate Count of the Number of H-2B Visas Issued

AILA does not agree with the system used by the CIS in counting the number of visas issued in the H-2B category to determine if the cap of 66,000 is reached. There is a 66,000 per year limit on the number of foreign workers who may receive H-2B status during each fiscal year. The fiscal year 1999 Omnibus Consolidated & Emergency Appropriations Act mandated the Attorney General to “to count the number of aliens subject to the numerical limitations of section 214(g)(1) of such Act (8 U.S.C. 1184(g)(1)) *who are issued visas or otherwise provided nonimmigrant status.*”

§416. Improving Count of H-1B and H-2B Nonimmigrants.

(a) Ensuring Accurate Count.--The Attorney General shall take such steps as are necessary to maintain an accurate count of the number of aliens subject to the numerical limitations of section 214(g)(1) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(1)) who are issued visas or otherwise provided nonimmigrant status.

(b) Revision of Petition Forms.--The Attorney General shall take such steps as are necessary to revise the forms used for petitions for visas or nonimmigrant status under clause (i)(b) or (ii)(b) of section 101(a)(15)(H) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)) so as to ensure that the forms provide the Attorney General with sufficient information to permit the Attorney General accurately to count the number of aliens subject to the numerical limitations of section 214(g)(1) of such Act (8 U.S.C. 1184(g)(1)) *who are issued visas or otherwise provided nonimmigrant status.*

The procedures laid out at 8 CFR 214.2(h)(8)(ii)(A) state that “each alien issued a visa or otherwise provided nonimmigrant status shall be counted ...”. However in a notice issued on March 16, 2004, the USCIS stated that the procedure used to determine whether the 66,000 was reached was based on the number of H-2B petitions received.

This notice informs the public that CIS has received a **sufficient number of H-2B petitions to reach the cap of 66,000** for FY 2004.

This standard is clearly erroneous and in contravention of the clear language in the legislation that requires the DHS to only look **at the number of aliens issued a visa or otherwise provided nonimmigrant visa**. The statute states that the number of visas issued “*shall*” be counted. The mere filing of a petition by an employer for a specified number of beneficiaries is no indication of the number of foreign nationals who will actually be issued a visa or otherwise be accorded nonimmigrant status. This requirement is not optional. The number of visas issued must be counted. The procedure implemented by the USCIS to count the number of visas issued is arbitrary and inaccurate.

The USCIS must comply with the clear letter of the law and make an accurate determination on whether the cap is reached by requiring the USCIS to count only those visas that are actually issued. Therefore, to properly determine whether the H-2B cap is reached, the USCIS must work with the DOS to determine how many visas are actually issued to foreign nationals.

Thank you for the opportunity to comment on these important issues. We ask that you carefully consider the above in the process of finalizing this rulemaking.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION