DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

[INS 1805–96]

RIN 1115–AC72

Tracking Usage of the H–1B and H–2B Nonimmigrant Classifications

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the Immigration and Naturalization Service's (Service) regulations by explaining in detail the new method by which the Service tracks the number of H–1B and H–2B petitions approved in a fiscal year and by removing incorrect references in the regulation regarding the tracking mechanism. This rule was written in response to a number of queries from the public asking how the Service determines which H–1B and H–2B petitions are included in the count. This rule will alleviate much of the confusion regarding the Service's method of counting H–1B and H–2B petitions.

DATES: Written comments must be submitted on or before March 2, 1998.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 5307, Washington, DC 20536. To ensure proper handling, please reference the INS number 1805–96 in your correspondence. Comments are available for public inspection at the above address by calling (202) 514–3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: John W. Brown, Adjudications Officer, Adjudications Division, Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, telephone (202) 514–3240.

SUPPLEMENTARY INFORMATION: The Immigration Act of 1990 (IMMACT), among other things, imposed a 65,000 annual numerical limitation on the number of aliens who may be granted H–1B visas or accorded such status in a fiscal year and a 66,000 annual numerical limitation on the number of aliens who may be accorded H–2B status. The Service agreed to track the number of aliens accorded H–1B and H–2B status since the Department of State, the agency which issues nonimmigrant visa's to aliens, has no centralized database to track visa issuance. Further, an H–1B or H–2B visa may not be issued to an alien without the Service first approving Form I–129, Petition for Nonimmigrant Worker, in the alien's behalf and, in addition, some H–1B and H–2B nonimmigrant aliens are not required to obtain a nonimmigrant visa.

The Service published a final rule in the **Federal Register** on December 2, 1991, at 56 FR 61111, in which the present tracking system was implemented. In the preamble to the rule, the Service advised that the numerical limitations would apply to new H–1B and H–2B petitions only and that petitions filed for extensions of stay would not be counted, since the alien beneficiary of the extended petition had previously been accorded H status. It was also stated in the preamble to the final rule that the Service would count petitions for concurrent employment, *i.e.,* where a beneficiary holds two H–1B or H–2B positions at the same time, and petitions for sequential employment, *i.e.,* where the beneficiary assumes one H–1B or H–2B position after another in the same fiscal year, in the cap. As stated in the preamble to the final rule published in December 1991, the reason for adopting this procedure was efficiency.

The Service has recently had reason to revisit its procedures for tracing the usage of H petitions in general, and the H–1B category in particular. On August 21, 1996, a preliminary report indicated that, under the tracking system then in place, the Service had approved in excess of 65,000 H–1B petitions for fiscal year 1996. While attempting to verify the validity of the preliminary count, the Service made a number of observations which culminated in the publication of this proposed rule.

The most significant observation that the Service made with respect to its current tracking system was that, by counting concurrent employment and sequential employment, it was actually counting positions, and not aliens. The Service has reconsidered its prior procedure and no longer counts either sequential or concurrent employment in the same fiscal year towards the numerical limitations. The numerical limitations would now relate solely to individuals regardless of the number of H–1B or H–2B positions such persons hold. This proposed rule would amend the regulation at 8 CFR 214.2(h)(8)(ii)(A) to reflect this change. The Service has made available on a quarterly basis the usage of H–1B/H–2B numbers. The Service intends to continue this practice.

Approved H–1B and H–2B petitions which are subsequently revoked by the Service will not be counted in the numerical limitation. The Service will run a periodic report containing the number of revoked petitions and adjust the numerical count accordingly. In view of this, petitioners are encouraged to notify the Service as soon as they learn that the beneficiary of an H–1B or H–2B petition does not intend to accept the petitioner's offer of employment.

This rule also proposes to amend the regulation at 8 CFR 214.2(h)(8)(ii)(B) and (D) which makes reference to the ''system which maintains and assigns numbers,'' since the regulatory language is not accurate. When this regulation was initially drafted, the Service had envisioned developing and designing a system which would count each petition which it approved and assign each petition a number. This system was never developed. Instead, the Service tracks the number of H–1B and H–2B petitions which it approves through its Computer-Linked Application Information Management System (CLAIMS) database. The terminology contained in the current rule implies that a petition is assigned a number upon approval. This is inaccurate. Instead, the Service runs periodic reports which count the number of petitions approved for the fiscal year without assigning a petition an actual number. There is no system which keeps a running count of approved H–1B and H–2B petitions.

This rule also proposes to remove the paragraph at 8 CFR 214.2(h)(8)(ii)(C) which makes reference to assigning numbers to petitions filed in Guam and the United States Virgin Islands. Since these petitions are counted in the same fashion as H petitions filed in the continental United States, the paragraph serves no purpose.

Finally, this rule proposes to amend the regulation at 8 CFR 214.2(h)(8)(ii)(E) and to redesignate it as 8 CFR 214.2(h)(8)(ii)(D). The regulation currently provides that, in the event that the numerical limitation is reached in a fiscal year, the Service shall reject any new petitions which are filed with a notice that numbers are not available until the next fiscal year. This proposed rule modifies the regulatory language by enabling the Service to adopt a different procedure in the event that rejecting petitions is determined not to be the most appropriate action for the Service to undertake. For example, in the situation where the numerical limitation is reached near the end of the fiscal year, it would not seem prudent to reject an H–1B petition or H–2B petition filed for that fiscal year since this procedure could create unnecessary work for the Service and an unnecessary hardship on petitioners in certain situations. The Service will notify the public through

the publication of a notice in the **Federal Register** of any such procedure should such a situation arise.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that the rule will not have a significant economic impact on a substantial number of small entities. This regulation merely explains the system which the Service currently uses to track the number of H–1B petition approved in a given fiscal year.

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.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule in 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.

Executive Order 12866

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

Executive Order 12612

The regulation proposed herein 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 Executive Order 12612, it is determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

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

List of Subjects in 8 CFR Part 214

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

Accordingly, part 214 of chapter I of title 8 of the Code of Federal Regulation is proposed to be amended as follows:

PART 214—NONIMMIGRANT GLASSES

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

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR part 2.

2. Section 214.2 is amended by revising paragraph (h)(8)(ii) to read as follows:

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

* * * * *

(h) * * *

(8) * * *

(ii) *Procedures.* (A) Each alien issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) or (ii)(b) of the Act shall be counted for purposes of the numerical limit prescribed in section 214(g)(1) of the Act. Requests for petition extension or an extension of the alien's stay, concurrent employment, or sequential employment within the same fiscal year shall not be counted against the numerical limit. The spouse and children of principal aliens classified as H–4 nonimmigrant aliens shall not be counted against the numerical limit.

(B) An alien will be counted against the annual H–1B or H–2B numerical limit only after an H–1B or H–2B petition has been approved on his or her behalf. An alien will be counted in the order by which the H–1B or H–2B petition has been approved on his or her behalf. An alien on whose behalf an H–1B or H–2B petition has been denied will not be counted against the annual numerical limit.

(C) When an approved petition is not used because the beneficiary(ies) does not obtain H–1B or H–2B classification, the petitioner shall notify the Service Center Director who approved the petition that the petition was not used as soon as the petitioner becomes aware of the circumstance. The petition shall be revoked pursuant to paragraph (h)(11)(ii) of this section.

(D) If the total numbers available in a fiscal year are used, the Service may reject and return the petition and the accompanying fee with a notice that numbers are not available for the nonimmigrant classification until the next fiscal year. The Service, may, in its discretion, adopt other mechanisms for processing petitions filed after the numerical limit has been reached in order to prevent unnecessary hardship to the public. The Service shall provide notice of such new mechanisms through publication in the **Federal Register.**

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Dated: October 21, 1997.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

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BILLING CODE 4410–10–M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 123 and 142

RIN 1515–AC16

Land Border Carrier Initiative Program

AGENCY: Customs Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to provide for the Land Border Carrier Initiative Program (LBCIP), a program designed to prevent smugglers of illicit drugs from utilizing commercial land conveyances for their contraband. The program provides for agreements between carriers and Customs in which the carrier agrees to increase its security measures and cooperate more closely with Customs and Customs agrees to apply special administrative provisions pertaining to penalty amounts and expedited processing of penalty actions if illegal drugs are found on a conveyance belonging to the participating carrier. Further, at certain high-risk locations along the land border, it is proposed to condition an importer's continued use of the Line Release method of processing entries of merchandise on the use of carriers/drivers that participate in the LBCIP. These proposed regulatory changes are designed to improve Customs enforcement of Federal drug laws along the land border by enhancing its ability to interdict illicit drug shipments through additional trade movement information provided by common