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September 19, 2008

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

Re: Regulatory Information Number (RIN) 1615-AB67; DHS Docket No. 2007-0058; "Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers" 73 Fed.Reg. 49109 (Aug. 20, 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 non-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 important specifics, as discussed below.

## **Unnamed Beneficiaries**

AILA wholeheartedly supports the Department of Homeland Security's recognition of the benefits of allowing unnamed beneficiaries on petitions filed with the Service.

## **Post H-2B Waiting Period**

AILA also supports and applauds the proposed change from six months to three months of the period of time the beneficiary must be outside the United States prior to seeking an extension, change of status or re-admission to the United States under INA § 101(a)(15)(H) and/or (L). This change would support productivity in the United States by permitting an employer to petition for experienced temporary employees under the H-2B visa.

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

AILA remains 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 suggested alternative of restricting participation to the “most cooperative” countries would have exactly the same effect. The continued denial by DOS of visas prevents the arrival of new individuals of these nationalities. Denials of petitions would add nothing to that process. The petitioning process is simply the wrong venue in which to address this issue.

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

AILA has grave concerns about the elimination of the process whereby H-2B petitions may be approved without a valid temporary labor certification. In its comments to the proposed DHS H-2A regulations, AILA did not object to the elimination of the temporary labor certification requirement. However, AILA's acceptance was based on the critical

availability of an expedited review and appeal process by the Department of Labor after a denial of an H-2A application.

Under current Department of Labor H-2B regulations, there is no available appeal or review once a temporary H-2B alien labor certification application is denied. *See* 20 CFR section 655.3; Department of Labor TEGL 21-06, Change 1; DOL H-2B regulations ("An H-2B temporary labor certification is advisory to USCIS and, where the employer is notified by the NPC Certifying Officer that certification is denied or cannot be made, the employer may elect to re-file the application with additional information with the SWA, or may submit countervailing evidence directly to USCIS. *There is no provision for reconsideration or appeal of the determination made by the DOL through the NPC Certifying Officer.*") The only avenue of redress after a denial of a temporary H-2B application is to either re-file the application with the inevitable result in the loss of H-2B cap numbers, or file the petition with the USCIS asking for approval based on countervailing evidence.

While we note that the Department of Labor's proposed regulation includes a review/appeal process, AILA strongly opposed that agency's proposed rule on grounds that the review process failed to create a set time frame within which critical steps of the review process should occur. Without a meaningful expedited review process by the Department of Labor, elimination of the current regulatory scheme for submission of the petition to the USCIS with countervailing evidence of Department of Labor error renders the H-2B application process useless to many employers who would lose their opportunity to obtain H-2B numbers while undergoing a slow and cumbersome review process.

This is because the H-2B numbers are heavily oversubscribed, and thus it is critical for an employer to process the case as quickly as possible through the DOL phase of the case, so that the H-2B petition is filed with USCIS at the earliest possible moment. Once the case is filed, the employer's ability to claim an available H-2B number is secure. Any delay whatsoever at the DOL stage can be fatal to that right. Under the current proposal, an employer who receives a denial is virtually guaranteed that all of the available H-2B numbers would be gone by the time the petition can be filed.

### **Prohibition on Change of Start Date and Amending Dates of Need**

The proposed refusal to adjudicate petitions for which the temporary labor certification has an earlier start date than that requested on the petition is ill-advised and negatively impacts employers who have temporary needs that start during months in which there are no available H-2B numbers because the H-2B cap is generally exhausted during the first month that H-2B numbers become available. Many employers have a genuine start date in months other than April or October. If they ultimately cannot fill any or all of their

needed slots with H-2B workers currently in status working for other employers, then they must wait for H-2B quota numbers to become available to file petitions. These positions are critical for the employer, even if the start date cannot be the optimal date because of the H-2B quota.

The proposed mandate that employers go back to the Department of Labor to amend their petition dates would penalize employers who are unfortunate enough to have a temporary need that does not start in April or October. While we understand the possible concern that employers who ask for an earlier beginning date than April 1 or October 1 on their temporary labor certification may be trying to “game” the system, this problem is best addressed by a Department of Labor determination that the employer has provided them with sufficient evidence that dates of need are bona fide, and this required documentation has been codified and strengthened in the Department of Labor’s recent guidance under TEGL 21-06, Change 1.

Although USCIS in the proposed rule suggests that the current H-2B system “unfairly benefits employers with longer seasonal or temporary employment windows, invalidates the labor market test certified by DOL in the approved application for labor certification, and can be easily exploited by certain employers,” the proposed rule would do nothing to alleviate this situation. Instead, it would unfairly disadvantage those industries whose needs do not happen to coincide with the beginning of the quota period.

Because USCIS will inevitably run out of H-2B numbers within a short period of time after October 1 and April 1 each fiscal year unless the cap is increased, by not allowing a start date on the petition which is different from that on the temporary labor certification, desperate employers could be forced to artificially squeeze their needs into start dates of April 1 or October 1. This result is unacceptable because it actually *increases* the prospect of misstatement of the actual start date, and simply does not reflect real world needs. Although the proposed modification might benefit seasonal businesses whose seasons start around April 1 or October 1, it would make it virtually impossible for anyone else to obtain an H-2B number.

Specifically, under the proposed rule, *all* employers would have to show a need beginning on or around April 1 or October 1 in order to obtain an H-2B number. If the employer’s actual need begins on July 1, for example, the proposed rule would provide great incentive for *those* employers to change their dates of need in order to obtain H-2B numbers. In short, the proposed rule would substitute one bad system for another. It would create an incentive for a different group of employers to misstate their period of need.

The proposed rule says the new system is being created “in order to ensure a fair and equitable distribution of the 33,000 H-2B visa numbers becoming available each half fiscal year.” This is simply incorrect. Unless employers with shorter or earlier periods of temporary need also coincidentally have start dates of April 1 or October 1, they would be prejudiced by the new proposed system as well. Further, the H-2B visa was created 22

years ago to provide for foreign workers for what turned out to be landscaping, construction and resort related employers. A later division of 33,000 per six months was created to spread the visa availability *in conjunction with the exemption of return workers in 2005*. This provision no longer exists and is a singular part of the current scarcity of the visa. The fair and equitable concept can only be reviewed in the context that returning workers were exempted then but are not today.

The proposed rule appears to address only employers with seasonal temporary needs and essentially eliminates the one-time, peakload, and intermittent categories, except for those positions that start on or around April 1 or October 1. Clearly, the USCIS cannot intend this unfair and inequitable outcome.

The proposed rule suggests that the labor market test is invalidated by a change in the start date. However, this is simply untrue; the labor market test covers the entire period of proposed employment and therefore the change in start date does not impact the previous recruitment.

### **Prohibition on Payment of Fees by Beneficiaries**

AILA supports the prohibition on foreign nationals paying recruiters' fees. Given the extensive potential for abuse, which has unfortunately played itself out in reality, we do not believe the regulation goes far enough to prevent abuses. To limit the abuses, AILA urges that the definition of "Agent" expressly exclude attorneys and other representatives as defined in 8 CFR section 292.2. These guidelines limit representation to (1) attorneys duly licensed and in good standing in the U.S., (2) Law students and law graduates not yet licensed to practice law who are participating under the direct supervision of a U.S. licensed attorney or a Board Certified representative, (3) A reputable individual of good moral character who is assisting without direct or indirect remuneration and who has a pre-existing relationship with the person or entity being represented, and (4) Accredited representatives, who are persons representing a non-profit organization who has been accredited by the Board of Immigration Appeals. In adopting this standard, USCIS would more directly target abusive recruiters, facilitators, or similar employment without unintentionally impacting the attorney-client relationship or inhibiting an employer's or H-2B worker's right to seek counsel.

Further, in contrast to recruiters and agents, there is effective recourse with respect to attorneys who engage in abusive practices, through state bar disciplinary programs. At the same time, workers have significant interests that can and should be protected through the retention of counsel. Indeed, the role of counsel can, and frequently does, serve to curtail abuses because the worker is equipped to fully pursue his rights. Every individual, whether foreign-born or a U.S. citizen, has a right to counsel in appearing before the government, and it is not for USCIS or any other agency to attempt to limit that right in any manner. The implication underlying the statement on page 49113 of the preamble of the proposed regulation that "the prospective employer would be responsible...for the payment of...attorneys' fees..." should be modified to make clear that a beneficiary can retain (and thus pay) an attorney to protect his or her rights.

AILA also has concerns about the USCIS's proposal to deny or revoke petitions in cases where petitioner "reasonably should know" that the beneficiary has paid or agreed to pay "any facilitator, recruiter, or similar employment service" a fee to secure H-2B employment. Specifically, this section of the proposed rule lacks any method of appeal or review of the USCIS's decision and in many cases the employer reasonably could not have known about a prohibited payment. This is especially true where the employer petitioner has not directly hired or contracted with a foreign recruiter and the only way it would have knowledge of the payment of prohibited fees would be directly through the H-2B beneficiary.

AILA supports the implementation of a 30-day grace period and non-accrual of unlawful presence after revocation of an H-2B petition under these circumstances. We also recommend that a 30-day grace period apply at the conclusion of any H-2B employment as provided in the proposed USCIS H-2A regulations at proposed section 214.2(h)(5)(viii)(B).

Lastly, there is a typographical error in the text of the proposed regulation at section 214(h)(6)(i)(B) (ii). The word "transportation" is omitted in the last sentence of the proposed rule regarding payment of return "transportation" in case of revocation where the worker fails to secure new H-2B employment within the 30-day grace period.

### **Denial and/or Revocation of Petition**

Clarifying USCIS' authority to issue a notice of denial or revocation of a Form I-129 in cases of inaccuracy, fraud or misrepresentation of a material fact may provide strong benefit to the I-129 application process. This is an area where confusion periodically exists, and clarifying the authority of USCIS to issue a notice of denial or revocation would enable petitioners and their representatives alike to have a clearer picture of potential impact and ramifications related to issues with Form I-129. Still, it is imperative that notices of denial or revocation are issued in good faith, and the parameters of this authority must always be strictly identified, as otherwise this authority has the potential of becoming overly-broad. More importantly, the USCIS should not be making these same determinations on applications for H-2B labor certification.

The Department of Labor oversees the labor certification process and has the greatest level of expertise in this area. The USCIS does not currently make determinations on previously certified labor certifications in H-2B petitions, which enables adjudicating officers at the USCIS to focus on their area of expertise. Thus, the USCIS may be overstepping its expertise and boundaries by proposing to make determinations on accuracy, fraud and misrepresentation on previously approved labor certifications. This has the potential to bring up multiple major issues and problems. If the USCIS were allowed to make decisions related to inaccuracy, fraud or misrepresentation on previously-approved labor certifications, the entire application process would always run the risk of reexamination, and the labor certification process would not truly be satisfied until

approval by the USCIS. For all these reasons, by including labor certifications this brief proposal would almost surely bring about substantial confusion, costs and delays and make the entire H-2B application process much less efficient.

Especially as a goal of these proposed changes is to benefit first time petitioners who petition without the benefit of counsel, it is very important that the USCIS does not over-expand its authority.

### **Notification Attestation**

USCIS would require employers to notify the DHS in some fashion when an H-2B employee either fails to report to work, finishes the job he was hired to do, or absconds. (We will refer to these events generically as “the event” or in more specific terms.) This section improves somewhat over a similar proposal advanced by the Department of Labor earlier this year, but the proposed provisions still require revision.

Business managers engage in business. They are not the immigration police, and it is not appropriate to ask them to act in that capacity. Even so, if DHS proceeds with deputizing employers in this fashion, we have several concerns.

First, the rule should state that the petitioner must send a notice of the event to DHS in writing and in a manner that is effective but does not cause an undue burden on the employer. The subsequent regulation to which DHS refers in the present proposed rule should include clear instructions on how an employer should complete notification, including how to notify DHS, and what information from the employer and/or employee is required to document termination or abscondment. The timing of notification is also not clear, as it is not clear whether the notification needs to be received by DHS from the time of the event, or if the notification must be mailed by the employer within 48 hours of the event. We urge DHS to keep these considerations in mind when it issues its further Federal Register notice on these specifics.

We also believe that 48 hours is too short a period of time for an employer to act when it is in the midst of a hectic work season. Part of the dynamic involved in H-2B industries is the chaotic nature of the activity during a very short period of time. Work activities for employers and the non-H-2B workers on the job regularly exceed 40 hours per week during the season. As a result, we believe that once the event has occurred (as defined in the regulations), the employer should have no less than 3 full business days, and preferably 5 business days, thereafter to send proper notice to DHS. This would not unduly burden DHS or anyone who is to receive this information; and it would provide a reasonable period of time for the employer to comply with this duty.

This additional time also would mean that an employer would not have a duty to report if a worker absconds within 10 days, or is terminated within the last five days of the contract period. For clarity, the text of Subsection (E) of the regulation also should have subparts that separate out each event so that the duty to report is clear.

The regulation also should define the duty to report in terms of business days, so that it reads:

“(1) Agreements. The petitioner shall send notice to DHS within five (5) business days of the occurrence of any of the following events:

- a. the H-2B worker fails to report for work within 5 business days after the employment start date stated on the petition, or within 5 business days after the start date established by his or her employer, whichever is later;
- b. the non-agricultural labor or services for which the H-2B worker was hired is completed, if it is completed more than 30 days prior to the end of the contract period;
- c. the H-2B worker absconds (as herein defined) from the worksite more than 10 business days prior to the completion of the contract period;
- d. the employer terminates the services of the H-2B worker more than 5 business days prior to the completion of the contract period.”

Regarding the definition of “abscond”, we suggest that the definition exclude situations in which the employee has the right to be absent, even if without the consent of the employer:

“(2) Abscondment. An H-2B worker has absconded if he or she has not reported for work for a period of 5 consecutive work days without the consent of the employer, or without a statutory or regulatory right to be so absent.”

### **Violations of H-2B Status**

AILA is concerned about the USCIS’s proposal to bar H-2B status for any H-2B visa holder who, through no fault of his or her own, violates such status within the past 5 years. There appears to be little constructive rationale, and no legal authority, for placing penalties on H-2B beneficiaries beyond those authorized in the Immigration & Nationality Act (INA). Congress has already identified in INA Section 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.

### **Temporary Worker Visa Exit Pilot 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 inadvertent 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.

Further, even if H-2B workers, as a whole, understand the exit departure requirement, it is highly conceivable that CBP may not designate a sufficient number of available exit ports in the geographical vicinity of the H-2B employer, or provide for adequate hours in which a worker must report to CBP, thus requiring substantial travel and wait time as well as increased expense to the H-2B worker. This requirement would create significant barriers for H-2B workers to fully comply with the exit requirement and would inevitably result in non-compliance.

Moreover, the consequence to the H-2B worker who fails to comply with the exit requirement is not entirely clear in the proposed rule, but such violation could conceivably be considered a violation of nonimmigrant status resulting in a bar to future admission in H-2B status as provided under the proposed rule. Such a consequence for inadvertent non-compliance of the exit requirement is unduly severe and would also have a direct negative impact on employers who would be prevented from utilizing the services of trained and skilled H-2B workers in future years.

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

### **Temporary Need**

AILA supports the proposed change which recognizes that employers may have a temporary need which lasts up to three years in duration. AILA would suggest however that the agency re-think its proposal that employers with a multi-year need “re-test the labor market” on an annual basis and obtain a temporary labor certification annually. (Part III, paragraph J). This language would appear to require that, notwithstanding the acknowledgement that a temporary need may last up to three years, the employer must go through all of the prevailing wage, recruitment, and filing steps each year. This increases the workload of both DHS and the Department of Labor, increases the cost to the employer, and fails to recognize the advantages of the employer having the availability of trained, experienced workers. A reasonable alternative would be for the employer to check the prevailing wage determination on an annual basis to assure that the workers are being paid the prevailing wage for the particular position. Further recruitment efforts, however, would render the official recognition by the agency of a temporary event of up to three years illusory.

## **Substitution of Beneficiaries**

AILA thanks DHS for proposing a method for substitution in situations in which a beneficiary has not yet entered the United States.

However, we have two major points to address with the regulation in its proposed form: We recommend that H-2B employers have the same right and procedure for substituting H-2B employees after admission that an H-2A employer has. In the H-2A context, the employer submits an amended petition, a copy of the approved labor certification application, the prior I-797 Approval Notice, proof of abscondment or termination, and copies of the absent beneficiary's visa and I-94.

The proposed regulation would prohibit substitution unless the employer essentially begins the process all over again. The reality is that the first half of the 33,000 numbers would be gone, so there is no need to seek substitution, and the right to substitute would be lost in every such situation. If the only thing that the employer is doing is substituting a new employee for the old one, no violence has been done to the labor certification and nothing has been done to question the validity of the labor market test. In fact, under the rationale of the proposed regulation, employers would be filing new labor certification applications when the new employees arrive, to confirm that there still are no available United States workers. To do that would be senseless; we submit the same conclusion applies here, and therefore the new labor certification should not be required. Further, our recommendation would ensure that H-2B employers who have successfully tested the market and who cannot locate available H-2B workers employed by other employers within the United States have a fully available H-2B workforce for the entire duration of their temporary period of need.

In addition, this section needs to be reorganized along these lines so that it is clear what duties and evidence should be provided, and to whom, depending on whether the original beneficiary has been admitted to the U.S. or not, and depending on whether the substitute beneficiary is inside or outside the US.

This is important because the proposed filings and duty to notify differ significantly depending on those circumstances. We suggest re-writing the current DHS proposed language so that it reads as follows:

## **Substitution of Beneficiaries**

- A) Where a beneficiary is approved by USCIS, processed for an H-2B visa and has been admitted to the U.S. in H-2B status, if the employer wants to substitute another worker for that beneficiary, the employer shall file an amended petition with the service center where the original petition was filed, along with a copy of the approved labor certification application, proof that the initial beneficiary absconded or failed to report to work, etc., and a copy of

the initial beneficiary's visa and I-94. Upon approval of the amended petition, the new beneficiary may be substituted for the initial one.

- B) Beneficiaries who are approved by USCIS, but who have not visa processed and have *not* been admitted to the United States in H-2B status:
- a. No substitution shall be allowed unless the employer shall provide evidence to the consular officer and to the border officer at the port of entry that the total number of beneficiaries (including the proposed substitute) will not exceed the number of beneficiaries certified in the original certification. Such evidence may include employment records or other documentary evidence to establish that the number of visas sought in the amended petition have not already issued.
  - b. Where the employer seeks to substitute such a beneficiary with a beneficiary who is *outside* the U.S., the petitioner shall, by letter and a copy of the petition approval notice, give notice of the proposed substitution to the consular office (if he is required to seek a visa) where the substitute beneficiary shall apply for a visa, and to the border officer at the port of entry (whether or not he is visa exempt) where the beneficiary shall apply for admission to the U.S. The petitioner also shall submit evidence of the substitute beneficiary's qualifications to the consular officer and to the border officer at the port of entry.
  - c. Where the employer seeks to substitute such a beneficiary with a beneficiary who is *currently in* the United States, the petitioner shall file an amended petition with fees at the Service Center where the original petition was filed, with a copy of the original petition approval notice, a statement explaining why the substitution is necessary, evidence of the substitute beneficiary's qualifications where applicable, evidence of the substitute beneficiary's current status in the U.S. The amended petition must retain a period of employment within the same half of the fiscal year as the original petition. Otherwise the employer must file a new labor certification application and new H-2B petition based thereon.

In addition to reorganizing this section, DHS should specify that the petitioner should provide to the consular officer and the officer at the port of entry, the evidence required to show that the total number of beneficiaries, including the substitute beneficiary, will not exceed the number of beneficiaries shown on the original petition. By making it clear, all petitioners will know that they must provide this evidence both at the consulate and also at the POE. The above language incorporates this suggestion.

The same is true regarding the duty to notify of the proposed substitution: this should be given to both the consular officer and the officer at the POE.

## **Employer Sanctions**

In Part III paragraph M, DHS states that it is interpreting INA section 214(c)(14) to allow delegation to Department of Labor of not only the authority to impose administrative remedies for certain violations related to H-2B petitions, but also the authority to make the initial finding of such violation. However, section 214(c)(14) does not grant such authority. Specifically, section 214(c)(14)(B) allows DHS to delegate to Department of Labor its authority under 214(c)(14)(A)(i), and this sub-section (i) deals only with imposing administrative remedies. In other words, the authority to delegate, as provided by 214(c)(14)(B), is limited specifically to sub-section (i) of 214(c)(14)(A), and does not include all responsibilities—such as making a finding of violation—encompassed in other parts of 214(c)(14)(A).

The proposed delegation to Department of Labor not only would exceed the terms of INA section 214(c)(14), it also would offer no protection of employers' due process rights for "notice and opportunity for hearing" as provided by section 214(c)(14). While the proposal notes that DHS and Department of Labor are discussing an enforcement process to investigate employer compliance, the details of such process, including Department of Labor's plan to ensure notice and hearing, should be made available for public comment before delegation occurs. This is particularly important since subsection (ii) of section 214(c)(14)(A) allows the barring of an employer's petitions for workers, not just in the H-2B program, but also in other H programs as well as L, O, and P-1.

AILA is also concerned about the lack of definition as to what conduct would constitute "substantial failure" to meet any of the conditions of the H-2B petition. Under INA section 214(c)(14)(D) the term "substantial failure" is defined as a "willful failure to comply with the requirements of this section that constitutes a significant deviation from the terms and conditions of a petition." However, because a determination of "substantial failure" could be grounds for petition debarment, the proposal should also require a finding that the employer has engaged in a pattern or practice of prohibited conduct before there can be a finding of substantial failure. By including a "pattern or practice" element, unscrupulous employers and their agents who abuse the system could still be punished, but honest and conscientious employers, many of whom are less sophisticated in their business practices, would be spared debarment for their innocent oversights and mistakes in the process.

**Conclusion**

Again, we thank the Department for its efforts in this regard. However, the program will not be workable if the issues discussed above are not effectively addressed.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION