



AILA National Office  
918 F Street, NW  
Washington, DC 20004

Tel: 202.216.2400  
Fax: 202.783.7853

[www.aila.org](http://www.aila.org)

Jeanne A. Butterfield  
*Executive Director*

Susan D. Quarles  
*Deputy Director, Finance & Administration*

Crystal Williams  
*Deputy Director, Programs*

April 14, 2008

Director, Regulatory Management Division  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
111 Massachusetts Ave. NW, Suite 3008  
Washington, DC 20529

Re: DHS Docket No. USCIS— 2007-0055  
Comment to Proposed Rule “Changes to Requirements  
Affecting H-2A Nonimmigrants” 73 Fed. Reg. 8230 (February  
13, 2008))

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) is a voluntary bar association of more than 11,000 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 petition on behalf of workers, as well as foreign-born individuals and their families. Our members also represent asylum seekers, often on a pro bono basis, as well as individuals seeking U.S. citizenship.

AILA appreciates the efforts of the Departments of Homeland Security and Labor to attempt to address agricultural worker policy in the face of the vacuum left by Congress’ failure to act. In the absence of statutory authority, the ability to provide true remedies is limited, but the effort to at least try to improve the process is laudable. We do, however, have some concerns with some of the specifics, as discussed below.

### **Notification and Liquidated Damages**

The rule would require H-2A employers to notify DHS in writing within 48 hours if: an H-2A worker fails to report for work within 5

days after the employment start date, the employment of the H-2A worker terminates more than 5 days before the employment end date; or the H-2A worker absconds from the worksite. For each failure to notify, the employer would pay liquidated damages of \$500.

AILA questions the imposition of liquidated damages on farmers and ranchers. If the motivation for this regulation is to encourage employers to use the H-2A program, such an additional expense in the event of an inadvertent error—particularly one so easy to trip up on—is a potential disincentive to use of the program. Farmers know how to farm, not how to be immigration police. Asking them to police the foreign nationals, at such high cost for error, would result in many farmers concluding that it is less risky to simply use other sources of labor where they are required to ask fewer questions.

If the Department insists upon including this provision, 48 hours simply is too short for a determination that the worker will not show up for work or that the worker has absconded. Large operations have many farm workers. In 2007, USCIS received 6,212 Form I-129 petitions for H-2A employees and approved petitions for 78,089 H-2A workers, an average of 13 H-2A workers per farm. The point of this regulation is to increase those numbers. Keeping on top of the comings and goings of the H-2A workers is no small undertaking. Consequently, expecting an employer to determine within 48 hours whether an employee has absconded is unrealistic.

If the Department imposes a notification requirement, AILA recommends that it extend its notification period from 48 hours to seven days. The proposed AgJobs [Agricultural Job Opportunities, Benefits and Security Act of 2007, H.R. 371, S. 340] legislation, a product of compromise among the different interests, would have set seven days as the requisite notification period. Sec. 218B(e)(2), AgJobs. DHS should borrow from that compromise.

In addition, DHS needs to reduce the “liquidated damage” from \$500 for each instance of non-compliance with the notification requirement to a significantly lesser amount. Under the proposed regime, an agricultural employer who notifies DHS on the eighth day after 15 H-2A employees failed to commence their employment will pay a “liquidated damage” of \$7,500. That is an outrageous amount for a farmer who was one day late with the notification. AILA recommends the “liquidated damage” amount not exceed \$50 for each instance.

Further, the imposition of damages must include provision for due process. The proposed regulation provides only for written notice of a violation and ten days to reply. No mention is made of what would be done with that reply, much less whether an objective party would consider its merits or how an appeal could be taken. With such hefty fines at stake, some process for objective review must be provided.

### **Portability**

DHS would allow the H-2A worker to apply for an extension of stay during his or her

period of admission. The H-2A worker could commence employment with a new employer once the new employer has filed an H-2A petition with USCIS, naming the H-2A worker as a beneficiary. The new employer would need to be enrolled in the E-Verify program. The H-2A worker would be allowed to work with the new employer for 120 days or until the visa petition was denied, whichever first occurred.

AILA is assuming for purposes of this discussion that DHS has the authority to provide for portability without statutory authorization. However, there is no point in examining that question, as the portability system as proposed would remain unused in any event. The conditions placed on participation are so onerous as to render it irrelevant.

The first problem is the time frame. Although 120 days ought to be adequate time for USCIS to adjudicate an H-2A petition, there is always the distinct possibility of delayed adjudication. DHS acknowledges that it is using the H-1B portability provisions as its model. It should fully use that example, and allow portability for the period the petition is pending. If the period is limited, an employer takes the risk that, if USCIS is slow to process the petition, the employer would end up with an employee who is not authorized to work anymore but not required to leave the country. The employee would be in the difficult position of having left his prior employment for a while, but be left stranded without a job while waiting for USCIS to act. This would make portability an untenable situation for both employer and employee.

Because the new employer must have an approved temporary labor certification to effect its filing (see 8 C.F.R. 214.2(h)(5)(i)) and because the Department of Labor's findings regarding the temporary or seasonal nature of the employment are normally followed (see 8 C.F.R. 214.2(h)(v)(iv)), the probability that USCIS will deny the H-2A petition is low. Accordingly allowing employment for the period of the pendency of the visa petition creates very little risk that the additional period of employment will ultimately turn out to be unwarranted.

The second problem is the E-Verify condition. AILA opposes conditioning portability on the new employer's participation in the E-Verify program. The system is not sufficiently accurate at this time to subject U.S. and foreign workers to its regimen.

The September 2007 report of Westat, "Findings of the Web Basic Pilot Evaluation," to the Department of Homeland Security on the precursor to E-Verify—the Web Basic Pilot program--raises too many red flags for the use of E-Verify at this time. The report found the following:

- A. 92% of cases were initially found to be work-authorized and 8% were not. 96% of employees attesting to being U.S. citizens were found to be work-authorized automatically, while, on average, 72% of cases in which the employee attested to being a lawful permanent resident and 83% of cases in which the employee attested to being an alien authorized to work were authorized automatically. pp. xxi and xxviii

- B. Foreign-born work-authorized employees are more likely to receive tentative non-confirmations than are U.S. born employees, thereby subjecting a greater percentage of foreign-born work-authorized employees to potential harm. p. xxv
- C. Foreign-born U.S. citizens are considerably more likely to receive erroneous tentative non-confirmations than are work-authorized foreign-born persons who have not become U.S. citizens. Among foreign-born employees verified by the Web Basic Pilot in October 2006 through March 2007, the percentage of ever-authorized employees found to be work-authorized after a tentative non-confirmation was 1.4 percent for noncitizens compared to 9.8 percent for naturalized citizens. pp. xxv-xxvi
- D. Tentative non-confirmations have negative consequences for work-authorized employees. The employer may discharge or suspend the employee during the tentative non-confirmation period, even though such action is legally prohibited. The employee is put to the time, trouble and expense of visiting a Social Security office or USCIS to get the records straightened out. p. xxvi

Most importantly, the Westat report found that, while the accuracy of the USCIS database has improved substantially since the start of the Basic Pilot program, it still is not sufficiently up to date to meet the IIRAIRA requirement for accurate verification, especially for naturalized citizens. p. 21 Because of this, one State--- Illinois--- prohibits the use of E-Verify by any employer until the Social Security Administration and Department of Homeland Security databases are able to make a determination on 99% of the non-confirmation notices issued to employers within three days. Ill. H.B. 1744 (signed 8/13/2007)

Until the databases are improved, no farm employer should be required to use E-Verify under any guise. Indeed, given the track record of E-Verify thus far, few employers are likely to find sufficient benefit in using the portability provision to expose their entire hiring process to its vagaries.

By making portability so unattractive for the employer, the conditions placed on it in the proposed rule negate the reason to have such a provision in the first place: to enable an employee who is being exploited or otherwise in an unhappy employment situation to “vote with his feet” and move readily to another employer. This provision, as constructed, does nothing to enhance the H-2A program for either employer or employee.

### **Payment of Recruiters and Facilitators**

AILA wholeheartedly agrees with the prohibition on foreign nationals paying fees to recruiters and “facilitators.” Given the extensive potential for abuse, which has unfortunately been the reality in many circumstances, we believe that the regulation does not go far enough to prevent abuses from unscrupulous recruiters and facilitators.

Significant abuse will continue to take place unless there is an effective system of enforcement against unscrupulous recruiters who charge fees, frequently exorbitant, to foreign nationals with the promise of a “visa.” If this area is unregulated, honest employer petitioners also stand to be victimized through liability for situations which they cannot control on their own. Today, visas can be sold on the streets of many cities and towns of feeder countries for H-2A and H-2B visas. We suggest that the best way to stop this practice is to limit the bona fide recruiter population for H-2A visas to those who can be taken to task for violations. The regulatory framework should limit use of recruiters and facilitators for H-2A purposes to those that maintain an office in the U.S. and are duly licensed to do business in the U.S. according to Federal and State laws. This, along with prohibiting employers from knowingly using recruiters who extract payment from foreign nationals, will better curtail abuses.

### **Effect of Violations of H-2A Status**

AILA is concerned that the proposed rule attempts to impose conditions on approval of an H-2A visa petition that are more restrictive than the grounds of inadmissibility found in Section 212 of the Immigration & Nationality Act (INA). AILA questions whether USCIS has authority to impose these additional terms and conditions. Congress has already identified in INA § 212 those grounds that render an applicant for admission inadmissible to the United States. USCIS lacks the authority to impose additional or more restrictive grounds of inadmissibility on the applicant.

### **Consideration of Denied Temporary Agricultural Labor Certifications**

AILA does not oppose USCIS eliminating its authority to approve H-2A petitions that are filed with a temporary agricultural labor certification that has been denied by the DOL. Our lack of opposition to this proposal, however, is based on the fact that there is an expedited process for an employer to appeal the DOL’s denial of a temporary agricultural labor certification to the Board of Alien Labor Certification Appeals (BALCA). If such due process protections for employers and their prospective employees were not available, however, we would oppose USCIS eliminating this authority.

### **Temporary Worker Visa Exit Program**

AILA supports efforts to develop and implement a comprehensive, efficient, and reliable entry-exit system. We do not support, however, efforts, such as the proposed Temporary Worker Visa Exit Program, that single out a particular segment of the foreign national population in the United States and subject them to a system that they are highly likely to violate inadvertently.

Barriers for temporary foreign workers to enter and exit the United States should be minimized to the greatest extent possible without compromising national security. Specifying that a temporary worker must exit at a designated port of entry, and go through a process that others using the same port are not required to use, virtually

guarantees accidental violations in many, if not most, cases. As we have already seen with the US VISIT kiosks and the NSEERS exit requirements, it is extremely difficult to effectively educate system users about the required method for exit if that method is not integral to how a person naturally exits the country. Given that the education level of the average agricultural worker tends to be lower than that of the average nonimmigrant subjected to the US VISIT and NSEERS requirements, the ability to understand and comply with the requirements will be even less among this group than among those for whom such a system already has failed.

This is not the place or the population with which to pilot an exit system.

### **Return Transportation**

The proposed rule would require employers to pay the cost of the employee's return transportation. AILA appreciates the considerations behind this proposal—to avoid stranding low-wage workers in the U.S. with no means to get home—but we have some concerns regarding whether the Department has the authority to impose this condition. In other contexts in which Congress has wanted such a condition, it has imposed it (i.e., the H-1B, where the employer must offer the return fare if the employee is dismissed before the end of the term of admission). While AILA does not oppose this condition for H-2A workers as a matter of policy, we do believe that it IS a question of policy that Congress is best positioned to weigh and decide.

### **Petitions for Nationals of Countries That Refuse Repatriation**

AILA is concerned that the proposal to deny petitions for nationals, residents, etc. of countries that deny or delay repatriation could defeat the very purpose for which it is intended. Under existing law, the State Department can refuse visas to such nationals, with the result that they are not able to lawfully enter the U.S. and thus cannot get into the position where they could be here and deportable under law but not deportable in practice.

USCIS denying petitions for such individuals, however, would add nothing to this process, but instead could create undocumented aliens out of legal ones, and leave the U.S. with no means to remove them. If such an individual already is in the U.S. and applying for a change or extension of status, USCIS denying the petition would not prevent the person from coming here—the person is already here. Instead, it would just be denying that person continued legal status. But, since the person cannot be removed, he would become subjected to the removal system but with no end in sight. It is better to allow someone already here to maintain their legal status than to deny them the ability to do so. The continued denial by DOS of visas would prevent the arrival of new individuals of these nationalities. Denials of petitions would add nothing to that process.

## **Conclusion**

Again, we thank the Department for its efforts in this regard. The proposals with respect to unnamed beneficiaries, multiple beneficiaries, the ability to process at multiple consular posts, shortened periods between admissions, and other streamlining are welcomed. However, the program will not be made workable if the issues discussed above are not effectively addressed.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION