

## DEPARTMENT OF JUSTICE

## Immigration and Naturalization Service

## 8 CFR Part 214

[INS No. 2003-99]

RIN 1115-AF47

**Treatment of Certain H Petitions Filed After the Numerical Cap Is Reached****AGENCY:** Immigration and Naturalization Service, Justice.**ACTION:** Proposed rules.

**SUMMARY:** This rule proposes to amend the Immigration and Naturalization Service's (Service) regulations by allowing the Service to accept and adjudicate certain petitions submitted after any of the annual numerical caps for H nonimmigrants have been reached. Under this proposed rule, petitions that are approved would be assigned a work start date to begin no earlier than the beginning of the following fiscal year. This rule is intended to benefit the great majority of petitioners by relieving them from the burden of refiling a new or amended petition once the H numerical cap is reached.

**DATES:** Written comments must be submitted on or August 16, 1999.

**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 INS No. 2003-99 on 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:** Sandra Schatz, Acting Branch Chief, Management and Records Liaison, Immigration Services Division, Immigration and Naturalization Service, 801 I Street, NW., Room 980, Washington, DC 20536, telephone (202) 616-7991.

**SUPPLEMENTARY INFORMATION:****Background**

Section 214(g)(1)(A) of the Act sets a cap on the total number of aliens who may be provided H-1B nonimmigrant classification during any fiscal year. This section of the Act applies to "new" H-1B petitions, as explained in a Service Notice which is being published elsewhere in this issue of the **Federal Register**. In addition, section 214(g)(1)(A) of the Act sets annual numerical limitations for certain other H nonimmigrants. Under the Service's

current regulations at 8 CFR 214.2(h)(8)(ii)(E), once the total numbers available to a particular H nonimmigrant classification have been used in a fiscal year, the Service must reject any new petition for that classification which contains a request for a work start date prior to October 1 of the following fiscal year, and refund to the petitioner the accompanying fee. Under current regulations, such a petitioner may not employ the alien as a new H nonimmigrant in the remaining portion of the fiscal year. To employ the alien as a new H nonimmigrant, the petitioner is required to file a new petition to request a work start date on or after October 1 of the following fiscal year, when numbers once again become available.

On December 30, 1997, the Service proposed to amend 8 CFR 214.2(h)(8)(ii)(E) to enable the Service, in its discretion, to adopt mechanisms other than rejection of petitions filed after the cap had been reached. See 62 FR 67764 (December 30, 1997). The purpose of the proposed change was to prevent unnecessary hardship to petitions and to avoid unnecessary work by the Service in situations where rejecting petitions was deemed not to be prudent. *Id.* The December 30 proposal did not discuss whether any petitioner may be adversely affected by the proposal. The December 30 proposal was not published as a final rule.

The Service received three comments regarding this specific proposal in the December 30 rule. All three commenters applauded the Service's proposal to change the method used to process H petitions filed after the numerical cap is reached in a fiscal year.

***Why Is the Service Proposing This Change to Its Regulations?***

In the case of H-1B petitioners, it has been the experience of the Service that the great majority of petitioners whose petitions were in the "pipeline," (*i.e.*, on file with the Service) at the time the numerical cap had been reached, in fact, have opted for a start date on or after October 1 of the following fiscal year rather than to withdraw their petitions. For Fiscal year 2000 and beyond, therefore, the Service is proposing to assign a work start date of no earlier than October 1 of the following fiscal year for certain petitions which are filed after the numerical cap is reached. Specifically, petitions which contain a request for a work start date prior to the beginning of the following fiscal year will be assigned an October 1 or later start date, regardless of the work start date requested in the petition. The Service believes that this proposal will

benefit the great majority of petitioners by relieving them from the burden of refiling or submitting a new petition once the cap is reached. This proposal would also ensure that petitions filed after the cap is reached are treated similarly to those petitions that were not adjudicated when the numerical cap was reached.

In light of the above, the Service believes that only a relatively small number of petitioners might not wish to have an October 1 or later work start date. Accordingly, the Service believes that the current proposed rule is preferable to its earlier proposed regulation which failed to take into account that the great majority of petitioners actually have preferred that the Service assign an October 1 work start date in order to avoid additional handling.

***Could Any Petitioners Be Adversely Affected by This Proposed Regulation?***

The Service recognizes that certain H-1B petitioners might not wish to be assigned an October 1 or later work start date, and may therefore be adversely affected by this proposed regulation. Under the current regulation, the Service would reject such employers' petitions and accompanying fees. The proposed regulation, however, would require the Service to accept all petitions, together with filing fee, for adjudication and processing, regardless of the petitioner's requested work start date. Although certain petitioners may not wish to avail themselves of a work start date later than they requested, they would, under this proposal, forfeit their filing fee. The Service believes, nevertheless, that this proposal will benefit the great majority of petitioners by relieving them from the burden of refiling the petition once the numerical cap is reached.

The Service notes that this proposed regulation would also apply to certain other H petitioners, should the respective numerical caps ever be reached. To date, however, none of the other visa classification caps have ever even been approached. For this reason, the Service does not anticipate that this proposal would have any immediate impact on the other H programs. The Service welcomes comments concerning this proposed regulation.

**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 proposed regulation and, by approving it, certifies that this rule will not have a significant economic

impact on a substantial number of small entities because of the following factors: The proposed procedures are intended to minimize burdens to the great majority of employers who use the H nonimmigrant visa program by removing the requirement to refile a new or amend petition once the numerical cap is reached. In addition, this proposed rule would ensure consistent treatment of all petitioners whose petitions have not been adjudicated by the time the numerical cap has been reached in a fiscal year by assigning all of them an October 1 or later work start date. This proposal may cause inconvenience, however, to certain petitioners who might not wish to accept an October 1 or later work start date.

Unfunded Mandates Reform Act of 1995

This proposed 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 1 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 proposed 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.

Executive Order 12866

This proposed 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 rule has been submitted to the Office of Management and Budget (OMB) 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 proposed rule meets the applicable standards set forth in sections 3(a) and (b)(2) of E.O. 12988.

List of Subjects in 8 CFR Part 214

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

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

PART 214—NONIMMIGRANT CLASSES

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)(E) to read as follows:

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

- \* \* \* \* \*
- (h) \* \* \*
- (8) \* \* \*
- (ii) \* \* \*

(E) The Service shall continue to accept for adjudication any new petition containing a request for a work start date prior to the beginning for the following fiscal year, together with the accompanying fee, even if the total numbers made available in a fiscal year have been used. If the petition is approved, the Service will grant the petition with a starting date no earlier than October 1 of the following fiscal year, regardless of the work start date requested in the petition.

\* \* \* \* \*

Dated: June 4, 1999.

Doris Meissner,  
Commissioner, Immigration and Naturalization Service.  
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