DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

[CIS No. 2434–07; DHS Docket No. USCIS–2007–0060]

RIN 1615–AB68

Petitions Filed on Behalf of H–1B Temporary Workers Subject to or Exempt From the Annual Numerical Limitation

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Interim rule with request for comments.

SUMMARY: The Department of Homeland Security is amending its regulations governing petitions filed on behalf of alien workers subject to the annual numerical limitations applicable to the H nonimmigrant classification. This rule precludes a petitioner from filing more than one petition based on the H–1B nonimmigrant classification on behalf of the same alien temporary worker in a given fiscal year if the alien is subject to a numerical limitation or is exempt from a numerical limitation by virtue of having earned a master's or higher degree from a U.S. institution of higher education. Additionally, this rule makes accommodations for petitioners seeking to file petitions on the first day on which filings will be accepted for the next fiscal year on behalf of alien workers subject to the annual numerical limitation or U.S. master's or higher degree holders exempt from this limitation. This rule also clarifies the treatment of H nonimmigrant petitions incorrectly claiming an exemption from the numerical limitations. Finally, the rule removes from the regulations unnecessary language regarding the annual numerical limitation applicable to the H–1B nonimmigrant classification. These changes are necessary to clarify the regulations and further ensure the fair and orderly adjudication of petitions subject to numerical limitations.

DATES: *Effective date:* This rule is effective March 24, 2008.

Comment Date: Written comments must be submitted on or before May 23, 2008.

ADDRESSES: You may submit comments, identified by DHS Docket No. USCIS–2007–0060 by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail:* You may submit comments directly to USCIS by e-mail at *rfs.regs@dhs.gov.* Include DHS Docket No. USCIS–2007–0060 in the subject line of the message.
- *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–2007–0060 on your correspondence. This mailing address may also be used for paper, disk, or CD-ROM submissions.
- *Hand Delivery/Courier:* U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529. Contact Telephone Number is (202) 272–8377.

FOR FURTHER INFORMATION CONTACT: Patricia Jepsen, Adjudications Officer, Business and Trade Services, Office of Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, 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 interim rule. The Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) also invite comments that relate to the economic, environmental, or federalism effects that might result from this interim rule. Comments that will provide the most assistance to USCIS in developing these procedures will reference a specific portion of the interim 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–2007–0060. 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., 3rd Floor, Washington, DC 20529.

II. Background

The ability of employers to fill available U.S. jobs on a timely basis with alien temporary workers otherwise eligible for the H–1B nonimmigrant classification generally depends on when they filed petitions for such workers and the number of such petitions that USCIS has approved with respect to the relevant fiscal year (i.e., October 1 through September 30). With a few exceptions, the total number of aliens who may be accorded H–1B nonimmigrant status during any fiscal year currently may not exceed 65,000 (referred to as the ''cap'' or ''numerical limitation''). *See* Immigration and Nationality Act (INA) sec. 214(g), 8 U.S.C. 1184(g). USCIS may only accord status to qualified aliens in the order in which the H–1B petitions are filed. *See* INA sec. 214(g)(3), 8 U.S.C. 1184(g)(3). This interim final rule will improve USCIS' ability to administer the cap by modifying the filing procedures for H–1B petitions submitted by employers on behalf of aliens.

A. The H–1B Petition Process

An H–1B nonimmigrant is an alien employed to perform services in a specialty occupation, services related to a Department of Defense cooperative research and development project or coproduction project, or services of distinguished merit and ability in the field of fashion modeling. INA sec. 101(a)(15)(H), 8 U.S.C. 1101(a)(15)(H); 8 CFR 214.2(h)(4). To qualify as a specialty occupation, the position must meet one of the following requirements: (1) The minimum entry requirement for the position normally is a bachelor's or higher degree or its equivalent; (2) the degree requirement is common to the industry or the 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 is so specialized and complex that the knowledge required to perform the duties is usually associated with attainment of a bachelor's or higher degree. 8 CFR 214.2(h)(4)(iii)(A).

Before employing an H–1B temporary worker, a U.S. employer first must file an H–1B petition with USCIS on behalf of the worker on Form I–129, ''Petition for a Nonimmigrant Worker'' together with the forms, ''H Classification Supplement to Form I–129'' and ''H–1B Data Collection and Filing Fee Exemption Supplement.'' The worker must be named on the petition. 8 CFR 214.2(h)(2)(iii). For a petition filed on behalf of a temporary worker in a

specialty occupation, the employer also must file a Labor Condition Application (LCA) that has been certified by the Department of Labor (DOL). 8 CFR 214.2(h)(4)(i)(B)(1). The LCA specifies the job, salary, length, and geographic location of employment. The petitioner must pay several different fees with the H–1B petition. The base filing fee is $320. 8 CFR 103.7(b)(1) (listing Form I–129 filing fee). In addition, a petition filed by an employer with 26 or more full-time employees must pay a $1,500 fee; a petition filed by an employer with 25 or fewer full-time employees must pay a $750 fee. INA 214(c)(9)(B), 8 U.S.C. 1184(c)(9)(B). Most employers filing an initial H–1B petition, and H–1B employers filing a petition on behalf of an alien currently employed as an H–1B temporary worker by another employer, must pay a fraud prevention and detection fee of $500. INA 214(c)(12)(A) and (C). Finally, an employer requesting expedited processing of the H–1B petition must pay an extra $1,000 premium processing fee with the expedited processing request. INA 286(u), 8 U.S.C. 1356(u); 8 CFR 103.2(f)(2). These fees are not refundable. 8 CFR 103.2(a)(1).

Once USCIS accepts the H–1B petition, it adjudicates the petition and issues a written decision notifying the petitioner whether USCIS requires additional information before it can issue a decision or whether the petition is approved or denied. 8 CFR 103.2(a)(8) and 214.2(h)(9) and (10). USCIS may revoke a petition that has been previously approved, even after expiration of the petition. 8 CFR 214.2(h)(11). A petitioning employer, following receipt of the written decision, may appeal to USCIS the denial or revocation of a petition. 8 CFR 214.2(h)(12). An approved H–1B petition is valid for a period of up to three years.[1] *See* 8 CFR 214.2(h)(9)(iii)(A)(1). Prior to the expiration of the initial H–1B petition, the petitioning employer may apply for an extension of stay, or a different employer may petition on behalf of the temporary worker. 8 CFR 214.2(h)(2)(i)(D) and (15)(ii)(B). However, any such extension only may only be granted for a period of time such that the total period of the temporary worker's admission does not exceed six years.[2] INA sec. 214(g)(4), 8 U.S.C. 1184(g)(4); 8 CFR 214.2(h)(13)(iii)(A). At the end of the six-year period, such alien must either seek permanent resident status or depart the United States.[3] *See* 8 CFR 214.2(h)(13)(iii)(A). The alien may be eligible for a new six-year period of admission in H–1B nonimmigrant status if he or she remains outside the United States for at least one year. *Id.*

B. H–1B Nonimmigrants Subject to the 65,000 Cap

Most aliens seeking H–1B nonimmigrant classification are subject to the 65,000 cap. Exempt from the 65,000 cap are aliens who: (1) Are employed at, or have received offers of employment from, an institution of higher education, or a related or affiliated nonprofit entity; (2) are employed at, or have received offers of employment from, a nonprofit research organization or a governmental research organization; or (3) have earned a master's or higher degree from a U.S. institution of higher education. INA sec. 214(g)(5), 8 U.S.C. 1184(g)(5). A cap of 20,000 applies to the exemption based on an alien's U.S. master's or higher degree (''20,000 cap on master's degree exemptions''). INA sec. 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C). Based on the employer's answers to the questions on the ''H–1B Data Collection and Filing Fee Exemption Supplement'' to Form I–129, USCIS determines whether the alien beneficiary qualifies for one of the exemptions.

The spouses and children of H–1B aliens, classified as H–4 nonimmigrants, are exempt from the 65,000 or 20,000 cap. *See* INA sec. 214(g)(2); 8 U.S.C. 1184(g)(2); 8 CFR 214.2(h)(8)(ii)(A). In addition, USCIS does not apply the 65,000 or 20,000 cap in the following cases: requests for petition extensions or extensions of stay in the United States; and petitions filed on behalf of aliens who are currently in H–1B nonimmigrant status but are seeking to change the terms of current employment, change employers, or work concurrently under a second H–1B petition. Such aliens have already been counted towards the cap(s). *See* INA sec. 214(g)(7), 8 U.S.C. 1184(g)(7); 8 CFR 214.2(h)(8)(ii)(A).

C. Random Selection Process

In order to ensure that the 65,000 and 20,000 caps are not exceeded, USCIS monitors the number of H–1B petitions it receives. The first day on which petitioners may file H–1B petitions can be as early as six months ahead of the employment start date. 8 CFR 214.2(h)(9)(i)(B). Therefore, a petitioner requesting an employment start date of October 1, the first day of the next fiscal year, may file the H–1B petition as early as April 1 of the current fiscal year. When USCIS determines, based on the number of H–1B petitions it has received, that the applicable cap will be reached, it announces to the public the final day on which it will accept such petitions for adjudication in that fiscal year. USCIS refers to this day as the ''final receipt date.'' *See* 8 CFR 214.2(h)(8)(ii)(B). USCIS then randomly selects the number of petitions necessary to reach the cap from the petitions received on the final receipt date. *Id.* If USCIS receives sufficient H–1B petitions to reach the cap for the next fiscal year on the first day that filings may be made, that day is the final receipt date. USCIS then randomly applies all of the cap numbers among the H–1B petitions filed on that day and the following day. *Id.*

Following the random selection process conducted for the 65,000 cap, USCIS rejects any petitions that are not selected or that are received after the final receipt date (or the day following the final receipt date, if applicable). *Id.;* 8 CFR 214.2(h)(8)(ii)(D). With respect to the 20,000 cap, USCIS will count any non-selected or subsequently filed H–1B petitions towards the 65,000 cap. If the 65,000 cap already has been reached, however, USCIS will reject such petitions.

The procedures at 8 CFR 214.2(h)(8)(ii)(B) for assigning cap numbers also apply to other H nonimmigrant petitions that are subject to numerical limitations. *See* 8 CFR 214.2(h)(8)(i). However, because demand for other H categories has not been as great as for the H–1B classification, USCIS has only had to apply the random selection procedures to H–1B petitions subject to the overall 65,000 cap or the 20,000 cap on master's degree exemptions.

D. Random Selection Process Under the 65,000 Cap for Fiscal Year 2008

On Monday, April 2, 2007, the first available filing day for fiscal year (FY) 2008, USCIS received H–1B petitions totaling nearly twice the 65,000 cap. *See* USCIS Update at *http://www.uscis.gov/files/pressrelease/H1BFY08Cap040307.pdf.* This was the first time since the random selection process regulations were promulgated that USCIS received more petitions than

[1] Initial H–1B petitions involving a DOD research and development or co production project may be approved for a period of up to five years. 8 CFR 214.2(h)(9)(iii)(A)(2).

[2] Aliens entering the United States in H–1B status to perform services of an exceptional nature in a research, development and/or co production project administered by the Department of Defense may remain in the United States for a maximum period of ten years. 8 CFR 214.2(h)(13)(iii)(B).

[3] Certain aliens are exempt from the six-year maximum period of admission under sections 104(c) and 106(a) and (b) of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106–313, 114 Stat. 1251 (2000).

available cap numbers on the first available filing day. USCIS believes that petitioners rushed to file H–1B petitions for FY 2008 on the first available filing day because the cap had been reached very early in the previous fiscal years, and petitioners may have anticipated that a similar shortage of H–1B cap numbers would occur for FY 2008.[4] In order to ensure receipt of a petition by USCIS on April 2, H–1B petitioners incurred significant costs to send their petitions via overnight courier. The huge volume of filings scheduled for delivery on April 2 caused logistical problems for overnight couriers and on the two USCIS service centers where filings could be made.

Using the petitions received on April 2 and April 3, USCIS conducted the random selection process and thereafter rejected all petitions that were not randomly selected. When adjudicating the selected petitions, USCIS found approximately 500 instances where a single beneficiary had been named on at least two petitions filed by the same petitioner in what appears to have been an attempt to increase the chances of being selected in the random selection process. As a general practice, when USCIS approved a petition for a specifically-named individual, it denied any duplicate petitions subsequently adjudicated. Under current procedures, because H–1B cap numbers are allotted per alien, and not per petition, no adverse consequences befall a petitioner that seeks to exploit the system through filing multiple petitions. By statute, USCIS may only allot one cap number per alien beneficiary, regardless of the number of petitions that were filed on the alien's behalf. INA section 214(g)(7), 8 U.S.C. 1184(g)(7).

Based on its experience administering the 65,000 cap, USCIS has determined that the current procedures applicable to petitions filed on behalf of cap-subject aliens pose three problems. First, USCIS has determined that accepting duplicate filings over the course of the fiscal year, as well as for the random selection process, undermines the fair and orderly administration of the cap. When USCIS receives enough H–1B petitions to meet the cap on the first filing day for the coming fiscal year, then conducts an early random selection process, the filing of duplicative petitions increases the odds that USCIS will select at least one of the duplicative petitions for adjudication. Such petitioners thereby gain an unfair advantage over other petitioners participating in the random selection process who filed a single petition for a given beneficiary and job offer. Moreover, the filing of duplicative petitions results in unnecessary adjudications. Such unnecessary adjudications slow the overall processing of H–1B petitions, creating disadvantages for employers and otherwise eligible alien beneficiaries who need to make advance arrangements for the beneficiaries' upcoming employment.

Second, since the current regulations provide that the final receipt date is the first day on which filings will be accepted if the cap is reached on that day, and USCIS understands that petitioners anticipate the cap being reached on the first day for future fiscal years, petitioners feel pressured to file petitions on that day for fear of being excluded from the random selection process. USCIS faces significant logistical difficulties in order to handle such a large number of filings being made on the same day. While the current regulations at 8 CFR 214.2(h)(8)(ii)(B) provide some relief by authorizing USCIS to include in the random selection process petitions filed on the first day and the following day, this relief has proved to be insufficient to alleviate these difficulties.

Third, the filing of duplicate or multiple petitions may result in USCIS making available more than one receipt number to the same beneficiary, making it more difficult for USCIS to achieve an accurate projection of the number of petitions needed to generate the required number of approvals to reach the cap. In turn, USCIS may prematurely determine that the cap has been reached and either subsequently reject timely-filed petitions or close the opportunity for other prospective H–1B employers to file petitions.

E. Cap on Master's Degree Exemptions

Just as with the 65,000 cap, the 20,000 cap on master's degree exemptions has been exhausted earlier and earlier for each fiscal year since the cap exemption was added to the law. *See* Omnibus Appropriations Act for Fiscal Year 2005, Div. J, Tit. IV, section 425, Public Law 108–447, 118 Stat. 2809 (2004) (establishing the master's degree exemption). For FY 2006, the 20,000 cap was reached on January 17, 2006. For FY 2007, the cap was reached on July 26, 2006, less than four months after petition filings began on April 1, 2006. For FY 2008, the cap was reached on May 4, 2007, just over one month after petition filings began on April 2, 2007. For each of these fiscal years, USCIS announced a final receipt date and conducted the random selection process. *See* USCIS Update at *http://www.uscis.gov/files/pressrelease/H1Bfy08CapUpdate050407.pdf*. USCIS rejected any non-selected or subsequently filed petitions since the 65,000 cap on H–1B petitions already had been reached by the time USCIS conducted the random selections.

USCIS believes that the trend of exhausting the 20,000 cap on master's degree exemptions at an earlier date will continue. Should both the 20,000 and 65,000 caps be reached on the same day that numbers become available (e.g., April 1 of the preceding fiscal year), no regulatory mechanism is in place to facilitate administration of the 20,000 cap in relation to the 65,000 cap. In addition, while USCIS is not aware of duplicative or multiple H–1B petitions being filed in past fiscal years on behalf of the same aliens eligible for the master's degree exemption, USCIS anticipates the possibility of such filings for future fiscal years as the H–1B classification becomes increasingly oversubscribed. In fact, USCIS believes that for FY 2009, it is likely that petitioners will rush to file H–1B petitions on behalf of aliens eligible for the master's degree exemption on the first available filing days, in anticipation that there will be a shortage of master's degree exemptions.

The filing of duplicative or multiple H–1B petitions on behalf of an alien eligible for the master's degree exemption would place employers filing such petitions at an unfair advantage over employers filing only a single petition by increasing the chances that one of the duplicative or multiple petitions would be selected. This problem would be exacerbated were the 20,000 cap to be reached prior to or at the same time as the 65,000 cap, since all petitions not selected in the random selection process for the 20,000 cap would be considered twice—at the time of the random selection for the 20,000 cap and, thereafter, for the 65,000 cap. This would reduce the availability of H–1B numbers for single petition filers. The same problem holds true if employers of aliens subject to the master's degree exemption seek to increase the chances of obtaining an H–1B number by filing concurrent petitions for the same aliens under both the master's degree exemption and the 65,000 cap. In its administration of the 65,000 and 20,000 caps, USCIS must remove any potential for unfairness and ensure that the H–1B petitions filed on

[4] Each year, the cap has been reached earlier in the year. In FY07, the cap was reached on 5–26–06 (*see http://www.uscis.gov/files/pressrelease/FY07H1Bcap_060106PR.pdf*). In FY06, the cap was reached on 8–10–05 (*http://www.uscis.gov/files/pressrelease/H–1Bcap_12Aug05pdf*). In FY05, the cap was reached on 10–1–04 (*http://www.uscis.gov/files/pressrelease/H1B_05fnl100104.pdf*).

behalf of aliens subject to either or both caps have an equal chance of being selected.

III. Changes in This Interim Rule

A. Final Receipt Date When Cap Numbers Are Used Up Quickly

This rule provides that USCIS will include petitions filed on all of those first five business days in the random selection process if USCIS receives a sufficient number of petitions to reach the applicable numerical limit (including limits on exemptions) on any one of the five business days on which USCIS may accept petitions. This will eliminate filing problems resulting from a rush of filings made on the first day on which employers may file petitions for the upcoming fiscal year. *See* revised 8 CFR 214.2(h)(8)(ii)(B). USCIS has determined that a filing period of five business days is sufficient to account for a wider range of mail delivery times offered by the various mail delivery providers available to the public.

This rule also provides that, if both the 65,000 and 20,000 caps are reached within the first five business days available for filing H–1B petitions for a given fiscal year, USCIS must first conduct the random selection process for petitions subject to the 20,000 cap on master's degree exemptions before it may begin the random selection process of petitions to be counted towards the 65,000 cap. *See* revised 8 CFR 214.2(h)(8)(ii)(B). After conducting the random selection for petitions subject to the 20,000 cap, USCIS then must add any non-selected petitions to the pool of petitions subject to the 65,000 cap and conduct the random selection process for this combined group of petitions. Therefore, those petitions that otherwise would be eligible for the master's degree exemption that are not selected in the first random selection will have another opportunity to be selected for an H–1B number in the second random selection process. This rule also clarifies that those petitions not selected in either random selection will be rejected. *See id.*

B. Elimination of Multiple Filings

To ensure the fair and equitable distribution of cap numbers, this rule precludes a petitioner (or its authorized representative) from filing, during the course of any fiscal year, more than one H–1B petition on behalf of the same alien beneficiary if such alien is subject to the 65,000 cap or qualifies for the master's degree exemption. *See* new 8 CFR 214.2(h)(2)(i)(G). This preclusion applies even if the petitions are not duplicative.

USCIS recognizes that, by statute, multiple filings of H–1B petitions are contemplated. *See* INA sec. 214(g)(7), 8 U.S.C. 1184(g)(7). Nevertheless, USCIS finds that this rule's preclusion of duplicative H–1B filings is consistent with the statute. Section 214(g)(7) of the INA, 8 U.S.C. 1184(g)(7), states that ''[w]here multiple petitions are approved for 1 alien, that alien shall be counted only once.'' USCIS interprets this statutory language as applying to an alien who has multiple petitions filed on his or her behalf by more than one employer. Therefore, an alien who will be performing H–1B duties on behalf of two separate petitioners will be counted only once against the cap. USCIS does not believe that the statutory language at section 214(g)(7) of the INA, 8 U.S.C. 1184(g)(7), was intended to allow a single employer to file multiple H–1B petitions on behalf of the same alien. Such a broad interpretation would undermine the purpose of the H–1B numerical cap since multiple filings can result in the misallocation of the total available cap numbers.

USCIS recognizes that, on occasion, an employer may extend the same alien two or more job offers for distinct positions and therefore have a legitimate business need to file two or more separate H–1B petitions on behalf of the same alien. This rule precludes this practice if the alien beneficiary is subject to the numerical limitations or qualifies for the master's degree exemption. First, allowing multiple filings by one employer on behalf of the same alien could create a loophole for employers that seek to exploit the random selection process to the competitive disadvantage of other petitioners. Such employers could file multiple petitions on behalf of the same alien under the guise that the petitions are based on different job offers, when the employment positions are in fact the same or only very slightly different.

Second, requiring USCIS adjudicators to distinguish between multiple petitions filed by one employer for one alien based on different job offers and duplicative petitions for one alien for the same, single position would require a significant expenditure of limited USCIS adjudicative resources. USCIS could not make such determinations on the face of the petition, but would need to substantively examine and compare the merits of the petition and any other petition filed by the same employer on behalf of the alien. This would defeat the purpose of the random selection process, which is not intended to be a decision on the merits, but instead, an expeditious way for USCIS to determine which petitions are eligible for consideration on the merits.

Finally, prohibiting employers from filing multiple petitions on behalf of the same alien should have no impact on the unusual situation where an employer may have the same alien in mind for materially distinct employment positions. Once an alien is allocated an H–1B number based on one petition, the employer is able to file an amended petition or a petition for concurrent employment to reflect the different nature of the duties that are associated with the beneficiary's second employment position. Since the alien would have already been counted against the cap, such amended or additional petition would not be affected by the prohibition on multiple petition filings. *See* INA sec. 214(g)(7), 8 U.S.C. 1184(g)(7).

For these reasons, USCIS believes that it must curtail both duplicative and multiple petition filings by the same employer in order to prevent future fairness problems similar to those USCIS experienced with its administration of the FY 2008 random selection process for the 65,000 cap. Accordingly, this rule provides that USCIS will deny all the petitions filed by an employer (or authorized representative) for the same fiscal year with respect to the same alien subject to the 65,000 or 20,000 caps. *See* new 8 CFR 214.2(h)(2)(i)(G). In cases where USCIS does not discover that duplicative or multiple petitions were filed until after approving them, this rule also provides that USCIS may revoke all such petitions if they were approved after this rule becomes effective. *Id.*

This rule does not, however, preclude related employers from filing petitions on behalf of the same alien. USCIS recognizes that an employer and one or more related entities (such as a parent, subsidiary or affiliate) may extend the same alien two or more job offers for distinct positions and therefore have a legitimate business need to file two or more separate H–1B petitions on behalf of the same alien.

For example, a Fortune 500 company may be the parent company of numerous U.S.-based subsidiaries whose business is to engage in either the food, beverage or snack industries. Each line of business may, in turn, be divided into several business units and operate distinct companies (restaurant, bottled beverage plant, cereal manufacturer, etc) with different EIN numbers, addresses, etc. Although all the subsidiaries are ultimately related to the parent company through corporate ownership, this rule does not prohibit different

subsidiaries from filing one H–1B petition each on behalf of the same alien so long as each employer/subsidiary has a legitimate business need to hire such alien for a position within that subsidiaries' corporate structure. Thus, in this example, if the bottled beverage plant owned by the Fortune 500 company and the cereal manufacturing company owned by the same Fortune 500 company are each in need of the services of a Chief Financial Officer, both may file one petition each on behalf of the same alien. A subsidiary should not file an H–1B petition for an alien just to increase the alien's chances of being selected for an H–1B number where that subsidiary has no legitimate need to employ the alien and is, instead, only filing a petition to facilitate the alien's hiring by a different, although related, subsidiary.

USCIS may issue a request for additional evidence or notice of intent to deny, or notice of intent to revoke for any or each petition if it determines that the employer and related entity(ies) filed a duplicate petition as defined in this regulation. *See* 8 CFR parts 103 and 214.2(h)(11). The burden rests with the employer to establish that it has a legitimate business need to file more than one H–1B petition on behalf of the same alien. If the employer does not meet its burden, USCIS may deny or revoke each petition, as appropriate. Without such authority, a loophole would exist for related employers to file multiple petitions on behalf of the same alien under the guise that the petitions are based on different job offers, when the true purpose of filing the petitions is to secure employment for the alien with a single employer seeking his or her services. As an example, one target of this provision is the unscrupulous employer that establishes or uses shell subsidiaries or affiliates to file additional petitions on behalf of the same alien in order to increase the alien's chances of being allotted an H–1B number. USCIS believes that these consequences are warranted in order to deter unfair filing practices and further ensure the integrity of the H–1B cap counting process.

To date, USCIS has identified the problems resulting from multiple filings only in the context of H–1B petitions. For this reason, this rule limits the bar on multiple petition filings to H–1B petitions.

C. Denial of Petitions After Cap Numbers Are Used

Over the past few years, USCIS has received a significant number of petitions that claim to be exempt from the 65,000 cap, but are determined after the final receipt date or after all cap numbers have been used to be subject to the cap. The current regulations do not specifically address treatment of such petitions. This rule amends the regulations to clarify that such petitions will be denied rather than rejected. See revised 8 CFR 214.2(h)(8)(ii)(B) and (D). USCIS has determined that denial of these petitions is appropriate because USCIS must adjudicate them in order to make a determination on whether the alien beneficiary is subject to the numerical cap. USCIS only rejects filings before an adjudication takes place. See 8 CFR 103.2(a)(7). Because USCIS must adjudicate these petitions, it will not return the petition and refund the filing fee.

D. Technical Changes

1. Removal of References To Cap Numbers

This rule revises 8 CFR 214.2(h)(8)(i)(A) to remove specific references to the H–1B numerical cap. The revised paragraph now generally refers to the numerical limitations set forth in section 214(g)(1) of the INA, 8 U.S.C. 1184(g)(1). USCIS has determined that specifying the cap numbers in the regulations is not necessary and may cause confusion in the future should Congress change the INA.

2. Inclusion of 20,000 Cap

This rule revises 8 CFR 214.2(h)(8)(ii)(B) to clarify that the random selection process applies to the administration of the 20,000 cap on master's degree exemptions. The current provision generally refers to ''numerical limitations,'' ''the numerical limit,'' or ''cap.'' To maintain consistent terminology, this rule also replaces references in 8 CFR 214.2(h)(8)(ii)(B) and (D) to the ''cap'' with the statutory term, ''numerical limitations.''

IV. Regulatory Requirements

A. Administrative Procedure Act

This final rule addresses requirements that are procedural in nature and does not alter the substantive rights of applicants or petitioners for immigration benefits. Accordingly, this final rule is exempt from the notice and comment requirements under the Administrative Procedure Act (APA) at 5 U.S.C. 553(b)(A). This rule does not change the eligibility rules governing any immigration benefit. It will not confer rights or obligations upon any party. This rule clarifies existing USCIS regulations and modifies the filing requirements for petitioners submitting H–1B petitions.

In addition, USCIS believes that good cause exists to implement this change effective immediately upon publication in the **Federal Register** as an interim final rule without first providing notice and the opportunity for public comment. The APA provides that an agency may dispense with notice and comment rulemaking procedures when an agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' *See* 5 U.S.C. 553(b)(B). The exception excuses notice and comment, in emergency situations, or where ''the delay created by the notice and comment requirements would result in serious damage to important interests.'' *Woods Psychiatric Institute* v. *United States,* 20 Cl. Ct. 324, 333 (Cl. Ct. 1990) *aff'd* 925 F.2d 1454 (Fed. Cir. 1991); *also National Fed'n of Fed. Employees* v. *National Treasury Employees Union,* 671 F.2d 607, 611(D.C. Cir. 1982).

This rule is necessary to preclude the potential for abuse by those petitioners who might seek an unfair advantage in obtaining one of the limited number of H–1B petition approvals. As discussed above, last year was the first year that the 65,000 H–1B cap was reached on the same day that petitioners could begin to file petitions. USCIS believes that the practice of filing multiple petitions in an effort to exploit the random selection process has become more wide-spread over the past year as fears are raised that the 65,000 H–1B cap and 20,000 cap on master's degree exemptions for FY 2009 will be reached on April 1, 2008. Delay in issuing this regulation to consider public comment, would not allow USCIS to ameliorate the problem by removing this loophole in time for the April 1, 2008 filing start date. This would adversely impact a large number of companies, in particular smaller businesses that cannot afford to pay multiple petition fees to secure an H–1B visa for their employees.

Accordingly, USCIS is implementing these amendments as an interim rule effective immediately upon publication in the **Federal Register**. USCIS nevertheless invites comments on this rule and will consider all timely comments in the preparation of a final rule.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 603(b)), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (i.e., small businesses, small

organizations, and small governmental jurisdictions) when the agency is required ''to publish a general notice of proposed rulemaking for any proposed rule.'' Because this rule is being issued as an interim rule, on the grounds set forth above, a regulatory flexibility analysis is not required under the RFA.

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 (Regulatory Planning and Review)

This rule has been designated as a ''significant regulatory action'' by the Office of Management and Budget (OMB) under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, an analysis of the economic impacts of this rule has been prepared and submitted to the Office of Management and Budget (OMB) for review. This rule imposes no additional costs on the public, or any regulated entity that is subject to its provisions. This rule does not preclude any petitioner from filing a legitimate petition, only the filing of the same petition more than once. The race to meet the filing date of each fiscal year has become a ritual for H–1B petitioners and USCIS expects the 65,000 and 20,000 maximums to be met easily every year. Thus, the volume of applications and fee income are not expected to change from current levels. This rule may result in a fee being collected instead of returned if the prohibition against duplicate petitions is violated, because while in 2007 only the duplicate petition was denied if the first one adjudicated was approved, this rule provides that both petitions will be denied. Nonetheless, all employers and employees that are the subject of a timely filing will have the same chance as all others for their petition to be selected for processing. This rule does not change that. Hence, this rule will benefit both petitioners and alien beneficiaries by making sure that all petitioners have an equal chance to have their petition considered. A copy of the complete analysis is available in the rulemaking docket for this rule at *www.regulations.gov*, under Docket No. USCIS–2007–0060, or by calling the information contact listed above.

F. Executive Order 13132 (Federalism)

This rule would have no 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, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting requirements inherent in a rule. This rule does not impose any new reporting or record-keeping requirements under the Paperwork Reduction Act.

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 of Federal Regulations is 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, 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. Section 214.2 is amended by:
■ a. Adding new paragraph (h)(2)(i)(G);
■ b. Revising paragraph (h)(8)(i)(A);
■ c. Revising paragraph (h)(8)(ii)(B); and by
■ d. Revising paragraph (h)(8)(ii)(D).
The addition and revisions read as follows:

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

* * * * *

(h) * * *

(2) * * *

(i) * * *

(G) *Multiple H–1B petitions.* An employer may not file, in the same fiscal year, more than one H–1B petition on behalf of the same alien if the alien is subject to the numerical limitations of section 214(g)(1)(A) of the Act or is exempt from those limitations under section 214(g)(5)(C) of the Act. If an H–1B petition is denied, on a basis other than fraud or misrepresentation, the employer may file a subsequent H–1B petition on behalf of the same alien in the same fiscal year, provided that the numerical limitation has not been reached or if the filing qualifies as exempt from the numerical limitation. Otherwise, filing more than one H–1B petition by an employer on behalf of the same alien in the same fiscal year will result in the denial or revocation of all such petitions. If USCIS believes that related entities (such as a parent company, subsidiary, or affiliate) may not have a legitimate business need to file more than one H–1B petition on behalf of the same alien subject to the numerical limitations of section 214(g)(1)(A) of the Act or otherwise eligible for an exemption under section 214(g)(5)(C) of the Act, USCIS may issue a request for additional evidence or notice of intent to deny, or notice of intent to revoke each petition. If any of the related entities fail to demonstrate a legitimate business need to file an H–1B petition on behalf of the same alien, all petitions filed on that alien's behalf by the related entities will be denied or revoked.

* * * * *

(8) * * *

(i) * * *

(A) Aliens classified as H–1B nonimmigrants, excluding those involved in Department of Defense research and development projects or coproduction projects, may not exceed the limits identified in section 214(g)(1)(A) of the Act.

* * * * *

(ii) * * *

(B) When calculating the numerical limitations or the number of exemptions under section 214(g)(5)(C) of the Act for a given fiscal year, USCIS will make numbers available to petitions in the

order in which the petitions are filed. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions (including the number of beneficiaries requested when necessary) received and will notify the public of the date that USCIS has received the necessary number of petitions (the ''final receipt date''). The day the news is published will not control the final receipt date. When necessary to ensure the fair and orderly allocation of numbers in a particular classification subject to a numerical limitation or the exemption under section 214(g)(5)(C) of the Act, USCIS may randomly select from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection as validated by the Office of Immigration Statistics. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected. Petitions filed on behalf of aliens otherwise eligible for the exemption under section 214(g)(5)(C) of the Act not randomly selected or that were received after the final receipt date will be rejected if the numerical limitation under 214(g)(1) of the Act has been reached for that fiscal year. Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded. If the final receipt date is any of the first five business days on which petitions subject to the applicable numerical limit may be received (i.e., if the numerical limit is reached on any one of the first five business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those five business days, conducting the random selection among the petitions subject to the exemption under section 214(g)(5)(C) of the Act first.

* * * * *

(D) If the total numbers available in a fiscal year are used, new petitions and the accompanying fee shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year. Petitions received after the total numbers available in a fiscal year are used stating that the alien beneficiaries are exempt from the numerical limitation will be denied and filing fees will not be returned or refunded if USCIS later determines that such beneficiaries are subject to the numerical limitation.

* * * * *

Dated: March 18, 2008.

Michael Chertoff,

Secretary.

[FR Doc. E8–5906 Filed 3–21–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28229; Directorate Identifier 2006–SW–23–AD; Amendment 39–15434; AD 2008–06–22]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model EC130 B4 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for the specified Eurocopter France (Eurocopter) Model EC 130 B4 helicopters, with certain twist grip assemblies installed, that requires inspecting the pilot and co-pilot collective levers for proper bonding between the twist grip drive tubes and the control pinions and if debonding is present, replacing the collective levers before further flight. This amendment is prompted by one incident in which the engine remained at idle speed although the twist grip had been turned to the flight position. The actions specified by this AD are intended to detect debonding between the twist grip drive tubes and the control pinions on the pilot and co-pilot collective levers to prevent loss of cockpit throttle control of the engine, and subsequent loss of control of the helicopter.

DATES: Effective April 28, 2008.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 28, 2008.

ADDRESSES: You may get the service information identified in this AD from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053–4005, telephone (972) 641–3460, fax (972) 641–3527.

Examining the Docket: You may examine the docket that contains this AD, any comments, and other information on the Internet at *http://www.regulations.gov* or at the Docket Operations office, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ed Cuevas, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Safety Management Group, Fort Worth, Texas 76193–0111, telephone (817) 222–5355, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION: A proposal to amend 14 CFR part 39 to include an AD for the specified model helicopters was published in the **Federal Register** on May 21, 2007 (72 FR 28456). That action proposed to require, within 110 hours time-in-service (TIS) or 4 months, whichever occurs first, or before installing a collective lever with an affected grip assembly on a helicopter, inspecting the bonding between the twist grip drive tube and the control pinion on both the pilot and co-pilot collective lever. If debonding is present, replacing the collective lever before further flight was proposed.

The European Aviation Safety Agency (EASA) notified us that an unsafe condition may exist on Eurocopter Model EC 130 B4 helicopters, with a twist grip assembly, part number (P/N) 350A27520900, 350A27520901, 350A27520902, or 350A27520903, with a serial number below 64, installed on the pilot's side, and a twist grip assembly, P/N 350A27521201, with a serial number below 67, installed on the co-pilot's side. EASA advises that analysis of an incident that occurred during autorotation training revealed a failure of the twist grip drive tube and control pinion bonded attachment. The engine remained at idle speed although the twist grip had been turned back to the flight position. The autorotation procedure continued to the ground without damage to the helicopter. The failure has been attributed to non-compliant surface preparation during manufacture.

Eurocopter, an EADS Company, has issued Alert Service Bulletin EC130 No. 76A001, dated February 10, 2006, which specifies a check by use of a twist grip adjusting gauge of the bonding between the twist grip drive tube and the control pinion on both the pilot and co-pilot collective lever. EASA classified this service bulletin as mandatory and issued AD No. 2006–0079, dated April