DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

RIN 1615-AC13

[CIS No. 2658-20 DHS Docket No. USCIS-2020-0018]

Strengthening the H-1B Nonimmigrant Visa Classification Program, Implementation of Vacatur

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Final Rule

SUMMARY: This final rule removes from the Code of Federal Regulations an interim final rule (IFR) issued in October 2020, which has since been vacated by a federal district court.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Mail Stop 2090, Camp Springs, MD 20588-0009. Telephone Number (240) 721-3000 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Background and Basis for Removal of Regulations

On October 8, 2020, the Department of Homeland Security (DHS) issued an Interim Final Rule (IFR) titled, *Strengthening the H-1B Nonimmigrant Visa Classification Program*.[1] On December 1, 2020, the U.S. District Court for the Northern District of

[1] 85 FR 63918 (Oct 8, 2020).

California vacated the IFR.[2] The Department announced on December 4, 2020, that it would fully comply with the court's decision vacating the October 2020 IFR; however, changes to the regulatory text as set forth in the IFR are still reflected in the Code of Federal Regulations (CFR) at 8 CFR 214.2.

This rule removes from the CFR the regulatory text that the Department promulgated in the October 2020 IFR and restores the regulatory text to appear as it did before the October 2020 IFR, and consistent with the rules that remain valid subsequent to the court's vacatur.

DHS is not required to provide notice and comment or delay the effective date of this rule because this rule simply implements the court's vacatur of the IFR and restores the regulatory text so that it correctly reflects the regulatory text that predates the vacatur and remains valid. The changes made by the IFR do not have any legal effect. Moreover, good cause exists here for bypassing any otherwise applicable requirements of notice and comment and a delayed effective date. Notice and comment and a delayed effective date are unnecessary for the implementation of the court's order vacating the rule and would be impracticable and contrary to the public interest in light of the agency's immediate need to implement the final judgment. *See* 5 U.S.C. 553(b)(B), (d). DHS believes that delaying the ministerial act of restoring the regulatory text in the Federal Register is contrary to the public interest because it could lead to confusion, particularly among the regulated public, as to the eligibility requirements for the H-1B classification. DHS has concluded that each of those three reasons—that notice and comment and a delayed effective date are unnecessary, impracticable, and contrary to the public interest—independently provides good cause to bypass any otherwise applicable requirements of notice and comment and a delayed effective date.

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[2] *See* JSW Chamber of Commerce of the United State of America et al. v. United States Department of Homeland Security, et al., No. 4:20-cv-07331 (N.D. Cal. Dec. 1, 2020).

List of Subjects in 8 CFR Part 214

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

Accordingly, for the reasons set forth in the preamble, DHS amends chapter I of title 8 of the Code of Federal Regulations as follows:

PART 214 -- NONIMMIGRANT CLASSES

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

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 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. Amend § 214.2 by:

a. Revising paragraph (h)(2)(i)(B);

b. Removing paragraph (h)(4)(i)(B)(*7*);

c. In paragraph (h)(4)(ii):

i. Removing the definition of "Employer-employee relationship";

ii. Revising the definition of "Specialty Occupation";

iii. Removing the definition of "Third-party worksite";

iv. Revising the definition of "United States employer"; and

v. Removing the definition of "Worksite."

d. Revising paragraph (h)(4)(iii)(A);

e. Removing paragraph (h)(4)(iv)(C);

f. Amending paragraph (h)(9) by:

i. Redesignating paragraph (h)(9)(i)(A) as paragraph (h)(9)(i), and removing paragraph (h)(9)(i)(B), and

ii. Revising paragraph (h)(9)(iii)(A)(*1*); and

g. Removing and reserving paragraph (h)(24)(ii).

The revisions read as follows:

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

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(h) * * *

(2) * * *

(i) * * *

(B) *Service or training in more than one location*. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

(4) * * *

(i) * * *

(B) * * *

(ii) * * *

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's

degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

* * * * *

United States employer means a person, firm, corporation, contractor, or other association or organization in the United States which:

(*1*) Engages a person to work within the United States;

(*2*) Has an employer-employee relationship with respect to employees under this part; as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

(*3*) Has an Internal Revenue Service Tax identification number.

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(iii) ***

(A) *Standards for specialty occupation position*. To qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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(9) * * *

(iii) * * *

(A)(1) *H–1B petition in a specialty occupation.* An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application.

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Alejandro N. Mayorkas,
Secretary,
U.S. Department of Homeland Security.

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