Proposed Rules

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

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214, 215 and 274a

[CIS No. 2428–07; Docket No. USCIS–2007–0055]

RIN 1615–AB65

Changes to Requirements Affecting H–2A Nonimmigrants

AGENCY: U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is proposing amendments to its regulations affecting temporary and seasonal agricultural workers within the H–2A nonimmigrant classification and their U.S. employers. This rule proposes to relax the current limitations on the ability of U.S. employers to petition unnamed agricultural workers to come to the United States and include multiple beneficiaries who are outside the United States on one petition. The rule proposes to revise the current limitations on agricultural workers' length of stay including: lengthening the amount of time an agricultural worker may remain in the United States after his or her employment has ended and shortening the time period that an agricultural worker whose H–2A nonimmigrant status has expired must wait before he or she is eligible to obtain H–2A nonimmigrant status again. This rule also proposes to provide for temporary employment authorization to agricultural workers seeking an extension of their H–2A nonimmigrant status through a different U.S. employer, provided that the employer is a registered user of the E–Verify employment eligibility verification program. In addition, the rule proposes to modify the current notification and payment requirements for employers when an alien fails to show up at the start of the employment period, an H–2A employee's employment is terminated, or an H–2A employee absconds from the worksite. To better ensure the integrity of the H–2A program, this rule also proposes to require certain employer attestations, preclude the imposition of fees by employers or recruiters on prospective beneficiaries, preclude reconsideration of certain temporary labor certification denials, and bar H–2A status for nationals of countries consistently refusing or unreasonably denying repatriation of its nationals. These changes are necessary to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers.

Finally, this rule proposes to establish a pilot program under which aliens admitted on certain temporary worker visas at a port of entry participating in the program must also depart through a port of entry participating in the program and present designated biographical information, possibly including biometric identifiers, upon departure. U.S. Customs and Border Protection will publish a Notice in the **Federal Register** designating which temporary workers must participate in the program, which ports of entry are participating in the program, which biographical and/or biometric information would be required, and the format for submission.

DATES: Written comments on this rule must be submitted on or before March 31, 2008 in order to be assured of consideration.

Written comments on the Paperwork Reduction Act section of this rule must be submitted on or before April 14, 2008.

ADDRESSES: You may submit comments, identified by DHS Docket No. USCIS–2007–0055, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529. To ensure proper handling, please reference DHS Docket No. USCIS–2007–0055 on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529. Contact Telephone Number (202) 272–8377.

FOR FURTHER INFORMATION CONTACT: Hiroko Witherow, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3000, Washington, DC 20529, telephone (202) 272–8410.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule. Comments that will provide the most assistance to the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), and U.S. Customs and Border Protection (CBP) in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Instructions: All submissions received must include the agency name and DHS Docket No. USCIS–2007–0055 for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*. Submitted comments may also be inspected at the Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529.

II. Background

Over the years, U.S. employers have faced a shortage of U.S. workers who are able, willing, and qualified to fill agricultural jobs, and who would be available at the time and place needed to perform the work. To meet this need, U.S. employers have considered hiring foreign workers. However, before U.S. employers may hire such workers, immigration law requires that they first sponsor the workers by filing a petition based on their qualification within the

H–2A nonimmigrant classification. Immigration and Nationality Act (Act or INA) sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a).

A. Description of the Current H–2A Nonimmigrant Program

The H–2A nonimmigrant classification applies to aliens seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States on a temporary basis. INA sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see* 8 CFR 214.1(a)(2) (designation for H–2A classification). Under current regulations, employment of a seasonal nature is employment that is tied to a certain time of year by an event or pattern and requires labor levels far above those necessary for ongoing operations. 8 CFR 214.2(h)(5)(iv). Employment is considered to be of a temporary nature where the employer's need to fill the position will last no longer than one year, absent extraordinary circumstances. *Id.*

Aliens seeking H–2A nonimmigrant status must be petitioned for by a U.S. employer. However, prior to filing the petition, the U.S. employer must complete the temporary agricultural labor certification process with the Department of Labor (DOL) for the job opening the employer seeks to fill with an H–2A worker. This process determines: whether the proposed employment is for agricultural labor or services; whether it is open to U.S. workers; if qualified U.S. workers are available; the adverse impact, if any, on similarly employed U.S. workers of employment of a qualified alien; and whether employment conditions, including housing, meet applicable requirements. 8 CFR 214.2(h)(5)(ii). After receiving a temporary labor certification, the U.S. employer files Form I–129, ''Petition for Nonimmigrant Worker,'' with the appropriate USCIS office. *See* 8 CFR 214.2(h)(5)(i)(A). In rare instances, when domestic labor fails to appear at the worksite and DOL has denied the employer's temporary labor certification and appeal of the denial, USCIS may consider the written denial of appeal as a certification if it is filed with evidence that domestic labor is unavailable. *Id.*

In order to meet its employment needs, an employer may petition for one or more H–2A workers. However, in the case of multiple beneficiaries, the total number of beneficiaries in the petition cannot exceed the number of positions indicated on the temporary labor certification, and all the beneficiaries on one petition must obtain a visa at the same consulate (or, if no visa is required, apply for admission at the same port of entry). 8 CFR 214.2(h)(5)(i)(B). Where the employer seeks to employ only one H–2A worker, the Form I–129 submitted by the employer must name that worker. 8 CFR 214.2(h)(5)(i)(C). If the employer includes multiple beneficiaries in the petition, the workers must be named unless they are unnamed in the DOL certification and are outside the United States. *Id.* The petition also must establish the temporary or seasonal nature of the employment and that the beneficiary meets the requirements in the temporary labor certification, including job and training requirements and any necessary post-secondary education or other formal training. 8 CFR 214.2(h)(5)(v).

The petitioner must make several petition agreements. The petitioner must: consent to allow access to the worksite where the labor will be performed; notify USCIS within twenty-four hours if an H–2A worker absconds or if the authorized employment ends more than five days before the temporary labor certification document expires, and pay $10 in liquidated damages for each instance where the employer cannot demonstrate compliance with the notification requirement; and pay $200 in liquidated damages for each instance where the employer cannot demonstrate that its H–2A worker either departed the United States or obtained authorized status based on another petition during the period of admission, or within five days of early termination (whichever comes first). 8 CFR 214.2(h)(5)(vi)(A).

An H–2A worker's stay is limited by the term of the approved H–2A petition. 8 CFR 214.2(h)(5)(viii)(C). He or she may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. 8 CFR 214.2(h)(15)(ii)(C). However, his or her total period of stay in H–2A nonimmigrant status may not exceed three years. *Id.* An H–2A worker who has reached the three-year maximum period of stay may seek H–2A nonimmigrant status again, but only after remaining outside the United States for a six-month period. 8 CFR 214.2(h)(5)(viii)(C).

Significant absences can interrupt the accrual towards the three-year cap of time spent as an H–2A worker. The H–2A worker can interrupt an accumulated stay of eighteen months or less by an absence from the United States of at least three months. *Id.* He or she can interrupt an accumulated stay of more than eighteen months by an absence from the United States of at least one-sixth of the accumulated stay. *Id.*

Once an H–2A worker's petition has expired, the H–2A worker is allowed an additional ten-day period before he or she is required to depart the United States. 8 CFR 214.2(h)(5)(viii)(B). However, an H–2A worker whose three-year limit has not been reached may seek to extend his or her stay with the same employer or a new employer. He or she is employment authorized for not more than 240 days past the authorized period of stay if the same employer petitions for an extension of stay before expiration of the authorized period of stay. 8 CFR 274a.12(b)(20). If a new employer files a request to extend the alien's stay in H–2A status, the alien is not employment authorized past the authorized period of stay and is not able to begin employment with the new employer until the petition is approved. 8 CFR 214.2(h)(2)(i)(D).

USCIS will not grant H–2A nonimmigrant status to an alien who violated the conditions of H–2A status within the previous five years by remaining beyond the authorized period of stay or engaging in unauthorized employment. 8 CFR 214.2(h)(5)(viii)(A).

B. Limited Use of H–2A Nonimmigrant Classification

Despite the availability of the H–2A nonimmigrant classification, a high percentage of the agricultural workforce is comprised of aliens who have no immigration status and are unauthorized to work. The Congressional Research Service Report to Congress, ''Farm Labor Shortages and Immigration Policy'' (Sept. 5, 2007), states that persons in the country illegally accounted for an estimated 37% of the domestic crop workforce in fiscal year (FY) 1994 to FY 1995. In FY 1997/FY 1998, this percentage increased to 52% out of the estimated 1.8 million workers employed on crop farms. By FY 1999/FY 2000, their proportion had increased to 55% before retreating to 53% in FY 2001/FY 2002.[1]

Members of the public have cited what they consider to be unnecessarily burdensome regulatory restrictions placed on the H–2A nonimmigrant classification as one of the principal reasons why U.S. agricultural employers facing a shortage of qualified U.S. workers do not fully use the H–2A nonimmigrant classification to petition for temporary or seasonal agricultural

[1] *See also* Research Report No. 8, U.S. Department of Labor Office of the Assistant Secretary for Policy Office of Program Economics (March 2000) (finding that in 1997–98, 52 percent of hired farm workers lacked work authorization, 22 percent were citizens and 24 percent were lawful permanent residents).

workers from abroad.[2] Upon an examination of the regulatory provisions governing the H–2A nonimmigrant classification, USCIS has identified several requirements regarding the duration of the H–2A workers' authorized period of stay that add unnecessary burdens for both the petitioning employers and H–2A workers. The regulations include limitations on the use of unnamed and multiple beneficiaries in the petition, and employment authorization following a change in employers. The regulations also require certain employer agreements and include financial consequences for failure to comply. This proposed rule modifies these regulatory limitations and requirements. In so doing, USCIS anticipates that these changes will improve the utility of the H–2A nonimmigrant classification, so that this classification will be a more effective means for supplying a legal workforce to agricultural employers.

To better ensure that the requirements proposed in this rule do not adversely affect H–2A workers, compromise national security, or undermine the integrity of the H–2A program, the rule also proposes a limited number of new terms and conditions on employers' participation in the program. First, the rule proposes to require an employer attestation regarding the scope of the H–2A employment and the use of recruiters to locate beneficiaries. Second, the rule proposes to provide for denial or revocation of the H–2A petition if an H–2A worker was charged a fee by the petitioner in connection with the employment. Third, the rule proposes to allow H–2A workers who are changing employers to begin work with the new petitioning employer before the change is approved by USCIS, but only if the new employer participates in USCIS' E–Verify program. The E–Verify program (successor to the Basic Pilot Program) provides employers with a free and electronic method for confirming the employment eligibility of their newly-hired employees. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) sec. 401–05, Pub. L. No. 104–208, 110 Stat. 3546 (September 30, 1996), as amended (8 U.S.C.A. 1324a note). Fourth, this rule proposes to prohibit the approval of an H–2A petition for a national of a country that consistently refuses or unreasonably delays repatriation of its nationals who have been ordered removed from the United States. Finally, this rule proposes a program to strengthen the reporting system for temporary workers departing the United States at the conclusion of their authorized period of stay.

III. Proposed Changes

A. Consideration of Denied Temporary Agricultural Labor Certifications

While current regulations allow USCIS, in limited circumstances, to approve H–2A petitions that are filed with denied temporary agricultural labor certifications, USCIS believes that this authority is of limited use and is proposing to remove it from the regulations. Current regulations permit USCIS to accept a written denial of an appeal of a denied temporary labor certification as a labor certification if the appeal denial is accompanied by evidence establishing that qualified domestic labor is unavailable to do the work. *See* 8 CFR 214.2(h)(5)(i)(A);[3] *see also* 8 CFR 214.2(h)(5)(ii) (last sentence). USCIS believes that determinations as to the availability of U.S. workers are not within the expertise of USCIS, but instead are more appropriately made by DOL. Therefore, USCIS will remove this process from 8 CFR 214.2(h)(5)(i)(A) and (ii). The employer, however, is not left without recourse. If the employer can establish that domestic labor is unavailable, it may seek a new temporary labor certification from DOL.

B. Unnamed Beneficiaries in the Petition

Currently, H–2A employers must name in the petition all the workers being sought (*i.e.*, beneficiaries) unless unnamed in the temporary labor certification involving multiple beneficiaries. This requirement places an undue burden on employers. *See* 8 CFR 214.2(h)(5)(i)(C) (naming requirement). It also fails to accommodate the hiring practices of agricultural employers. An intervening event may preclude an employer from being able to continue to petition for the beneficiaries named in the temporary labor certification. This rule proposes to alleviate the problems encountered by employers when workers become unavailable by removing most of the constraints on an employer's ability to petition for unnamed beneficiaries and maintaining only the requirement that the petition include the names of those beneficiaries who are already in the United States.

By removing from the current regulations the requirement to name beneficiaries outside of the United States on the petition, USCIS believes that agricultural employers would have more flexibility to recruit foreign workers that are actually interested in the position on the date of stated need. Since employers often start the temporary labor certification and petitioning processes several months ahead of the actual date of stated need, naming beneficiaries that far in advance increases the likelihood that those beneficiaries are unavailable to fill the positions. Conversely, if a beneficiary is already in the United States, USCIS believes that naming such beneficiaries is necessary because the granting of the petition will either confer a new immigration status or extend the status of a particular alien immediately upon approval, whereas prospective beneficiaries abroad still must undergo both a visa interview at a U.S. consulate and an inspection by a U.S. Customs and Border Protection officer upon arrival at a port of entry to the United States. Based on the proposed changes, if an employer wishes to petition for multiple beneficiaries, some of whom are in the United States and some of whom are outside the United States, the employer must name the beneficiaries who are in the United States, and only provide the number of beneficiaries who are outside the United States. This naming requirement would apply regardless of the number of beneficiaries on the petition or whether the temporary labor certification named beneficiaries.

Rather than amend the applicable H–2A provision at 8 CFR 214.2(h)(5)(i)(C), this rule proposes to incorporate these changes into the general provision at 8 CFR 214.2(h)(2)(iii), governing the naming of beneficiaries in H categories. USCIS believes that maintaining two separate provisions on the naming of beneficiaries unnecessarily complicates the regulations and results in confusion. Therefore, this rule proposes to remove the unnamed beneficiary requirements from 8 CFR 214.2(h)(5)(i)(C) and revise the requirements in the general provision at 8 CFR 214.2(h)(2)(iii). This provision, as revised, would specify which H classifications must name beneficiaries in the petition and which do not need to name beneficiaries and under what circumstances. Note that

[2] *See* Mexico-Migration: A Shared Responsibility. The U.S.-Mexico Migration Panel Carnegie Endowment for International Peace and Instituto Tecnológico Autónomo de México (2001); *see also* Washington, April M., ''*Canada offers migrant tips; Colorado looks north of the border for ways to draw workers*,'' Rocky Mtn. News 10 (Sep. 15, 2007) (quoting a farmer, ''There is a bottleneck at the federal level in approving work visas, causing real problems for farmers'').

[3] Note that 8 CFR 214.2(h)(5)(i)(A) currently erroneously cites to section 216(e)(2) of the INA as the statutory authority for administrative appeals of denied temporary labor certifications. The correct statutory provision is section 218(e)(2) of the INA.

USCIS also is developing a separate rulemaking action to amend requirements for H–2B that may have additional impacts on H classifications.

C. Multiple Beneficiaries

USCIS has determined that the current regulatory provision at 8 CFR 214.2(h)(5)(i)(B) that permits petitioners to petition for multiple beneficiaries who are overseas only if all the beneficiaries will obtain a visa at the same overseas consulate or apply for admission at the same port of entry is no longer necessary. This rule proposes to eliminate this requirement from 8 CFR 214.2(h)(5)(i)(B). This requirement previously was necessary because, in the past, USCIS had to forward each approved petition to the consulate overseas where a beneficiary will apply for a visa. For petitions containing a request for multiple beneficiaries, the beneficiaries had to apply for their visas at the same consulate to ensure effective tracking and usage of available numbers in an approved petition. However, the U.S. Department of State recently implemented a new electronic system to effectively track visa issuance for specific petitions approved for multiple beneficiaries in real time regardless of the consulate location where a beneficiary may apply for a visa. Thus, the proposed change will benefit a prospective H–2A employer by permitting the employer to file only one petition with USCIS when petitioning for multiple H–2A beneficiaries from multiple countries. The benefit to the employer will be realized not only in terms of convenience but also from a financial standpoint since the employer will only be responsible for paying one petition filing fee.

D. Payment of Fees by Beneficiaries To Obtain H–2A Employment

1. Grounds for Denial or Revocation on Notice

USCIS has found that certain job recruiters and U.S. employers are charging potential H–2A workers job placement fees in order to obtain H–2A employment. Such workers are coming to the United States to fill positions that U.S. workers are unwilling or unable to fill and are doing so in order to improve their own difficult economic circumstances at home. USCIS has learned that payment by these workers of job placement-related fees not only results in further economic hardship for them, but also, in some instances, has resulted in their effective indenture. In an effort to protect H–2A workers from such abuses, this rule proposes to provide USCIS with the authority to deny or revoke upon notice any H–2A petition if it determines (1) That the alien beneficiary has paid or has agreed to pay any fee or other form of compensation, whether directly or indirectly, to the petitioner, or (2) that the petitioning employer is aware that the alien beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service, in connection with obtaining the H–2A employment. *See* proposed 8 CFR 214.2(h)(5)(xi)(A); *see also* 8 CFR 214.2(h)(11)(iii) (revocation on notice). We understand that there may be circumstances where an alien beneficiary may seek to pay or otherwise compensate a recruiter, facilitator or similar employment service without the knowledge of the petitioner. By revoking or denying the petition in such circumstance, USCIS would be penalizing the alien beneficiary whose illegal actions should not be rewarded by continued stay in the United States, and deterring both aliens and recruiters from entering into such arrangements in the future. However, revocation or denial would also harm the petitioner as well, through loss of an employee. DHS solicits comments on appropriate administrative penalties in the event that USCIS determines that the alien beneficiary, without the knowledge of the petitioner, paid or agreed to pay a fee or any form of compensation to a facilitator, recruiter, or similar employment service, in connection with an offer or as a condition of H–2A employment.

USCIS believes that this proposal will help minimize immigration fraud and protect against other abuses that have occurred when such aliens have been required to pay such employment fees, including petition padding (i.e., the filing of requests for more workers than needed), visa selling, and human trafficking. This proposal would not preclude the payment of any finder's or similar fee by the prospective employer to a recruiter or similar service, provided that such payment is not assessed directly or indirectly against the alien worker.

To provide protection to H–2A workers who are in the United States based upon an approved petition that is later revoked pursuant to proposed 8 CFR 214.2(h)(5)(xi)(A), this rule proposes a thirty-day grace period during which time such workers may find new employment and apply for an extension of stay, or depart the United States. *See* proposed 8 CFR 214.2(h)(5)(xi)(B). During the thirty-day period, such workers would not be unlawfully present in the United States, but, instead, would be in an authorized period of stay. *See* INA sec. 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B). In general, the unlawful presence of an alien in the United States for more than 180 days results in the alien being inadmissible to the United States for a minimum of three years. *Id.*

Further, to minimize the costs to H–2A workers who are affected by the revocation of a petition pursuant to proposed 8 CFR 214.2(h)(5)(xi)(A), this rule also proposes to require employers to pay such workers' reasonable transportation expenses to return to their last place of foreign residence. Proposed 8 CFR 214.2(h)(5)(xi)(B). However, the rule would not require employers to be held liable for such expenses in cases where affected aliens obtain approval of an extension of H–2A stay based on a subsequent job offer with another employer during the thirty-day grace period, provided that the new employer states in the job offer that it will pay such reasonable return transportation expenses upon completion of the alien's new employment.

2. Employer Attestation

USCIS recognizes that some H–2A petitioners, particularly those petitioning for the first time and without the benefit of counsel, may not appreciate the limitations on H–2A employment imposed by the regulations and the representations in the H–2A petition and the accompanying application for temporary labor certification. This rule proposes to require H–2A petitioners to include with their petitions an attestation, certified as true and accurate by the petitioner under penalty of perjury, that during the period of intended employment for which the petition is approved, the petitioner will not materially change the information provided on the Form I–129 and the temporary labor certification, including, but not limited to, the alien workers' duties, their place of employment, and the entities for which the duties will be performed. Proposed 8 CFR 214.2(h)(5)(i)(C). USCIS believes that this requirement will apprise petitioners of their responsibilities and obligations, and, at the same time, help prevent the employment of H–2A alien workers in a manner that conflicts with the representations upon which approval of the petition is based. In the event that a material change does occur in the terms and conditions of employment specified in the original petition, petitioners are currently obligated to file a new petition under 8 CFR 214.2(h)(2)(i)(E).

As an anti-fraud and worker protection measure to complement the proposed changes to 8 CFR 214.2(h)(5)(xi), USCIS is further proposing that the petitioning employer also include in its attestation a statement that it has not received, nor intends to receive, any fee, compensation, or other form of remuneration from the workers it intends to hire or from any person, agency or other entity. The petitioner would also be required to attest to whether it has used a facilitator, recruiter, or any other similar employment service, to locate foreign workers to fill the positions covered by the H–2A petition, and if so, to provide the names of such facilitators, recruiters, or placement services.

E. Petition Agreements and Liquidated Damages

USCIS has found that the notification and liquidated damages requirements provided for in the current regulations at 8 CFR 214.2(h)(5)(vi)(A) are onerous on employers and not effective in ensuring that H–2A workers maintain their nonimmigrant status. Therefore, USCIS is proposing to modify this provision by requiring petitioners to provide written notification to DHS in the following instances: an H–2A worker fails to report to work within five days of the date of the employment start date; the employment terminates more than five days early; or the H–2A worker absconds from the worksite. *See* proposed 8 CFR 214.2(h)(5)(vi)(B)(1). The rule proposes to lengthen the time within which the petitioner must meet the notification requirements from the current twenty-four hours to forty-eight hours. The rule also proposes to provide the method of notification via notice in the **Federal Register**, as well as the date on which the new notification requirements will take effect. To enforce the notification provision, the rule proposes to require employers to retain evidence (e.g., a photocopy) of the written notification for a one-year period. *See* proposed 8 CFR 214.2(h)(5)(vi)(B)(2).

This rule further proposes to increase the liquidated damages for failing to meet the notification requirement from $10 to $500 per instance because the $10 amount is not a sufficient deterrent against noncompliance. *See* proposed 8 CFR 214.2(h)(5)(vi)(B)(3). However, the rule removes the current requirement for the petitioner to pay $200 in liquidated damages for failing to demonstrate that its H–2A worker either departed the United States or obtained authorized status based on another petition during the period of admission or within five days of early termination. USCIS believes that petitioners are not in a position to know or easily obtain this information.

Additionally, the rule proposes to add a provision setting forth the circumstances in which an H–2A worker may be found to be an absconder, thus defining a term that would otherwise vary in interpretation from one employer to the next, possibly to the detriment of the alien worker. *See* proposed 8 CFR 214.2(h)(5)(vi)(E). The definition employs the same five-day period used to trigger a notification requirement when the alien does not show-up for work at the beginning of the petition period.

In proposed 8 CFR 214.2(h)(5)(vi), USCIS is restructuring the entire paragraph. Substantive modifications were only made to the notification and liquidated damage requirements. Conforming amendments were made to 8 CFR 214.2(h)(5)(ix).

F. Violations of H–2A Status

USCIS has determined that the current provision at 8 CFR 214.2(h)(5)(viii)(A) precluding a new grant of H–2A status where the alien worker violated the conditions of H–2A status within the prior five years requires clarification. This provision only lists two types of status violations and fails to include all status violations. This rule clarifies that *any* violation of a condition of H–2A status committed within the five years prior to adjudication of the petition by USCIS will result in a denial of H–2A status.

G. Revocation of Labor Certification

DOL published a rule that proposes to allow for the revocation of an approved temporary agricultural labor certification when an employer violates the terms of that labor certification. The proposal includes a means to contest a possible revocation of the labor certification. Accordingly, in this rule, USCIS is proposing to provide for the immediate and automatic revocation of the petition upon the revocation of the labor certification by DOL. *See* proposed 8 CFR 214.2(h)(2)(11)(ii). Since the labor certification is a prerequisite for an H–2A petition, and the DOL proposed rule would provide for contesting revocation of the labor certification, USCIS need not engage in a separate review before the petition is revoked.

H. Prohibiting H–2A Petitions or Admissions for Nationals of Countries That Refuse Repatriation

An alien worker who violates his or her status may be subject to administrative proceedings before an immigration judge to remove the alien from the United States. *See* INA sections 237(a)(1)(C), 239(a), 240(a); 8 U.S.C. 1227(a)(1)(C), 1229(a), 1229a(a). A removal order typically includes the name of the country to which the alien is to be removed, which usually is the alien's country of nationality. In order to effectuate the removal order, DHS must ensure that the alien has the necessary travel documents (*e.g.*, passport) to return to the named country and that the country agrees to receive the alien. DHS has faced an on-going problem of countries refusing to accept or unreasonably delaying the acceptance of their nationals who have been ordered removed. To combat this problem, Congress gave the Secretary of State the authority to discontinue the issuance of visas to citizens, subjects, nationals, and residents of a country if DHS notifies the Secretary of State that the government of that country consistently denies or unreasonably delays their return. INA sec. 243(d), 8 U.S.C. 1253(d); *see also* IIRIRA sec. 307.

In an effort to further alleviate the problem, this rule proposes to preclude USCIS from approving a petition filed on behalf of one or more aliens from countries determined by the Secretary of Homeland Security to consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals or residents. *See* proposed 8 CFR 214.2(h)(5)(i)(F); *see also* INA secs. 214(a)(1), 215(a)(1) and 243(d); 8 U.S.C. 1184(a)(1), 1185(a)(1), and 1243(d). At the time that DHS makes such determination, DHS expects in most cases to notify the Secretary of State under INA 243(d) of the determination so that applications for H–2A visas from citizens, subjects, nationals, and residents of that country may be lawfully denied on that basis. The Secretary of Homeland Security will periodically review determinations that countries have consistently denied or unreasonably delayed acceptance of their nationals to ensure the determinations are still justified. These provisions are intended to encourage more nations to promptly accept the return of nationals subject to a final order of removal.

More generally, DHS expects that the proposals in this rule intended to increase the flexibility and attractiveness of the H–2A visa program, complemented by the streamlining proposals the Department of Labor is making in its H–2A rule, will increase the popularity of the program with U.S. agricultural employers. But even though a more workable H–2A program would mean fewer aliens entering the country illegally to seek work, it could also lead

to an increase in the number of H–2A workers that abscond from their workplace or overstay their immigration status. The repatriation proposal outlined above is designed, in part, to address this challenge. DHS hereby invites comments from the public on additional or alternative approaches, for example by restricting eligibility to nationals of countries that provide the most cooperation to the United States in administering the program, rather than by excluding those whose governments provide the least cooperation. DHS is particularly interested in additional ways to promote cooperation by foreign governments in matters of security, particularly in connection with travel and immigration, such as the country's willingness to share passport information and criminal records of aliens who are seeking admission to, or are present in, the United States under this program.

I. Period of Admission

This rule proposes to extend the H–2A admission period following the expiration of the H–2A petition from not more than ten days to an absolute thirty-day period. *See* proposed 8 CFR 214.2(h)(5)(viii)(B). The purpose of this post-petition period is to provide the H–2A worker enough time to prepare for departure or apply for an extension of stay based on a subsequent offer of employment. As discussed below, USCIS is proposing to increase the mobility of aliens from one H–2A employer to another (see proposed 8 CFR 274a.12(b)(21)). USCIS believes that the change to a thirty-day period will facilitate this new benefit.

The proposed rule also corrects 8 CFR 214.2(h)(5)(viii)(B) by removing an incorrect cross-reference to 8 CFR 214.2(h)(5)(ix)(C). In its place, a cross-reference to 8 CFR 214.2(h)(5)(viii)(B) should be included in 8 CFR 214.2(h)(5)(viii)(C).

J. Interruptions in Accrual Towards 3-Year Maximum Period of Stay

An alien's total period of stay in H–2A nonimmigrant status may not exceed three years. 8 CFR 214.2(h)(15)(ii)(C). However, certain periods of time spent outside the United States are deemed to ''stop the clock'' towards the accrual of the three-year limit. 8 CFR 214.2(h)(5)(viii)(C). USCIS has determined that the length of time that the current regulations require before an H–2A's three-year period of stay is deemed interrupted is unnecessarily long. This results in H–2A workers reaching the three-year cap on their authorized period of stay much sooner than reasonably anticipated by both the workers and their employers, causing disruptive breaks in employment and difficulty for employers to meet their time-sensitive agricultural requirements. This rule proposes to reduce from three months to forty-five days the minimum period spent outside the United States that would be considered interruptive of accrual of time towards the three-year limit, where the accumulated stay is eighteen months or less. *See* proposed 8 CFR 214.2(h)(5)(viii)(C). If the accumulated stay is longer than eighteen months, this rule proposes to simplify the calculation of the interruptive period required from at least one-sixth of the period of accumulated stay to two months. *Id.* These proposed reductions would reduce the amount of time employers are required to be without the services of needed workers and enable the employers to have a set timeframe from which they can better monitor compliance with the terms and conditions of H–2A status.

K. Post-H–2A Waiting Period

Once an H–2A worker has reached the three-year ceiling on H–2A nonimmigrant status, current regulations require the worker to wait six months outside the United States prior to seeking H–2A nonimmigrant status again (or any other nonimmigrant status based on agricultural activities). 8 CFR 214.2(h)(5)(viii)(C). USCIS believes that a shorter waiting period would better meet the needs of agricultural employers in a time-sensitive industry experiencing such a shortage of U.S. workers. This rule proposes to reduce the required absence period to three months, in order to reduce the amount of time employers would be required to be without the services of needed workers, while not offending the fundamental temporary nature of employment under the H–2A program.

L. Extending Status With New Employer and Participation in E-Verify

This proposed rule would permit H–2A workers to continue to be employment authorized while awaiting an extension of H–2A status based on a petition filed by a new employer accompanied by an approved labor certification. Proposed 8 CFR 274a.12(b)(21). Specifically, the new provision would authorize an individual who has filed an application for an extension of stay during his or her period of admission to be employed by the new, petitioning employer for a period not to exceed 120 days beginning from the date of the notice that USCIS issues to acknowledge that it has received the application for the extension of stay. USCIS issues such notices on Form I–797, ''Notice of Action.'' The notice date on Form I–797 is called the ''Received Date.'' Note that if the application for the extension of stay is denied by USCIS prior to the expiration of this 120-day period, employment authorization would automatically terminate upon notification of the denial decision.

The proposed rule places one condition on this employment authorization benefit: The new H–2A employer must be a registered user in good standing (as determined by USCIS) of USCIS' E–Verify program. If the new employer does not meet this condition, proposed 8 CFR 274a.12(b)(21) would not apply, and the alien worker would not be authorized to work for the new employer until USCIS grants the extension of stay application. USCIS believes that this proposed employment authorization provision will create an incentive for agricultural employers to enroll in the E-Verify program, thereby reducing opportunities for aliens without employment authorization to work in the agricultural sector and helping protect the integrity of the H–2A program.

This proposed rule makes conforming amendments to 8 CFR 214.2(h)(2)(i)(D) (prohibiting an alien from commencing employment until the new employer's petition is approved) and includes a cross-reference to proposed 8 CFR 274a.12(b)(21). It also includes a cross-reference to section 214(n) of the INA, 8 U.S.C. 1184(n). This statutory provision applies to aliens within the H–1B specialty worker classification and, in general, permits such aliens to work for a new employer before such an employer's petition is approved. The addition of section 214(n) of the INA, 8 U.S.C. 1184(n), in this proposed rulemaking is made so that the regulations conform to the statute.

M. Miscellaneous Changes to H–2A Program

1. Extensions of Stay Without New Temporary Labor Certifications

USCIS regulations currently provide that, under certain circumstances, an application for an extension of stay for an H–2A nonimmigrant worker need not contain an approved temporary labor certification. 8 CFR 214.2(h)(5)(x). This rule proposes revisions to this provision to improve its readability; it proposes no substantive changes.

2. Filing Locations

To improve the efficient processing of H–2A nonimmigrant petitions, USCIS recently established special mailing

addresses at the USCIS California Service Center for all H–2A petition filings. The current regulations, however, only permit petitions to be filed with the USCIS Service Center that has jurisdiction in the area where the alien will perform services (or receive training) except as provided for elsewhere in the regulations or by a designation specified in a notice published in the **Federal Register**. 8 CFR 214.2(h)(2)(i)(A). USCIS has found that effecting changes to filing procedures by notice in the **Federal Register** creates an unnecessary obstacle to the timely implementation of petition processing improvements. Such changes would be more timely conveyed to the public via the petition's form instructions and USCIS's Web site. Therefore, this rule proposes to remove the **Federal Register** notice requirement at 8 CFR 214.2(h)(2)(i)(A) and instead provides that the form instructions will contain information regarding appropriate filing locations for these nonimmigrant visa petitions.

N. USCIS Policy Applicable to H–2A Sheepherders

For a number of years, the Immigration and Naturalization Service (INS) and now USCIS have refrained from applying the three-year maximum period of stay to H–2A aliens who work as sheepherders. *See* Memorandum from INS Assistant Commissioner John R. Schroeder to Northern Service Center Director James M. Bailey, ''Limits of Stay for H–2A Sheepherders under 8 CFR 214.2(h)(5)(viii)(C)'' (Oct. 31, 1991) (referring to Letter from INS Commissioner Alan Nelson to Senator Alan K. Simpson (Nov. 11, 1987)) (stating that a 6-month absence from United States is not required of H–2A sheepherders). As a result, H–2A aliens working as sheepherders who have reached the three-year maximum period of stay have been able to commence a new three-year period of stay in H–2A status without ever departing and remaining outside the United States for six months. *See* 8 CFR 214.2(h)(5)(viii)(C) (specifying 6-month departure requirement). While USCIS recognizes the special nature of this unique type of agricultural work, including the need to herd sheep over extensive expanses of open range for long periods of time, USCIS has concluded that its policy of exempting H–2A sheepherders from the six-month departure requirement is inconsistent with the parameters of the H–2A classification. Those parameters require that H–2A workers have a residence in a foreign country that they have no intention of abandoning, and perform agricultural labor or services in the United States on a temporary basis. Without imposing a meaningful departure after the three-year maximum period of stay has been reached, USCIS has found that H–2A sheepherders' stay is not truly temporary.

Therefore, USCIS proposes to impose on H–2A sheepherders the same departure requirement applicable to all H–2A workers. However, before doing so, USCIS is soliciting comments from the public regarding this change in policy. Under the proposed change, USCIS would not take action against individuals who have already been admitted in H–2A classification to engage in sheepherding activities. Such individuals, however, would be required to depart from the United States at the end of their period of admission in H–2A status and remain outside of this country for the requisite time period (six months under the current regulation; three months under the proposed rule) before being eligible to obtain H–2A status again. *See* INA sec. 101(a)(15)(H)(ii)(A), 8 U.S.C. 1101(a)(15)(H)(ii)(A); 8 CFR 214.2(h)(5)(iv).

O. Land Border Exit System Pilot

The Secretary of Homeland Security is authorized to prescribe conditions for the admission of nonimmigrant aliens under section 214 of the INA. Section 235 of the INA provides for the inspection of applicants for admission. Pursuant to 8 CFR 235.1(h)(1), nonimmigrant aliens who are admitted to the United States, unless otherwise exempt, are issued Form I–94, ''Arrival/Departure Record,'' as evidence of the terms of admission. Once admitted into the country, nonimmigrant aliens are required to comply with all the conditions of their stay, depart the United States before the expiration of the period of authorized stay, and surrender the departure portion of the Form I–94 upon departure from the United States. Section 215 of the INA provides the authority for departure control for any person departing from the United States. Additionally, 8 CFR part 215 provides the regulations for controls of aliens departing from the United States. Specifically, 8 CFR 215.2 allows for DHS, at its discretion, to require any alien departing from the United States to be examined under oath and to submit for official inspection all documents in the alien's possession.

Available statistics indicate that a significant number of nonimmigrant aliens either do not turn in their Form I–94 upon departure or overstay their authorized period of stay. DHS intends to strengthen its departure control record keeping system. On August 10, 2007, the Administration announced that it would establish a new land-border exit system for guest workers, starting on a pilot basis. In order to ensure that temporary workers depart the United States within the authorized period, DHS is proposing to institute a land-border exit system for H–2A guest workers on a pilot basis. Under the proposed program, an alien admitted on an H–2A visa at a port of entry participating in the program must also depart through a port of entry participating in the program and present designated biographic and/or biometric information upon departure at the conclusion of their authorized period of stay. CBP would publish a Notice in the **Federal Register** designating which ports of entry are participating in the program, which biographic and/or biometric information would be required, and the format for submission of that information by the departing H–2A workers. The exit pilot program would allow DHS to ensure that the H–2A workers subject to this pilot program have departed from the United States when their authorization expires and would provide a foundation for the comprehensive land border exit system for guest workers proposed by the Administration in August 2007. DHS requests comments on the establishment of the proposed pilot program. DHS also solicits comments on whether to include H–2B workers in the exit pilot program. (The H–2B nonimmigrant classification applies to foreign workers performing nonagricultural temporary labor or services in the United States. INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 CFR 214.1(a)(2) (H–2B classification designation)).

DHS previously conducted exit pilot programs at selected air and sea ports of entry through United States Visitor and Immigrant Status Indicator Technology (US–VISIT) Program. See 69 FR 46556. Those pilots began in August 2004 and concluded in May 2007. The pilot program exit system proposed under this rule will utilize any applicable lessons learned from the US–VISIT air and sea exit pilot program. DHS will continue to coordinate these screening programs to ensure both security and efficiency of the programs.

IV. Rulemaking Requirements

A. Regulatory Flexibility Act-Initial Regulatory Flexibility Analysis

The H–2A program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign

workers to the United States to perform agricultural labor or services of a temporary or seasonal nature. U.S. employers have historically faced a shortage of domestically available workers for seasonal agricultural jobs. Many farm workers also in America lack proper work authorization and immigration status. In addition, the requirements that Federal labor and immigration authorities impose on farmers and agribusinesses to obtain H–2A workers are generally felt to be overly burdensome. Therefore, USCIS is proposing changes intended to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers.

1. Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

a. Regulated Entities

USCIS has concluded that the entities affected by this rule are generally categorized as small. By and large this rule applies to farms engaged in the production of livestock, livestock products, field crops, row crops, tree crops, and various other enterprises. It does not apply to support activities for agriculture. The industry affected by this rule, as described in the North American Industry Classification System (NAICS), as encompassing NAICS subsectors 111, Crop Production, and 112, Animal Production.

b. Number of Small Entities to Which the Proposed Rule Will Apply

USCIS estimates that it will receive approximately 6,300 petitions per year for H–2A workers with many farms submitting multiple petitions. About 5,000 of those are expected to be submitted by small entities. The number of regulated firms represents about 0.3 percent of all farmers and the number of H–2A employees make up about 9.3 percent of all farm workers. Finally, about 550 sheep ranchers (an unknown number but presumed majority of which are small entities) are expected to be directly affected by this proposed rule as a result of the proposed changes that are specific to sheepherders.

2. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

a. Paperwork Reduction Act

The proposed rule adds no ''reporting'' or ''recordkeeping'' requirements within the meaning of the Paperwork Reduction Act; thus the rule does not require professional skills for the preparation of ''reports'' or ''records'' under that Act.

b. New Reporting Requirement

The proposed rule would impose new reporting requirements on H–2A employers, including the time frame for reporting, the mechanisms for reporting, the amount of liquidated damages for failure to comply, and defenses for failure to comply. This rule proposes to announce via notice published in the **Federal Register** appropriate notification requirements and assesses liquidated damages for failure to comply with the notification requirements at $500 per violation. DHS has no basis for estimating the cost of this new requirement on H–2A employers. However, DHS believes that the occurrence of non-compliance is not prevalent enough to affect a substantial number of the affected entities. However, the agency has requested and seeks further comment on the actual costs or expenditures, if any, of impact on any one firm that is assessed liquidated damages as a result of being found to be in violation of this new requirement and how that impact may differ or vary for small entities.

3. Identification of Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rule

DHS is unaware of any duplicative, overlapping, or conflicting federal rules. As noted below, DHS seeks comments and information about any such rules, as well as any other state, local, or industry rules or policies that impose similar requirements as those in this proposed rule.

4. Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities, Including Alternatives Considered, Such as: (1) Establishment of Differing Compliance or Reporting Requirements or Timetables That Take into Account the Resources Available to Small Entities; (2) Clarification, Consolidation, or Simplification of Compliance and Reporting Requirements Under the Rule for Such Small Entities; (3) Use of Performance Rather Than Design Standards; (4) Any Exemption From Coverage of the Rule, or Any Part Thereof, for Such Small Entities

Throughout the development of the proposed rule DHS has made every effort to gather information regarding the economic impact of the rule's requirements on all operators, including small entities. Questions for public comment regarding the costs and benefits associated with the proposed rule with respect to how operators, including small entities, can comply with the rule's requirements are included in this part of the rule.

5. Questions For Comment To Assist Regulatory Flexibility Analysis

Please provide comment on any or all of the provisions in the proposed rule with regard to:

a. The impact of the provision(s) (including any benefits and costs), if any; and

b. What alternatives, if any, DHS should consider, as well as the costs and benefits of those alternatives, paying specific attention to the effect of the rule on small entities in light of the above analysis. In particular, please provide the above information with regard to the following sections of the proposed rule:

i. The new reporting requirements on H–2A employers, including the time frame for reporting, the mechanisms for reporting, the amount of liquidated damages for failure to comply, and defenses for failure to comply in 8 CFR 214.2(h)(2)(vi)(B)(*2*).

ii. The requirement for H–2A sheepherders to have the same departure requirement applicable to all H–2A workers under 8 CFR 214.2(h)(5)(viii)(C) (specifying 6-month departure requirement).

iii. Any other requirement not mentioned above.

c. Costs to ''implement and comply'' with the rule including expenditures of time and money for any employee training; attorney, computer programmer, or other professional time;

preparing relevant materials; processing materials, including, materials or requests for access to information; and recordkeeping.

Please describe ways in which the rule could be modified to reduce any costs or burdens for small entities consistent with the Immigration and Nationality Act's requirements.

Please describe whether and how technological developments could reduce the costs of implementing and complying with the rule for small entities or other operators.

Please provide any information quantifying the economic benefits of:

a. Reducing delays in the petition, application, and approval process.

b. Reducing the time required for an H–2A worker to be out of the country, allowing more time for departure after the visa has expired, and allowing for an extension of stay while a new petition is pending.

c. Encouraging employers who currently hire seasonal agricultural workers who are not properly authorized to work in the United States to replace those workers with legal workers.

d. Minimize immigration fraud and protect against abuses that occur when aliens are required to pay employment fees.

Please identify all relevant federal, state or local rules that may duplicate, overlap or conflict with the proposed rule. In addition, please identify any industry rules or policies that already require compliance with the requirements of the DHS proposed rule.

B. Provisions to Which the Regulatory Flexibility Act Does Not Apply

CBP is also seeking comments through this rule with respect to a pilot program that would require that aliens admitted on certain temporary worker visas at a port of entry must depart through a port of entry participating in the program. Although there may be costs associated with participation in this program, the aliens impacted by this portion of the rule are not considered ''small entities,'' as that term is defined in 5 U.S.C. 601(6). Since the regulation will require the alien to comply with the pilot program, rather than placing a requirement on the employers, the employers are not directly impacted by this proposed rule. Employers, including small entities, are free to offer assistance to their H–2A workers in complying with this requirement if they choose to do so. However, the employer's assumption of any costs inherent with complying with this requirement on behalf of their workers is voluntary and, therefore, not subject to the Regulatory Flexibility Act.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

E. Executive Order 12866

This rule has been designated as significant under Executive Order 12866. Thus, under section 6(a)(3)(C) of the Executive Order, USCIS is required to prepare an assessment of the benefits and costs anticipated to occur as a result of this regulatory action and provide the assessment to the Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs.

In summary, this rule proposes several changes to the H–2A visa program that USCIS believes are necessary to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers. There are no additional regulatory compliance requirements to be added that will cause a detectable increase in costs for participating firms. Costs of compliance will not be changed by this proposed rule. Volume of applications may increase slightly, but the burden of compliance both in time and fees will not increase above that currently imposed. Qualitatively, this rule will benefit applicants by:

- Reducing delays caused by IBIS checks holding up the petition application process.
- Reducing disruption of the life and affairs of H–2A workers in the United States.
- Protecting laborers' rights by precluding payment of fees by the alien.
- Preventing the filing of requests for more workers than needed, visa selling, coercion of alien workers and their family members, or other practices that exploit workers and stigmatize the H–2A program.
- Encouraging employers who currently hire seasonal agricultural workers who are not properly authorized to work in the United States to replace those workers with legal workers.
- Minimizing immigration fraud and human trafficking.

The H–2A program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the United States to perform agricultural labor or services of a temporary or seasonal nature. This rule is being promulgated as part of the reform process to make changes that are intended to provide agricultural employers with an orderly and timely flow of legal workers while protecting laborers' rights.

F. Temporary Alien Farm Workers: The Current H–2A Program

The H–2A nonimmigrant classification applies to aliens who are coming to the United States temporarily to perform agricultural labor or services of a temporary or seasonal nature. Seasonal employment is tied to a certain time of year that requires labor above regular operations. Temporary labor means the employer's need will last no longer than one year.

Aliens seeking H–2A nonimmigrant status first must be petitioned by a U.S. employer, after the employer has completed a temporary agricultural labor certification process with the Department of Labor (DOL). DOL determines whether employment is agricultural, whether it is open to U.S. workers, if qualified U.S. workers are available, the adverse impact of employment of a qualified alien, and whether employment conditions, including housing, meet applicable requirements. The U.S. employer then files Form I–129, ''Petition for Nonimmigrant Worker,'' which must name one or more alien beneficiaries; if multiple beneficiaries, they may be unnamed if unnamed in the DOL certification and outside the United States. The petition must establish the temporary, seasonal employment and that the beneficiary meets job and training, post-secondary education or other formal training requirements if necessary.

H–2A nonimmigrant status is valid for a total of three years, but can be renewed after the alien remains outside

the United States for a six-month period. The H–2A nonimmigrant can interrupt an accumulated stay of eighteen months or less by an absence from the United States of at least three months. He or she can interrupt an accumulated stay of more than eighteen months by absence from the United States of at least one-sixth of the accumulated stay. Once an H–2A nonimmigrant's authorized period of stay has expired, they have a ten-day grace period before being required to leave the United States. However, an H–2A nonimmigrant whose three-year limit has not been reached can be employment authorized for another 240 days past the authorized period of stay if requested by the same employer. If for a new employer, employment will not be authorized past the authorized period of stay until the petition is approved. H–2A nonimmigrant status is not approved for an alien who violated the conditions of H–2A status within the previous five years by remaining beyond the authorized period of stay or engaging in unauthorized employment.

V. Full Regulatory Impact Assessment

Over the years, U.S. employers have faced a shortage of available U.S. workers who are able, willing, and qualified to fill agricultural jobs, and who would be available at the time and place needed to perform the work. To meet this need, U.S. employers have considered hiring foreign workers. U.S. law requires that they first sponsor the workers by filing a petition based on their qualification within the H–2A nonimmigrant classification.

1. Unauthorized Workers

Estimates from many different government and non-government sources suggest that up to 70% of farmworkers in America lack proper work authorization and immigration status.[4] The United States Department of Labor reports that in 1997 and 1998, 52 percent of hired farmworkers lacked work authorization, 22 percent were citizens and 24 percent were lawful permanent residents.[5]

2. Insufficient Labor Pool

The H–2A temporary agricultural program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature. Before USCIS can approve an employer's petition for such workers, the employer must file an application with the Department of Labor stating there are not sufficient workers who are able, willing, qualified, and available, and the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Labor concerns are prevalent in areas where the agricultural industry is dependent on seasonal labor. For example, the California Farm Bureau Federation estimated that farm labor shortages resulted in $85 million in losses to its members in 2006.[6] Also, a 2007 survey of Wisconsin dairy producers cited an ample labor supply as a main limiting factor in the future of the survey subjects' farming operations.[7] Some commenters believe the requirements that Federal labor and immigration authorities impose on farmers and agribusinesses to obtain H–2A workers are overly burdensome. Others suggest that excessive bureaucratic delays by the responsible agencies in approving worker petitions contribute to the inability to attract sufficient workers.[8] A few sources feel the shortage of farm workers has been exacerbated by tighter security at the Mexican border.[9] Therefore, whether there is an ample supply of farm workers is a major concern in agricultural communities. In short, there is fairly widespread agreement that there is a problem in the seasonal agricultural worker program that needs to be addressed in some fashion.

A. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104–121), requires Federal agencies to conduct a regulatory flexibility analysis that describes the impact of the proposed rule on small entities whenever an agency is publishing a notice of proposed rulemaking. In accordance with the RFA, this section discusses the changes proposed in the subject rule and analyzes whether any of the changes entail compliance requirements with a significant economic impact on a substantial number of small entities requiring publication of an Initial Regulatory Flexibility Analysis.

1. Regulated Entities

a. Agriculture Employment.

The H–2A nonimmigrant classification applies to aliens seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States on a temporary basis. The work must be agricultural in nature. Table 1 [10] below summarizes the total number of farm workers in the most recent 5 calendar years and their average hourly wages in those years.

TABLE 1.—FARM WORKERS, UNITED STATES, 2002–2006

Year	Total number of workers in thousands	Average annual wages (Dollars per hour)		
		All workers	Field workers	Field and livestock workers
2002	885.7	8.81	8.12	8.18
2003	836.0	9.08	8.31	8.42
2004	825.2	9.23	8.45	8.56
2005	780.0	9.51	8.70	8.84
2006	751.9	9.87	9.06	9.15

[4] Regelbrugge, Craig J., American Nursery & Landscape Association. Co-chair, Agriculture Coalition for Immigration Reform, speech given at USDA Agricultural Outlook Conference, American Agriculture And Immigration Reform: An Industry Perspective, March 1, 2007.

[5] Research Report No. 8, U.S. Department of Labor Office of the Assistant Secretary for Policy, Office of Program Economics (March 2000).

[6] Farm Labor Shortages, Mechanization, Rural Migration News, Vol. 14 No. 4 (October 2007).

[7] 2007 Dairy Producer Survey, USDA, National Agricultural Statistics Service (July 2007).

[8] Washington, April M., *Canada offers migrant tips; Colorado looks north of the border for ways to draw workers* Sep. 15, 2007 Rocky Mtn. News 10 (quoting a farmer, ''There is a bottleneck at the federal level in approving work visas, causing real problems for farmers,'').

[9] Mountain State Reporter, United States Department of Agriculture, National Agricultural Statistics Service, West Virginia Department of Agriculture, Vol., 19, no. 9 (Sept. 2006).

[10] U.S. Department of Agriculture, National Agricultural Statistics Service, Statistical Bulletin 1007, Statistical Highlights of U.S. Agriculture for 2006 and 2007, October 2007, *http://www.nass.usda.gov/Publications/Statistical_Highlights/2007/2007stathi.txt.*

The H–2A program is used mainly by farms engaged in the production of livestock, livestock products, field crops, row crops, tree crops, and various other enterprises. The affected industries do not include support activities for agriculture.[11] Therefore, in accordance with the RFA, USCIS has identified the industry affected by this rule as described in the North American Industry Classification System (NAICS) as encompassing NAICS subsectors 111, Crop Production, and 112, Animal Production.[12]

b. Number Affected

In fiscal year 2007 USCIS received 6,212 Form I–129 petitions for H–2A employees, and approved petitions for 78,089 H–2A workers.[13] In fiscal year 2006, USCIS received 5,667 Form I–129 petitions and approved 5,448 of them for 56,183 workers. Also, in fiscal year 2006, 6,717 employers requested certification from the Department of Labor (DOL) for 64,146 H–2A workers, and for those workers, the United States Department of State (DOS) issued 37,149 H–2A visas. In fiscal year 2005, USCIS approved Form I–129 petitions for 49,229 workers, 6,725 employers requested certification from the Department of Labor for 50,721 employees, and 31,892 visas were issued by DOS.[14]

Thus, based on recent results, USCIS estimates that the baseline number of H–2A petitions volume absent this rule would in an average year be approximately 6,300 petitions[15] for an average of 70,000 total H–2A workers per year. In 2006 there were 2,089,790 farms in the United States and about 752,000 workers employed in agricultural jobs. Thus, about 0.3 percent of all farmers use the H–2A program and 9.3 percent of all farm workers are aliens employed under the H–2A program.

2. Size Categories of Affected Entities

The U.S. Small Business Administration (SBA) Small Business Size Regulations at 13 CFR part 121, provide that farms with average annual receipts of less than $750,000 qualify as small businesses for Federal Government programs. According to United States Department of Agriculture data, 44,348, or 2.1 percent, of the 2,128,982 farms in the U.S. had gross cash receipts of more than $500,000.[16] Since 97.9 percent of farms have sales of less than $500,000 it appears that almost all farms are small entities under the SBA definition. That means that almost all of the employers requesting USCIS approval to hire H–2A alien employees per year, an estimated 5,220, are small businesses looking to hire a seasonal farm worker.

The fact that the very small percentage of farms that use the H–2A program accounts for 9.3 percent of all farm workers indicates that those farms that use the H–2A program are larger than average. Nonetheless, the impacts of this rule would have to be totally concentrated among the largest farms in the U.S. in order for the affected entities to not be small as determined under SBA guidelines. Therefore, USCIS has concluded that the entities affected by this rule are generally categorized as small.

B. New Compliance Requirements of the Proposed Rule

1. Compliance Costs

Liquidated Damages for Non-reporting. USCIS is proposing new reporting requirements on H–2A employers, including the time frame for reporting, the mechanisms for reporting, the amount of liquidated damages for failure to comply, and defenses for failure to comply. This rule also proposes to enable DHS to announce via notice published in the **Federal Register** appropriate procedures for notifying DHS of events requiring employer notification. USCIS has no data on the number of employers that typically fail to comply with reporting requirements and no estimate of the number of firms that will have to pay liquidated damages. However, USCIS believes that the occurrence of non-compliance is not prevalent enough to affect a substantial number of the affected entities. Further, while $500 is believed to be sufficient to provide an incentive for participating firms to comply, it is not large enough to impose a significant economic impact on any one firm that is assessed liquidated damages as a result of being found to be in violation of this new requirement.

2. Costs of Exit Requirement

Under the proposed rule, certain aliens admitted on an H–2A visa must comply with the DHS Biometric Exit Pilot as part of US–VISIT. The Exit Pilot Program was implemented to provide a straightforward exit process to ensure that individuals adhere to the terms of their admission and is intended as an added measure to ensure the integrity of our immigration system. This means that the alien must depart through a port of entry participating in the program and present designated biographic and or biometric information upon departure at the conclusion of their authorized period of stay.[17] The alien must either: (1) Check out at an automated exit kiosk or with a US–VISIT exit attendant at the departure gate at the port, have their travel documents read, their two index fingers digitally scanned, a digital picture taken, receive a printed receipt that verifies that they have checked out, and present the receipt at their departure gate to confirm that they checked out; or (2) go through a biometric check-out process with a US–VISIT exit attendant stationed at visitors' departure gates. USCIS assumes that the additional time to register at time of departure is between ½ to 1 hour. USCIS seeks comment on this assumption. Thus, this rule will require H–2A to incur the following additional time costs, analyzed in the following model.

Estimating how many H–2A workers will be subject to the Exit Pilot requires determining how many H–2A workers who leave the country each year are doing so because their periods of authorized stay have ended. As stated above, that is why the Exit Pilot program was instituted—DHS had no process for ensuring that aliens complied with their periods of authorized stay. Since there is no follow-up monitoring system, there is little data available, and the statistics that are available are unreliable. USCIS does know that, in fiscal year 2007, it approved petitions for 78,089 H–2A workers.[18] This number, however, includes requests for extensions of stay and changes in employers; thus, it does not represent the number of H–2A

[11] A few larger Farm Labor Contractors and Crew Leaders (NAICS Code 115115) and Custom Harvesting Operations (NAICS 115113) are believed to use the H–2A program to meet their client's seasonal needs, but the objectives of the program and this rule are focused on the independent producer.

[12] U.S. Small Business Administration, Table of Small Business Size Standards, *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[13] These are not all new employees or entrants to the United States. This number includes petitions approved for an extension or change of employer that are not segregated for reporting purposes.

[14] *http://www.foreignlaborcert.doleta.gov/.*

[15] This figure may not represent the actual number of farm owners or operators as some larger farms may submit multiple petitions per year.

[16] Economic Class of Farms by Market Value of Agricultural Products Sold and Government Payments: 2002 *http://www.nass.usda.gov/census/census02/volume1/us/st99_1_003_003.pdf.*

[17] *http://www.dhs.gov/xnews/releases/press_release_0476.shtm.*

[18] These are not all new employees or entrants to the United States. This number includes petitions approved for an extension or change of employer that are not segregated for reporting purposes.

employees entering or exiting the U.S.[19] USCIS believes that the closest indicator available of the number of H–2A visitor exits per year would be the average number of entries per year. It is logical to assume that the number of employees beginning their authorized employment would vary only slightly from the number ending their authorized term of employment from one year to the next. The number of H–2A entries during fiscal years 2002 through 2006 averaged 17,551 per year.[20] As such, approximately 18,000 immigrant workers are expected to be affected by this rule and spend between ½ to 1 hour in the registration process during exit.

The costs of exit in this case are entirely opportunity costs, as the worker forgoes ½ to 1 hour in the registration process, and gives up this amount of time to his or her ''second best'' activity. It is also important to note that the opportunity cost to the worker depends on whether he or she could have been working, or could have been engaging in a leisure activity. According to Fugitt and Wilcox[21] (1999), opportunity cost of leisure time is calculated as ⅓ of the wage rate. However, if the respective H–2A individual could have been at work instead of in the exit registration process, the opportunity cost is the full value of the wage.

According to the U.S. Department of Labor[22], the hourly wage rate for the H–2A worker is $9.49. As such, the total annual undiscounted cost of H–2A workers having to spend ½ hour during the exit process is approximately $85,000 ($9.49 * ½ hour * 18,000). The opportunity costs if all workers spend a full hour in the exit process are approximately $171,000 ($9.49 *1 hour * 18,000).

However, the preceding estimates of opportunity costs to the H–2A worker assume that each individual is forgoing an hour of time at work. It may also be the case that the individual is foregoing leisure. As such, the opportunity cost of leisure time is represented as ⅓ the wage rate (Fugitt and Wilcox, 1999) as opposed to the full wage.

The undiscounted opportunity costs to workers in this case spending a ½ hour in the exit process are approximately $28,000 (⅓ * $9.49 * 18,000 * ½ hour). However, if each worker spends an hour in the exit process, the opportunity costs rise to approximately $56,000 (⅓ * $9.49 * 18,000 * 1 hour). As such, depending on what assumptions are made about the time required to exit and whether the time forgone is work or leisure, the annual undiscounted costs range from $28,000 to $171,000.

3. Fees

USCIS funds the cost of processing applications and petitions for immigration and naturalization benefits and services, and USCIS' associated operating costs, by charging and collecting fees. For each Form I–129 USCIS charges a filing fee of $320. While the enhancements in this rule will increase the number of H–2A petitions per year by making the program more attractive, there is no increase in per petition fees for employees being imposed by this rule. Thus, the fee impacts of this rule on each petitioning firm are neutral.

4. Paperwork Burden

USCIS estimates that the public reporting burden for each Form I–129 is 2 hours and 45 minutes per response, including the time for reviewing instructions, completing, and submitting the form. The aggregate public reporting burden for all firms affected by this rule may increase as a result of the increased due of the program. However, this rule proposes no changes to the per-firm reporting requirements or costs of the existing H–2A program.

5. Costs Imposed on Sheepherders and Their Employers

There may be a slightly negative impact on sheep ranchers in the few states in the Western United States as a result of one change that is necessary to bring sheepherder H–2A employees in under the requirements to return to their home countries that are applied to all other H–2A employees. Currently, H–2A aliens working as sheepherders who have reached their three-year maximum stay period may obtain a new three-year period of stay in H–2A status without departing and remaining outside the United States for six-months as required for other H–2A aliens. The period of stay in the alien's home country is proposed to be changed to three months in this rule and will be imposed on sheepherders the same as for all other H–2A workers.

a. Size of Sheep Farming Entities Affected

The sheep farming entities affected by this rule (Sheep Farming is NAICS Code 112410) are defined as small. No data exists on the relative breakdown on the number of sheep farms with average annual receipts of more than $750,000 (making them not qualify as a small business). However, nothing points to sheep ranches being comprised of a significantly higher percentage of large operations than other farm enterprises.[23] The number of people employed by sheep farms in the United States is unknown.[24] However, the number of United States farming operations with sheep totaled 69,090 during 2006.

Total sales of sheep and lambs in 2006 were $473 million for an average of $6,846 per farm.[25] Of these farms, 90.8 percent were comprised of operations having from 1 to 99 head. Farms with a range of 100 to 499 head of sheep comprise 7.6 percent of the industry and the remaining 1.6 percent were operations with 500 head or more.[26] Operations with more than 500 sheep account for 47.3 percent of the sheep production in the United States.

[27] USDA, National Agricultural Statistics Service, *http://www.nass.usda.gov/QuickStats/index2.jsp*.

The table below lists the top sheep producing states for 2007, indicating that the larger sheep farming operations are concentrated in the western United States.

SHEEP AND LAMBS.—TOTAL SHEEP AND LAMBS FOR 2007[27]

State rank	State	Total sheep and lambs (thousand head)
1	Texas	1,070
2	California	610
3	Wyoming	460
4	Colorado	400
5	South Dakota	380

[19] See 2003–2005 figures at *http://www.dhs.gov/xlibrary/assets/statistics/publications/2005_NI_rpt.pdf*.

[20] Yearbook of Immigration Statistics, Temporary Admissions of Nonimmigrants to the United States: 2006 *http://www.dhs.gov/xlibrary/assets/statistics/publications/NI_FR_2006_508_final.pdf*.

[21] Fugitt, D. and S. Wilcox. (1999). *Cost-Benefit Analysis for Public Sector Decision Makers*. London, Quorium Books.

[22] Available at: *http://www.dol.gov/compliance/topics/wages-foreign-workers.htm*.

[23] Sheep and Lambs—Inventory, Wool Production, and Number Sold by Size of Flock: 2002. *http://www.nass.usda.gov/census/census02/volume1/us/st99_1_030_032.pdf*.

[24] E-mail from Scott Hollis, Livestock Section Statistician, USDA, NASS to Phillip Elder, Associate Counsel, USCIS, (November 02, 2007 1:15 PM EST) (on file with author).

[25] Total sales divided by total number of farms. Smaller farms do not generally derive a significant portion of their income from sheep farming.

[26] *Farms, Land in Farms, and Livestock Operations,* 2006 Summary, Agricultural Statistics Board, United States Department of Agriculture, National Agricultural Statistics Service.

b. Number of Sheep Farming Entities Affected

The policy exception for sheepherders not returning home for 6 months between their three year employment stints was provided because livestock operations utilize rangeland in the Western United States as a source of pasture and forage needed year round, and not seasonal employees, and a reliable domestic labor source did not exist. USCIS is proposing to reduce the required period for an H–2A employee to return to their home country to three months and believes that this reduced period will be reasonable for H–2A sheepherders as well, obviating the need for the sheepherder policy exception.

According to the American Sheep Industry Association, more than 500 sheep operations depend on foreign sheepherders for sheep production and more than 1,500 herders are in the United States continuously helping care for the flocks.[28] USCIS receives about 300 petitions a year for sheepherder H–2A employees, mostly from two sources: Western Range Association, of Salt Lake City Utah, and Mountain Plains Association, of Cheyenne, Wyoming. As of September 30, 2007, Western Range, had 929 H–2A sheepherders under contract with 217 member sheep ranchers. Of the 929 employees, 774 were from Peru, 79 were from Chile, 52 from Mexico, and 23 from Bolivia.[29] During calendar year 2007, Mountain Plains has acted as agent for 1,460 H–2A employees for livestock farms or ranches. Mountain Plains has placed employees with approximately 330 range production livestock operations, which are not limited to sheep but for this analysis USCIS will assume that they are all sheep farmers. Mountain Plains estimates that the 1,460 H–2A employees they have had in 2007 were 60 percent from Peru, 30 percent from Mexico, and 10 percent from Chile or other countries.

Thus, about 550 sheep ranchers [30] are expected to be directly affected by this proposed rule, representing less than 1 percent of the 69,090 sheep operations in the United States in 2006 and only 6 percent of the sheep producers in California, Colorado, Idaho, Montana, Nevada, Mew Mexico, and Wyoming. This small group will face a disproportionate impact from the proposed rule relative to other sheep farmers.

c. Size of Sheep Farming Entities Affected

The sheep farms that are members of Mountain Plains and Western Range have flocks that range in size from approximately 500 ewes to as high as about 10,000 ewes with total sales from sheep, lambs and wool ranging from $50,000 to $950,000. Operations, such as these, with more than 500 sheep account for 1.6 percent of sheep farming operations. Annual sales per sheep farm averages about $7,000 per farm; however, that figure includes many farms that barely exceed the minimum annual $1,000 in sales threshold that the United States Internal Revenue Service and USDA use to define a ''farm.'' The number of these directly affected farms that are small or large entities as a result of exceeding or falling below the $750,000 threshold defining those categories are unknown.

d. Increased Compliance Costs for Sheep Farms

(i) Travel Expenses

This rule only proposes that the sheepherder be required to stay away from the United States for three months or more before returning, as opposed to returning immediately as currently allowed. This rule does not change the requirement that a sheepherder return to his or her home country or regulations governing payment of the alien's travel expenses. The farmer must pay the costs for many of his H–2A sheepherders to go home every year anyway as a result of normal turnover, and this rule will not have an impact on that cost.

(ii) Availability and Cost of Labor

This proposed rule will not substantially reduce the availability of seasonal sheepherders or increase the cost of employing them. Sheepherders are unique from other H–2A seasonal agricultural employees in that sheepherders are needed year round, and not for short term needs with a start and end, such as a crop harvest. While the need for sheepherders increases in lambing or sheering season, the nature of the employment is not necessarily seasonal. The requirement to return home for six months fits a vegetable or row crop farm with at least six months between harvests. Ranches, however, need at least a few hands year round.

Due to the solitude experienced by a sheepherder who must live out on the range for extended periods of time, employee turnover may be more pronounced in the sheep ranching industry than in many others. Rates of employees absconding from rangeland H–2A jobs is estimated at 10 percent, which is much higher than in other employment based visa programs. A major complaint that sheep ranchers have about the H–2A program is the inability to have absconding employees, detained, deported, and replaced.

(iii) Training

If a farm loses an employee it may have to bring in another sheepherder and incur the costs of training the new employee on the specific requirements of that ranch. This rule is not expected to impact this cost.

(iv) Time Away From U.S. Between 3 Year Maximum Stays

Currently, a sheepherder may return to the United States immediately after returning home. This proposed rule will require him or her to remain outside the United States for three months.

The productivity and overall expenses of a typical user of the H–2A sheepherder program are not expected to be affected. A six-month stay-home requirement would be a major concern for sheep farms because that length of time may reduce the likelihood of the employee returning to the U.S. and increases the sheep farmers' risk of having an insufficient number of employees. However, the three-month stay home requirement will have a minimal impact. According to major users of the sheepherder H–2A program, most sheepherders stay home for two or three months already. Employers active in the program have already built that expectation into their planning.[31] The new mandatory three-month stay-away requirement will be an additional factor for a sheep ranch's consideration in deciding how many H–2A alien employees it needs. Also, the ranch will want to make sure that all of its H–2A sheepherders are not on the same cycle for their requirement to return home and stay. However, alien workers leave their jobs for a number of reasons on a regular basis and often have to return home for family events and emergencies. No increase in expenses is expected as a result of sheepherders being mandated under this rule to stay away. In addition, qualitative impacts are expected to be slight, if they occur at all.

Therefore, the changes proposed in the subject rule that add new compliance requirements on rangeland livestock operations will not have a significant economic impact.

[28] *http://www.sheepusa.com.*

[29] Telephone conversations with Sarah Peters and Dennis Richens of the Western Range Association.

[30] Western Range—217 plus Mountain Plains—330 = 547—rounded to 550.

[31] Sheep Industry Association, Mountain Plans, and Western Range.

C. Effect of Repatriation Provision

As stated above, this rule proposes to prohibit the approval of an H–2A petition for a worker from a country that refuses repatriation of its citizen, subjects, nationals or residents. Thus, where a country has no repatriation agreement with the United States, or where the country routinely refuses to issue travel documents, or cooperate in repatriation, or where for whatever reason the United States is unable to systematically repatriate deportees, H–2A employees from that country will not be permitted.

This change is intended to encourage more nations to promptly accept the return of their nationals who no longer have valid status as nonimmigrants in the United States. However, the actual impact is expected to be negligible because very few H–2A workers are from such countries. According to U.S. Immigrations and Customs Enforcement, the top five non-cooperating countries are the People's Republic of China, India, Vietnam, Pakistan, and Laos. However, 98 percent of all H–2A workers during FY 2006, based on number of admissions, were from Mexico (40,283), Jamaica (3,376), South Africa (757), Peru (562), and Canada (454). Repatriation is not a problem with these countries and there is no reason to believe that the changes made in this rule will cause any shift in major source countries for temporary agricultural workers at all, much less to the countries where this is a problem. Thus this change is not expected to have any impact on the availability of H–2A labor.

D. Other Impacts of the Proposed Changes

1. Volume of Applications

The changes proposed by this rule are intended to increase the flexibility and attractiveness of the H–2A visa program. Therefore, the proposals in this rule are expected to result in a small increase in the number of H–2A visas petitioned for and approved. USCIS has no reliable way to estimate the impact of these proposed changes on petition filings and approval volume with any precision. Nonetheless, it is reasonable to expect about a 5 percent increase per year in the number of employers filing a Form I–129 to request H–2A employees as a result of the proposals in this rule. Based on the 6,000 projected Form I–129 filings for H–2A employees per fiscal year, this would result in an estimated 300 additional filings per year.[32]

[32] 5,667 + 6,212/2 = 5,940 × .05 = 297.

2. Qualitative Impacts

Reduced delays: USCIS expects no significant increase in filings to result from allowing employers to petition for unnamed beneficiaries and only requires the petition to include the names of those beneficiaries who are in the United States. In H–2A filings many beneficiaries are currently unnamed. This change will benefit applicants mainly by eliminating the requirement that beneficiaries be named so that no Intragency Border Inspection System (IBIS) check will hold up the petition application process.

Improved quality of life for H–2A seasonal workers. Reducing the time required for an H–2A worker to be out of the country, allowing more time for departure after the visa has expired, and allowing for an extension of stay while a new petition is pending, will cause less disruption of the life and affairs of H–2A workers in the United States.

Reduce abuses in the program. Another major goal of this rule, in addition to providing agricultural employers with an orderly and timely flow of legal workers, is protecting laborers' rights. Changes e, f, g, and h above, go directly to protecting laborers' rights by precluding the payment of employment or recruitment fees by aliens seeking H–2A positions. Specifically, these changes will reduce the abuse of H–2A employees by unscrupulous H–2A petitioners and/or their agents, who have required (or who have used third parties that require) persons seeking H–2A positions to pay such fees. USCIS also believes that this rule will help minimize the immigration fraud and abuses that have been known to occur when aliens are required to pay employment fees. Abuses that will be reduced by the changes in e, f, g and h will include petition padding (i.e., the filing of requests for more workers than needed), sale of H–2A positions to the highest bidder, and human trafficking. Changes e, f, g and h are also intended to deter the coercion of alien workers and their family members by recruiters, facilitators, and others who would otherwise pressure such persons for payment of debts incurred in connection with seeking an H–2A position. These changes will also discourage other exploitative practices that, in the past, have tarnished the reputation of the H–2A program.

In addition, the attestation requirement referred to in change f above will ensure continued compliance with section 218 of the INA. Should the employer wish to employ an H–2A worker in a different capacity than that represented in its labor certification, application, and petition, it may after complying with some requirements depending on the circumstances. This change will ensure continued compliance with section 218 of the INA and the integrity of the H–2A program.

In summary, the changes in e, f, g, and h are essential for ensuring against the most egregious of the documented abuses to the H–2A program while in no way limiting the availability of H–2A workers to U.S. agricultural employers.

Illegal immigration (number of agricultural workers who are unauthorized) will decline. It is presumed that this rule will result in those employers who currently hire seasonal agricultural workers who are not properly authorized to work in the United States to replace those workers with legal workers to the extent that this rule allows the employer to obtain a sufficient number of H–2A employees considering the costs and risk associated with hiring no worker or an unauthorized worker.

3. Government Costs

This rule is expected to result in no changes in program costs for the government.

E. Summary and Conclusion

1. Small Entity Effects

The entities affected by this rule are nearly all categorized as small under the RFA. However, only about 0.3 percent of all farmers use the H–2A program and 9.3 percent of all farm workers are aliens employed under the H–2A program. As for sheep ranchers that may be directly affected by the changes in this rule, the 550 identified predominant users comprise less than 1 percent of the 69,090 sheep operations in the United States and Puerto Rico in 2006, and only 6 percent of the operations in California, Colorado, Idaho, Montana, Nevada, New Mexico, and Wyoming. USCIS believes that the percentages of total farms affected by this rule do not represent a sufficient portion of the agricultural producers in the United States to rise to a level that could be called substantial as the term is intended under the RFA.

This rule will not impose a significant economic impact on any firms. This rule proposes several changes to the H–2A visa program that USCIS believes are necessary to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers. There are no additional regulatory compliance requirements to be added that will cause a detectable increase in costs for participating firms. Thus, when comparing the annualized costs of this

proposed rule as a percentage of a typical participating regulated small firm's annual sales there is no significant economic effect.

2. Increased Costs for Small Businesses

Costs of compliance for small businesses will not be changed by this proposed rule. Volume of applications may increase slightly, but the burden of compliance both in time and fees will not increase above that currently imposed.

3. Increased Costs for Individuals

The annual undiscounted costs for aliens admitted on an H–2A visa to comply with the DHS Biometric Exit Pilot as Part of US–VISIT range from $28,000 to $171,000.

4. Benefits

This rule will benefit applicants by:

- Reducing delays caused by IBIS checks holding up the petition application process:
- Reducing disruption of the life and affairs of H–2A workers in the United States;
- Protecting laborers' rights by precluding payment of fees by the alien;
- Preventing the filing of requests for more workers than needed, visa selling, coercion of alien workers and their family members, or other practices that exploit workers and stigmatize the H–2A program;
- Encouraging employers who currently hire seasonal agricultural workers who are not properly authorized to work in the United States to replace those workers with legal workers; and
- Minimizing immigration fraud and human trafficking.

F. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988

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

H. Paperwork Reduction Act

This rule requires that a petitioner submit Form I–129, Petition for Nonimmigrant Worker, seeking to classify an alien as an H–2A nonimmigrant. This form has been previously approved for use by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The OMB control number for this collection is 1615–0009. However, USCIS will make minor changes to the Form I–129 by requiring an employer to certify that during the period of intended employment for which the petition is approved, the petitioner will not expand the alien workers' duties, place of employment, nor the entities for which the duties will be performed beyond the information provided on the Form I–129 and temporary labor certification, and by updating the language describing employers' responsibility to inform DHS of H–2A employee no-show, termination, or abscondment and the requirement to pay liquidated damages for failure to make such notification. In addition, USCIS estimates that the number of U.S. employers using the Form I–129 will increase. Accordingly, once this rule is published as a final rule, USCIS will submit to OMB, the Form I–129 (with minor changes) and raise the number of respondents and burden hours associated for this information collection using an OMB 83–C, Correction Worksheet.

In addition, this rule requires, as a prerequisite to an H–2A worker receiving an automatic extension of employment authorization with the filing of a petition by a new employer, that employers enroll in E-Verify, which is an information collection system previously approved for use under the Paperwork Reduction Act. The OMB Control Number for this information collection is 1615–0092.

Under the changes contained in this regulation, USCIS estimates that the number of U.S. employers using E-Verify will increase. Accordingly, once this rule is published as a final rule, USCIS will submit an OMB 83–C, Correction Worksheet, to OMB raising the number of respondents and burden hours associated for this information collection.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students, Victims.

8 CFR Part 215

Administrative practice and procedure, Aliens.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185, 1186a, 1187, 1221, 1253, 1281, 1282, 1301–1305 and 1372; section 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 8 CFR part 2.

2. Section 214.2 is amended by:

a. Revising paragraphs (h)(2)(i)(A) and (D);
b. Revising paragraph (h)(2)(iii);
c. Revising paragraph (h)(5)(i)(A);
d. Revising paragraph (h)(5)(i)(B);
e. Revising paragraph (h)(5)(i)(C);
f. Adding a new paragraph (h)(5)(i)(F);
g. Removing last sentence from (h)(5)(ii);
h. Revising paragraph (h)(5)(vi);
i. Revising paragraph (h)(5)(viii)(A);
j. Revising paragraph (h)(5)(viii)(B);
k. Revising paragraph (h)(5)(viii)(C);
l. Adding a new paragraph (h)(5)(viii)(D);
m. Revising paragraph (h)(5)(ix);
n. Revising paragraph (h)(5)(x);
o. Adding a new paragraph (h)(5)(xi); and by
p. Revising paragraph (h)(11)(ii).

The revisions and additions read as follows:

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

* * * * *

(h) * * *

(2) * * *

(i) * * *

(A) *General.* A United States employer seeking to classify an alien as an H–1B, H–2A, H–2B, or H–3 temporary employee must file a petition on Form I–129, Petition for Nonimmigrant Worker, as provided in the form instructions.

* * * * *

(D) *Change of employers.* If the alien is in the United States and seeks to

change employers, the prospective new employer must file a petition on Form I–129 requesting classification and an extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay must conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. Except as provided by 8 CFR 274a.12(b)(21) or section 214(n) of the Act, 8 U.S.C. 1184(n), the alien is not authorized to begin the employment with the new petitioner until the petition is approved. An H–1C nonimmigrant alien may not change employers.

* * * * *

(iii) *Naming beneficiaries.* H–1B, H–1C, and H–3 petitions must include the name of each beneficiary. All H–2A and H–2B petitions must include the name of each beneficiary who is currently in the United States, but need not name any beneficiary who is not currently in the United States. However, a petitioner who files on behalf of workers who are not present in the United States an H–2B petition that is supported by a temporary labor certification requiring education, training, experience, or special requirements of the beneficiary must name all the requested workers in each petition. Unnamed beneficiaries must be shown on the petition by total number. If all of the beneficiaries covered by an H–2A or H–2B temporary labor certification have not been identified at the time a petition is filed, multiple petitions for subsequent beneficiaries may be filed at different times but must include a copy of the same temporary labor certification. Each petition must reference all previously filed petitions for that temporary labor certification.

* * * * *

(5) * * *

(i) * * *

(A) *General.* An H–2A petition must be filed on Form I–129 with a single valid temporary agricultural labor certification. The petition may be filed by either the employer listed on the temporary labor certification, the employer's agent, or the association of United States agricultural producers named as a joint employer on the temporary labor certification.

(B) *Multiple beneficiaries.* The total number of beneficiaries of a petition or series of petitions based on the same temporary labor certification may not exceed the number of workers indicated on that document. A single petition can include more than one beneficiary if the total number does not exceed the number of positions indicated on the relating temporary labor certification.

(C) *Petitioner's Attestation.* A petitioner must file an attestation, certified as true and accurate by an appropriate official of the petitioner, that during the period of intended employment for which the petition is approved, neither the alien workers' duties, place of employment, nor the entities for which the duties will be performed will expand beyond the related information provided on the Form I–129 and labor certification. The petitioner must also state in the attestation whether: It received, directly or indirectly, any fee or other form of compensation from any alien beneficiary; it has any arrangement or intends to have an arrangement for remuneration, direct or indirect, from any recruiter, facilitator or similar employment service with which it coordinates employment of the H–2A workers, and if so, the name of any recruiter, facilitator, or similar employment service used to locate H–2A workers; and, to the best of its knowledge, any alien beneficiary has provided, or intends to provide, any remuneration, direct or indirect, to any such recruiter, facilitator, or similar employment service.

* * * * *

(F) *Petitions for Nationals of Countries That Refuse Repatriation.* No H–2A petition can be approved for a citizen, subject, national or resident of a country whose government the Secretary of Homeland Security has determined consistently denies or unreasonably delays accepting the return of citizens, subjects, nationals or residents who are subject to a final order of removal from the United States. The Secretary will review such determinations periodically to evaluate if the subject country is accepting repatriated nationals.

* * * * *

(vi) *Petitioner consent and notification requirements*—(A) *Consent.* In filing an H–2A petition, a petitioner and each employer consents to allow access to the site where the labor is being performed for the purpose of determining compliance with H–2A requirements.

(B) *Agreements.* The petitioner agrees to the following requirements:

(*1*) To notify DHS in writing, within 48 hours, and beginning on a date and in a manner specified in a notice published in the **Federal Register** if: An H–2A worker fails to report for work within 5 days after the employment start date stated on the petition; the employment of an H–2A worker terminates more than 5 days before the employment end date stated on the petition; or an H–2A worker absconds from the worksite.

(*2*) To retain evidence of such notification and make it available for inspection by DHS officers for a one-year period beginning on the date of the notification.

(*3*) To pay $500 in liquidated damages for each instance where it cannot demonstrate it is in compliance with the notification requirement.

(C) *Process.* Except when the petitioner has admitted in writing a failure to comply with the notification requirement, the petitioner will be given written notice and 10 days to reply before being given written notice of the assessment of liquidated damages.

(D) *Failure to pay liquidated damages.* If liquidated damages are not paid within 10 days of assessment, an H–2A petition may not be processed for that petitioner or any joint employer shown on the petition until such damages are paid.

(E) *Abscondment.* An H–2A worker has absconded if he or she has not reported for work for a period of 5 days without the consent of the employer.

* * * * *

(viii) * * *

(A) *Effect of violations of status.* An alien may not be accorded H–2A status who USCIS finds to have, at any time during the past 5 years, violated any of the terms or conditions of admission into the United States as an H–2A nonimmigrant, including remaining beyond the specific period of authorized stay or engaging in unauthorized employment.

(B) *Period of admission.* An alien admissible as an H–2A nonimmigrant shall be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to one week before the beginning of the approved period for the purpose of travel to the worksite, and a 30-day period following the expiration of the H–2A petition for the purpose of departure or extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12 or section 214(n) of the Act, the beneficiary may not work except during the validity period of the petition.

(C) *Limits on an individual's stay.* Except as provided in paragraph (h)(5)(viii)(B) of this section, an alien's stay as an H -2A nonimmigrant is limited by the term of an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining

an extension of stay. However, an individual who has held H–2A status for a total of 3 years may not again be granted H–2A status until such time as he or she remains outside the United States for an uninterrupted period of 3 months. An absence from the United States can interrupt the accrual of time spent as an H–2A nonimmigrant against the three-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least two months. Eligibility under this paragraph (h)(5)(viii)(C) will be determined in admission, change of status or extension proceedings. An alien found eligible for a shorter period of H–2A status than that indicated by the petition due to the application of this paragraph (h)(5)(viii)(C) shall only be admitted for that abbreviated period.

(D) *Nationals of Countries That Refuse Repatriation.* No alien may be accorded H–2A status who is a citizen, subject, national or resident of a country whose government the Secretary of Homeland Security has determined consistently denies or unreasonably delays accepting the return of citizens, subjects, nationals or residents who are subject to a final order of removal from the United States. The Secretary of Homeland Security will review such determinations periodically to evaluate if the subject country is accepting repatriation within a reasonable period of time.

(ix) *Substitution of beneficiaries after admission.* An H–2A petition may be filed to replace H–2A workers whose employment was terminated early. The petition must be filed with a copy of the certification document, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (h)(5)(i)(D) of this section. It must also be filed with a statement giving each terminated worker's name, date and country of birth, and termination date. A petition for a replacement may not be approved where the requirements of paragraph (h)(5)(vi) of this section have not been met. A petition for replacements does not constitute the notification required by paragraph (h)(5)(vi)(B)(*1*) of this section.

(x) *Extensions in emergent circumstances.* In emergent circumstances, as determined by a Service Center director, a single H–2A petition may be extended without an approved labor certification if filed on behalf of one or more beneficiaries who will continue to be employed by the same employer that previously obtained an approved petition on the beneficiary's behalf, so long as the employee continues to perform the same duties and will be employed for no longer than 2 weeks after the expiration of previously-approved petition. The previously approved petition must have been based on an approved temporary labor certification.

(xi) *Treatment of petitions and alien beneficiaries upon a determination that fees were collected from alien beneficiaries*—(A) *Denial or revocation of petition.* As a condition to approval of an H–2A petition, no fee or other compensation (either direct or indirect) may be collected from a beneficiary of an H–2A petition by a petitioner, agent, facilitator, recruiter, or similar employment service in connection with an offer or condition of H–2A employment. If a Service Center director determines that the petitioner has collected, or entered into an agreement to collect, such fee or compensation or that the petitioner is aware that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service, in connection with obtaining the H–2A employment, the H–2A petition will be denied or revoked on notice.

(B) *Effect of petition revocation.* Upon revocation of an H–2A petition based upon paragraph (h)(5)(xi)(A) of this section, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment. The employer shall be liable for the alien beneficiary's reasonable costs of return to his or her last place of foreign residence abroad, unless such alien obtains an extension of stay based on an approved H–2A petition filed by a different employer, and such employer states in the job offer that it will pay the alien's reasonable return transportation expenses upon completion of the his or her new employment.

* * * * *

(11) * * *

(ii) *Immediate and automatic revocation.* The approval of any petition is immediately and automatically revoked if the petitioner goes out of business, files a written withdrawal or the petition, or the Department of Labor revokes the labor certification upon which the petition is based.

* * * * *

PART 215—CONTROLS OF ALIENS DEPARTING FROM THE UNITED STATES

2. The authority citation for part 215 continues to read as follows:

Authority: 8 U.S.C. 1104; 1184; 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1365a note, 1379, 1731–32.

3. Section 215.9 is added to read as follows:

§ 215.9 Temporary Worker Visa Exit Program.

An alien admitted on an H–2A visa at a port of entry participating in the Temporary Worker Visa Exit Program must also depart at the end of their authorized period of stay through a port of entry participating in the program and present designated biographic and/or biometric information upon departure. U.S. Customs and Border Protection will publish a notice in the **Federal Register** designating which H–2A workers must participate in the Temporary Worker Visa Exit Program, which ports of entry are participating in the program, which biographical and/or biometric information would be required, and the format for submission of that information by the departing designated temporary workers.

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

4. The authority citation for section 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

5. Section 274a.12 is amended by:

a. Removing the word ''or'' at the end of paragraph (b)(19);

b. Removing the period at the end of paragraph (b)(20), and adding a ''; or'' in its place; and by

c. Adding a new paragraph (b)(21).

The addition reads as follows:

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

* * * * *

(b) * * *

(21) A nonimmigrant alien within the class of aliens described in 8 CFR 214.2(h)(1)(ii)(C) who filed an application for an extension of stay pursuant to 8 CFR 214.2 or 8 CFR 214.6 during his or her period of admission. Such alien is authorized to be employed by a new employer that has filed an H–2A petition naming the alien as a beneficiary and requesting an extension of stay for the alien for a period not to exceed 120 days beginning from the ''Received Date'' on Form I–797 (Notice of Action) acknowledging receipt of the

petition requesting an extension of stay, provided that the employer has enrolled in and is a participant in good standing in the E-Verify program, as determined by USCIS in its discretion. Such authorization will be subject to any conditions and limitations noted on the initial authorization, except as to the employer and place of employment. However, if the District Director or Service Center director adjudicates the application prior to the expiration of this 120-day period and denies the application for extension of stay, the employment authorization under this paragraph (b)(21) shall automatically terminate upon 15 days after the denial decision. The employment authorization shall also terminate automatically if the employer fails to remain a participant in good standing in the E-Verify program, as determined by USCIS in its discretion.

* * * * *

Michael Chertoff,

Secretary.

[FR Doc. E8–2532 Filed 2–12–08; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0109; Directorate Identifier 2007–NM–235–AD]

RIN 2120–AA64

Airworthiness Directives; Lockheed Model 382, 382B, 382E, 382F, and 382G Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: This document announces a reopening of the comment period for the above-referenced NPRM. The NPRM proposed the adoption of a new airworthiness directive for all Lockheed Model 382, 382B, 382E, 382F, and 382G series airplanes. That NPRM invites comments concerning the proposed requirements for revising the FAA-approved maintenance inspection program to include inspections that will give no less than the required damage tolerance rating for each structural significant item (SSI), doing repetitive inspections to detect cracks of all SSIs, and repairing cracked structure. This reopening of the comment period is necessary to provide additional opportunity for public comment on the proposed requirements of that NPRM.

DATES: We must receive comments on this proposed AD by March 31, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Lockheed Martin Aeronautics Company, 86 South Cobb Drive, Marietta, Georgia 30063.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Carl Gray, Aerospace Engineer, Airframe Branch, ACE–117A, FAA, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia 30349; telephone (770) 703–6131; fax (770) 703–6097.

SUPPLEMENTARY INFORMATION:

We proposed to amend 14 CFR part 39 with a notice of proposed rulemaking (NPRM) for an AD for all Lockheed Model 382, 382B, 382E, 382F, and 382G series airplanes. The NPRM was published in the **Federal Register** on November 14, 2007 (72 FR 64005). The NPRM proposed to require revising the FAA-approved maintenance inspection program to include inspections that will give no less than the required damage tolerance rating for each structural significant item (SSI), doing repetitive inspections to detect cracks of all SSIs, and repairing cracked structure. The NPRM action invites comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD.

Actions Since NPRM Was Issued

Since we issued the NPRM, we have received one comment. Lynden Air Cargo requests an additional 45 days to comment on the NPRM. Lynden Air Cargo states that it needs more time to:

- Review Lockheed Martin Model 382, 382B, 382E, 382F, and 382G Series Aircraft Service Manual Publication (SMP), Supplemental Structural Inspection Document, SMP 515–C–SSID, Change 1, dated September 10, 2007 (referred to the NPRM as the appropriate source of service information for accomplishing the proposed actions). Lynden Air Cargo states that the service information was not made available by the Type Certificate holder until December 18, 2007.
- Comment about the conclusion in the Regulatory Evaluation (located in the docket) that the NPRM does not affect intrastate aviation in Alaska. Lynden Air Cargo states that its military operations in Alaska account for some 4.5 million pounds of lift per year.
- Review service difficulty reports to validate the presence of an unsafe condition relating to the affected airplanes. Lynden Air Cargo states that it does not appear that the requirements of the NPRM are based upon any unsafe condition related to a particular type design.

It is our intent to address the identified unsafe condition in a timely manner with minimum disruption to industry. We encourage interested parties to continue to evaluate the NPRM and to submit additional comments with more specific details concerning issues that we may need to evaluate before finalizing decisions on the proposal. We have determined that such input may be beneficial before adoption of a final rule. As a result, we have decided to reopen the comment period for 45 days to receive additional comments.

No part of the regulatory information has been changed; therefore, the NPRM is not republished in the **Federal Register**.

Comments Due Date

We must receive comments on this AD action by March 31, 2008.

Issued in Renton, Washington, on February 7, 2008.

Kevin Hull,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–2742 Filed 2–12–08; 8:45 am]

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