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Building and Construction Trades Department

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September 19, 2008

Chief, Regulatory Management Division
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
111 Massachusetts Avenue, N.W., Suite 3008
Washington, D.C. 20529

Re: Department of Homeland Security Notice of Proposed Rulemaking [RIN 1615-AB57], Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers, 20 C.F.R. Parts 204, 214, and 215, DHS Docket No, USCIS-2007-0058

Dear Sir or Madam:

The following comments are submitted on behalf of the Building and Construction Trades Department, AFL-CIO ("BCTD"), who's thirteen affiliated national and international unions represent more than 2.5 million workers engaged in the building and construction industry in the United States and Canada.

Most of the workers represented by the BCTD and its affiliates in the United States are engaged in or seek employment in the building and construction industry, which can be short-term and intermittent. These workers, as well as other U.S. workers who perform non-agricultural skilled and unskilled labor, are the intended beneficiaries of a labor certification process that is part of the H-2B visa program created by Section 101(a)(15(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15(H)(ii)(b), which is overseen by three Federal Government agencies. The Department of Homeland Security's U.S. Citizenship and Immigrations Services ("USCIS") is responsible for adjudicating petitions for H-2B visas.

These comments are submitted in response to the Notice of Proposed Rulemaking (NPRM) published on August 20, 2008 by the Department of Homeland Security ("DHS"), 73 Fed. Reg. 49109 *et seq.*, which would: (1) modify current limitations with respect to petitions for unnamed H-2B workers and the period of time that an H-2B worker must remain outside the United States before he or she would be eligible to seek certain nonimmigrant status again; and (2) change the definition of "temporary employment" to recognize that such employment could last up to three

years. For the following reasons, the BCTD is opposed to adoption of these proposed rules.

On the other hand, the BCTD strongly supports proposed rule changes that would: (1) require petitioners seeking H-2B visas to certify as true and accurate under penalty of perjury that they have been informed of their responsibilities and obligations, and help prevent the employment of H-2B workers in a manner that conflicts with the representations upon which approval of the petition is based; (2) preclude the imposition of fees by employers on prospective H-2B workers; (3) require reimbursement of fees paid by H-2B workers to recruiters; (4) preclude the change of the employment start date after the grant of a temporary labor certification; (5) eliminate the process whereby H-2B petitions may be approved notwithstanding the absence of a valid temporary labor certification by the Department of Labor ("DOL"); (6) require employer notification when H-2B workers fail to show up for work, are terminated, or abscond from the worksite; (7) require certain H-2B workers departing the United States to participate in a temporary worker visa exit pilot program; (8) delegate authority to enforce the terms of the H-2B petition to the Secretary of Labor (in the event DHS and DOL work out a mutually agreeable delegation of enforcement authority from DHS to DOL; and (9) bar nationals of countries consistently refusing or unreasonably delaying repatriation of their nationals from obtaining H-2B status.

I. Proposed Rules That the BCTD Opposes.

A. Employers Should Not Be Permitted to File Petitions for H-2B Visas, Which Specify Only the Number of Foreign Workers Sought But Not Their Names.

USCIS is proposing to amend Section 214.2(h)(2)(iii) of the DHS regulations, 8 C.F.R. § 214.2(h)(2)(iii) (2008), in order to allow employers petitioning for aliens to fill H-2B positions to specify only the number of positions sought and not name the individual alien(s), except where the alien is already present in the United States.

Currently, Section 214.2(h)(2)(iii) states that petitions for non-agricultural workers must include the names of the alien workers on whose behalf the petitions are filed. Section 214.2(h)(2)(iii) further states that exceptions to this requirement may be granted for petitions for H-2B workers "in emergent situations involving multiple beneficiaries at the discretion of the director. And in special filing situations as determined by the [USCIS's] Headquarters." This requirement is especially important in circumstances where an agent, not the employer, files petitions for H-2B visas.

Additionally, Section 214.2(h)(2)(II)(F) of the DHS regulations, 8 C.F.R. § 214.2(h)(2)(II)(F) (2008), currently permits United States agents to file petitions for H-2B

visas "in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers." The DHS regulation further states that a "United States agent may be the actual employer of the [H-2B worker], the representative of both the employer and the [H-2B worker], or, a person or entity authorized by the employer to act for, or in the place of, the employer as it (sic) agent" subject to the conditions set forth in Section 214.2(h)(2)(F)(*1*) through (*3*), 8 C.F.R. § 214.2(h)(2)(F)(*1*)-(*3*) (2008).

The co nditions applicable to such "agents" set forth in the DHS regulations include a requirement that agents performing the function of an employer must, among other things, "provide an itinerary of definite employment and information on any other services planned for the period of time requested." 8 C.F.R. § 214.2(h)(2)(F)(*1*); *see also* 8 C.F.R. § 214.2(h)(2)(F)(*2*) (requiring agents, which file H petitions involving multiple employers as the representative of both the employer and the H-2B worker or workers, to provide itineraries that specify the dates of each worker's service or engagement, the names and addresses of the establishment, venue, or location where the services will be performed, and "in questionable cases, a contract between the employers and the [H-2B worker or workers] may be required").

The BCTD has become aware that temporary staffing agencies often file petitions for H-2B visas on behalf of large numbers of foreign workers who are leased to U.S. employers for a fee. In many instances, the actual place of employment of the leased H-2B workers is in states other than the one in which the temporary labor certification was issued in support of the petition. This practice effectively renders the labor certification meaningless inasmuch as it is based, among other things, on a determination by the DOL that there are not sufficient workers who are able, willing, qualified and available at the place where the alien is to perform such skilled or unskilled labor. Proposed elimination of the requirement in Section 214.2(h)(2)(iii) that petitions for H-2B visas must include the names of the alien workers on whose behalf the petitions are filed will make it virtually impossible to monitor the location and working conditions of H-2B workers employed by staffing agencies acting as "agents."

Thus, it is suggested that DHS withdraw its proposal to amend Section 214.2(h)(2)(iii) so that it would allow employers to specify in their petitions for H-2B visas only the positions sought and not the names of the individual H-2B workers whose admission to the U.S. is sought. A less desirable alternative is to modify proposed Section 214.2(h)(2)(iii) so that it allows employers but not agents, as defined in Section 214.2(h)(2)(II)(F) of the DHS regulations, to specify only the number of positions sought and not the names of the individual aliens in their petitions for H-2B visas.

This alternative proposal, although not as protective of labor standards as our preferred alternative of simply withdrawing the proposal to amend Section

214.2(h)(2)(iii), is fair and equitable inasmuch as these so-called agents are currently only permitted to file petitions in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf (presumably to petition for H-2B visas on behalf of their own employees to permit them to work in the U.S. on a temporary basis). In each of these circumstances, the agent is supposedly acting on behalf of readily identifiable foreign workers. Therefore, there should be no need to file petitions for H-2B visas without naming each beneficiary. Moreover, this alternative proposal would give bona fide employers, who satisfy the labor certification requirements that are a prerequisite to obtaining H-2B visas on behalf of these H-2B workers, greater flexibility to recruit foreign workers who are actually interested in and available for employment on the date of the stated need, without encouraging escalation of the number of wholesale petitions for H-2B visas filed by staffing agencies that intend to lease the H-2B workers to employers throughout the United States. Finally, this alternative proposal would also reduce the volume of petitions filed for the limited number of H-2B visas available each fiscal year thereby making them more readily available to U.S. employers that have a legitimate need for temporary foreign labor.

B. A Multiple-Year Need for Labor is not a "Temporary" Job Opportunity Eligible for Labor Certification under the H-2B Program.

Section 214.2(h)(6)(ii)(B) of the DHS regulations states:

> (B) *Nature of petitioner's need.* As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(B) (2008). However, the NPRM states that the USCIS has determined that the general one-year limit contained in the current definition of a petitioner's temporary need for the services or labor performed by an H-2B worker "is unnecessarily limiting on the employment opportunities that may otherwise qualify for H-2B classification." 73 Fed. Reg. at 49114.

Accordingly, DHS explains in the NPRM:

> Under the proposed rule, a job would be defined to be temporary where the employer needs a worker to fill the job for a limited period of time. The

> term "limited period of time" is in turn defined as a period of need that will end in the near, definable future. As under the current regulations, USCIS would generally consider a period of temporary need to be limited to one year or less, but the proposed rule eliminates the "extraordinary circumstances" restriction on periods longer than a year and explicitly provides that such a period could last up to three years.

Id. But the DHS explanation of the proposed rule fails to accurately describe the plain language of the proposed rule, which states:

> (B) *Nature of petitioner's need.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. That means the employer must establish that the need for the employee will end in the near, definable future. ***Generally, that period of time will be limited to one year or less, but in the case of a one-time occurrence event, could last longer than one year and up to three years.*** The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

73 Fed. Reg. at 49123 (emphasis added).

Hence, contrary to the broad description in the NPRM, the proposed rule does not state that a petitioner's period of "temporary need" could last up to three years regardless of the nature of such need. Instead, the proposed rule clearly states that the "temporary need" of a petitioner for an H-2B visa will generally "be limited to one year or less" ***except*** "in the case of a one-time occurrence event" when, under certain circumstances, the petitioner's "temporary need" "could last longer than one year and up to three years."

The NPRM makes clear that the USCIS proposed this rule change:

> because there are some employers who may need temporary workers for a specific project, such as the construction of a specific building, structure (e.g., bridge, power plant) or other development, which will have a definable end point but may require more than one year to complete. Under this proposal, an employer's need for the duties to be performed by H-2B workers can be considered temporary if it is a one-time occurrence and does not exceed three years.

73 Fed. Reg. at 49115. However, a contractor or subcontractor in the building and construction industry would rarely if ever be able to demonstrate that its need for temporary labor qualifies as a "one-time occurrence."

Section 214.2(h)(6)(B)(*1*) of the DHS regulations describes, as follows, the circumstances that must exist in order for a petitioner's need to qualify as a "one-time occurrence:"

> The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, ***or*** that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created a need for a temporary worker.

8 C.F.R. § 214.2(h)(6)(B)(*1*) (2008) (emphasis added).

Thus, the nature of the need of a contractor or subcontractor in the building and construction industry, which regularly employs craft workers to perform certain tasks such as pipefitting, masonry work, electrical work, steel erection or carpentry, to hire temporary foreign labor to perform such tasks on "a specific project, as part of the construction of a specific building, structure (e.g., bridge, power plant) or other development," would rarely if ever qualify under the first prong of Section 214.2(h)(6)(B)(*1*) of the DHS regulations as a "one-time-occurrence." This is because such contractors and subcontractors would rarely, if ever, be able to demonstrate that they have "not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future," albeit on different projects.

Moreover, a contractor or subcontractor in the building and construction industry would rarely if ever be able to satisfy the alternative prong of Section 214.2(h)(6)(B)(*1*) of the DHS regulations, which requires that the contractor or subcontractor "has an employment situation that is otherwise permanent, but a temporary event of short duration has created a need for a temporary worker," because employment in that industry is typically short-term and intermittent rather than permanent.

Consequently, the proposed expanded definition of "temporary need" set forth in the NPRM, if applied as written, would not enable many, if any, employers in the building and construction industry to hire foreign temporary workers for a specific project, such as the construction of a particular building, structure (e.g., bridge, power plant) or other development, for a period longer than one year notwithstanding the stated intent of USCIS to do so.

More importantly, ***any*** proposed change in the DHS regulations that would expand the period of a petitioner's "temporary need" for H-2B workers up to as long as three years begs the fundamental question of whether, except under extraordinary

circumstances, an H-2B visa should ever be issued for a period of time that exceeds one year. Perhaps in an alternative universe "temporary need" means a period that exceeds one year or more, but not in this world. Moreover, in case the commonly understood meaning of "temporary" does not clearly and unequivocally demonstrate that the proposal to authorize issuance of multiple-year H-2B visas is simply wrong-headed, one need only consider the well-settled standards, which DHS has applied over the years to determine whether an employer's need for non-agricultural labor or services is "temporary."

Under the DHS H-2B visa program, an employer's need for services or labor must be either (1) a one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need. *See* 8 C.F.R. § 214.2(h)(6)(ii)(B) (2008) and 73 Fed. Reg. at 49123 to be codified as 8 C.F.R. § 214.2(h)(6)(ii)(B). The DHS regulations implementing the H-2B visa program identify each of the four situations, which qualify as a "temporary need," in terms that convey the idea that the need of an employer petitioning for H-2B visas must be for a short duration.

As already discussed hereinabove, Section 214.2(h)(6)(B)(*1*) of the DHS regulations, 8 U.S.C. § 214.2(h)(6)(B)(*1*) (2008), describes a "One-Time Occurrence" (petitioner must establish that it has not employed workers to perform the services or labor in the past and will not need workers to perform the services or labor in the future, or that the petitioner has an employment situation that it otherwise permanent but a temporary event of short duration has created the need for a temporary worker(s)). In addition, Section 214.2(h)(6)(B)(*2*) of the DHS regulations, 8 U.S.C. § 214.2(h)(6)(B)(*2*) (2008), defines a "Seasonal Need" (petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature, and petitioner must specify the period(s) of time during each year in which it does not need the services or labor. Furthermore, Section 214.2(h)(6)(B)(*3*) of the DHS regulations, 8 U.S.C. § 214.2(h)(6)(B)(*3*) (2008), defines a "Peakload Need" (petitioner must establish that (1) it regularly employs permanent workers to perform the services or labor and that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand, and (2) that the temporary workers will not become a part of the petitioner's regular workforce. Finally; Section 214.2(h)(6)(B)(*4*) of the DHS regulations, 8 U.S.C. § 214.2(h)(6)(B)(*4*) (2008), defines an "Intermittent Need" (petitioner has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently. *i.e.* sporadically, now and then, from time to time, erratically, needs temporary workers to perform services or labor for short periods).

None of the situations described in the DHS regulations as a "temporary need" is consistent with the notion that such need can last for as long as three years. Moreover, the very essence of a "temporary need" is its short duration. Three years is simply not a

"short duration," as that term is commonly understood. Therefore, any proposal that expands the meaning of a "temporary need" for H-2B visa purposes from one year to as long as three years is simply wrong.

Accordingly, the BCTD strongly opposes the proposal in the NPRM to redefine a "temporary need" for H-2B visa purposes; under any circumstances no matter how limited it might be, as lasting more than one year but not more than three years.

C. The Proposed Reduction of the Current Six-Month Waiting Period Prior to Filing for an Extension, Change of Status, or Readmission to the United States Once a Nonimmigrant Worker Reaches the Three-Year Limit on H-2B Nonimmigrant Status is Unnecessary and Offends the Fundamental Temporary Nature of Employment under the H-2B Visa Program.

Section 214.2(h)(13)(iv) of the DHS regulations, 8 C.F.R. § 214.2(h)(13)(iv) (2008), states that an H-2B alien who has spent three (3) years in the United States under Section 101(a)(15)(H) and/or L of the INA may not seek an extension, change status, or be readmitted to the United States under 101(a)(15)(H) and/or L of the INA "unless the alien has resided and been physically present outside the United States for the immediate past 6 months."

The NPRM proposes amending Section 214.2(h)(13)(iv) to shorten the waiting period for H-2B aliens outside the United States from six to three months before they can seek an extension, change status, or be readmitted to the United States under 101(a)(15)(H) and/or L of the INA. *See* 73 Fed. Reg. at 49122 (to be codified as 8 C.F.R. § 214.2(h)(13)(iv)). The NPRM's justification for shortening the waiting period is that it "would 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 of the H-2B program." 73 Fed. Reg. at 49111.

In fact, the proposed shortening of the waiting period does offend the fundamental temporary nature of employment under the H-2B program. First, H-2B workers employed in the U.S. on a seasonal or intermittent basis are not currently required to remain outside the country for any period of time before they can apply for an extension, change status, or be readmitted to the United States under 101(a)(15)(H) and/or L of the INA. Similarly, H-2B workers who are employed for an aggregate of six months or less per year are not required under the current DHS regulations to remain outside the U.S. for six months before applying for an extension, change of status, or be readmitted to the United States under 101(a)(15)(H) and/or L of the INA. *See* Section 214.2(h)(13)(v) of the DHS regulations, 8 C.F.R. § 214.2(h)(13)(v) (2008) (exempts from the limitations in Section 214.2(h)(13)(iv) alien nonimmigrants holding H-2B visas, among others, "who did not reside continually in the United States and whose

employment in the United States was seasonal or intermittent or was for an aggregate of six months or less per year"). Hence, H-2B workers employed in the U.S. on a seasonal or intermittent basis as well as H-2B workers regardless of the basis on which they are employed in the U.S., who are employed for an aggregate of six months or less per year, will not be affected by the proposed amendment of Section 214.2(h)(13)(iv) set forth in the NPRM.

Second, shortening the waiting period outside the United States currently applicable to H-2B workers who have been employed in the country for three (3) years on the basis of a one-time occurrence or a peakload need, as those terms are defined respectively in Section 214.2(h)(6)(B)(*1*) and 214.2(h)(6)(B)(*4*) of the DHS regulations is unquestionably offensive to the fundamental temporary nature of employment of foreign workers under the H-2B program. Section 214.2(h)(6)(ii)(B) of the DHS regulations describes the "nature of temporary employment need" that a U.S. employer can satisfy through employment of an H-2B worker on a one-time, seasonal, peakload, or intermittent basis as generally limited to one year or less. In addition, Section 214.2(h)(15)(ii)(C) of the DHS regulations, 8 C.F.R. § 214.2(h)(15)(ii)(C) (2008), states that an H-2B worker's visa can be extended for a period of up to one year; however, the H-2B worker's stay may not exceed three years, except in the U.S. Virgin Islands where the total period of stay may not exceed 45 days.

Hence, under the current DHS regulations, only H-2B workers who have been hired on a one-time occurrence basis, or on a peakload need basis, are required to physically leave the country after they have been employed for a period of three years and remain outside the U.S. for at least six (6) months before they can apply for an extension, change of status, or be readmitted to the United States under 101(a)(15)(H) and/or L of the INA. Justifying the need to shorten the period of time that an H-2B worker, who was hired to meet an employer's one-time occurrence or peakload need, must wait outside the country before he or she can be readmitted to work in the U.S. for the same employer in order to "reduce the amount of time [the employer] would be required to be without the services of needed workers would extend the meaning of an "employer's temporary need" to the furthest stretch of its indeterminacy. Yet that is exactly what the proposed amendment of Section 214.2(h)(13)(iv) set forth in the NPRM would do.

For these reasons, notwithstanding the assertion in the NPRM to the contrary, this proposed amendment offends the fundamental temporary nature of employment under the H-2B visa program. Therefore, the BCTD strongly opposes the proposal in the NPRM to shorten the period of time an H-2B worker, who has already spent three years working "temporarily" in the United States, must remain outside the U.S. before he or she can seek an extension, change of status or be readmitted to the United States under 101(a)(15)(H) and/or L of the INA.

II. Proposed Rules That the BCTD Supports.

As indicated above, the BCTD supports several of the proposed rule changes set forth in the NPRM. Specifically, the BCTD strongly supports proposed rules that would: (1) require petitioners seeking H-2B visas to certify as true and accurate under penalty of perjury that they have been informed of their responsibilities and obligations, and help prevent the employment of H-2B workers in a manner that conflicts with the representations upon which approval of the petition is based; (2) preclude the imposition of fees by employers on prospective H-2B workers; (3) require reimbursement of fees paid by H-2B workers to recruiters; (4) preclude the change of the employment start date after the grant of a temporary labor certification; (5) eliminate the process whereby H-2B petitions may be approved notwithstanding the absence of a valid temporary labor certification by the DOL; (6) require employer notification when H-2B workers fail to show up for work, are terminated, or abscond from the worksite; (7) require certain H-2B workers departing the United States to participate in a temporary worker visa exit pilot program; (8) delegate authority to enforce the terms of the H-2B petition to the Secretary of Labor (in the event DHS and DOL work out a mutually agreeable delegation of enforcement authority from DHS to DOL; and (9) bar nationals of countries consistently refusing or unreasonably delaying repatriation of their nationals from obtaining H-2B status.

I do not intend to discuss each of these proposed rule changes other than to express the BCTD's support for them. However, I do want to briefly discuss a couple of the proposed rule changes.

A. The Certified Attestations that the Proposed Rule Changes will Impose on Petitioners for H-2B Visas are Fundamentally Different from the Attestation Requirements, Which the Department of Labor has Proposed to Replace its Current Labor Certification Procedures.

DOL recently published for notice and comment proposed changes in its rules applicable to the H-2B labor certification process, which it administers in conjunction with the H-2B visa process administered by DHS and the Department of State. *See* 72 Fed. Reg. 29942 *et seq.* (May 22, 2008) ("DOL NPRM"). One of the major changes in DOL's current H-2B labor certification procedures proposed in the DOL NPRM is adoption of an attestation-based process that would require employers seeking H-2B temporary labor certifications to submit a written attestation, which states that they have met certain recruitment and labor requirements, instead of requiring them to adopt prevailing wages applicable to the job opportunity for which they seek H-2B workers and conduct the prerequisite efforts to recruit U.S. workers for the job opportunity for which

they seek H-2B workers under the oversight and supervision of the various State Workforce Agencies ("SWA").

The BCTD vehemently opposes DOL's proposed change to an attestation-based temporary labor certification process. The basic reason for the BCTD's adamant opposition to the proposed attestation-based temporary labor certification process is that by eliminating the SWA responsibility for overseeing employer recruitment activity, including advertisement of job openings in appropriate publications, and replacing it with a series of employer attestations that would be submitted to a DOL National Processing Center subject to a combination of measures, which include post-adjudication audit, supervised recruitment and/or debarment from future participation in the H-2B temporary labor certification process, would only detect fraud and abuse of the attestation process ***after*** the fact rather than deny temporary labor certifications that will adversely affect the interests of U.S. workers similarly employed in the same locality.

On the other hand, the attestation requirements proposed in the DHS NPRM are intended to preclude petitioners for H-2B visas from avoiding liability for violating the conditions upon which the visas were issued to them by arguing that they were unaware of their responsibilities and obligations. Unlike the attestations that the proposed DOL temporary labor certification process would impose on applicants, which declare after – the-fact that the applicants have satisfied the prerequisites for such certification without actual contemporaneous verification; the attestations in the DHS proposed rule require petitioners for H-2B visas to certify that they understand their responsibilities and obligations under the terms of the visas that will be issued to them, and that they will not violate those responsibilities and obligations in the future.

The use of attestations is an effective means of enforcing ***future compliance*** with the law. It is an ineffective means of enforcing ***past compliance*** with the law. Hence, our support of the proposed attestation requirements in the DHS NPRM and our opposition to the attestation requirements proposed in the DOL NPRM.

B. The Proposed Rule Change That Eliminates the Process Whereby Petitions for H-2B Visas May be Approved by DHS Notwithstanding the Absence of a Valid Temporary Labor Certification Issued by DOL is Consistent with Applicable Law.

Under the current DHS regulations, a petitioner seeking an H-2B visa on behalf of foreign workers who will be employed temporarily in the United States, other than Guam, which receives a notice from the Secretary of Labor that a temporary labor certification cannot be made, may file with the USCIS a petition for an H-2B visa that contains countervailing evidence intended to overcome the absence of a temporary labor certification by the Secretary of Labor 8 C.F.R. § 214.2(h)(6)(iv)(D), (E),

(h)(6)(v)(C), (D) (2008). Moreover, in any case where the USCIS decides that approval of the petition for an H-2B visa is warranted despite the issuance of a Non-Determination Notice by the Secretary of Labor, the approval must be certified by the USCIS Administrative Appeals Office (AAO) pursuant to 8 C.F.R. § 103.4. 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii) (2008).

The NPRM proposes to eliminate USCIS's current authority to adjudicate a petition for an H-2B visa, which lacks a temporary labor certification issued by the Secretary of Labor, because it would be "inappropriate for USCIS to review that decision by adjudicating a petition [for an H-2B visa] that lacks an approved temporary labor certification." 73 Fed. Reg. 49111. It is submitted, however, that DHS's current practice is not only "inappropriate," it is arguably contrary to law.

Section 214(c)(1) of the INA, 8 U.S.C. § 1184(c)(1), states that "the question of importing any alien as a nonimmigrant under [*inter alia*, section 1101(a)(15)] of [Title 8, United States Code] (excluding nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title) in any specific case or specific cases shall be determined by USCIS], after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition, shall be made and approved before the visa is granted." In addition, section 212(a)(5)(A)(i) of the INA, 8 U.S.C. § 1182(a)(5)(A)(i), defines certain classes of persons who cannot be admitted to the United States, either as immigrants or nonimmigrants, unless certain conditions are met. Those classes of persons include aliens who seek to enter the United States to perform skilled or unskilled labor. The statute provides, in relevant part, as follows:

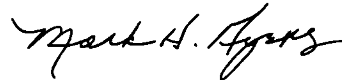
> Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
>
> (5)(A)(i) Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, ***unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General*** that --
>
> (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1182(a)(5)(A)(i) (emphasis added).

Thus, an alien seeking temporary admission to the United States to perform skilled or unskilled labor may be admitted ***only*** when the Secretary of Labor certifies beforehand that U.S. workers are unavailable to perform such work and that the alien's admission will not adversely affect the wages and working conditions of U.S. workers. The principal visa program applicable to non-agricultural temporary skilled and unskilled labor is the H-2B visa program. Accordingly, the USCIS is required to deny an employer's petition for H-2B visas, which is not accompanied by a DOL labor certification issued in accordance with section 212(a)(5)(A)(i) of the INA. Consequently, to the extent that DHS's current regulations purport to permit the USCIS to supercede DOL's notice that a section 212(a)(5)(A)(i) labor certification cannot be issued in support of an employer's petition for an H-2B visa, they are arguably contrary to law and must be amended. Thus, the BCTD supports the proposed conforming amendments to 8 C.F.R. § 214.2(h)(1)(ii)(D), (h)(6)(iii)(C), (h)(6)(iii)(E), (h)(6)(iv)(A), (h)(6)(iv)(D), (h)(6)(iv)(E), (h)(6)(v)(A), (h)(6)(v)(A)(2), (h)(6)(v)(C), (h)(6)(v)(D), (h)(6)(vi)(A), (h)(6)(vi)(B), and (h)(9)(iii)(B)(2), which reflect DHS's decision to eliminate its current practice.

Your consideration of these comments is greatly appreciated.

Sincerely,



Mark H. Ayers
President