return the employee to his or her home or to the place of employment.

§ 61.307 Transportation of recovered bodies of missing persons.

If an employee dies while in detention and the body is later recovered, the Office may provide the cost of transporting the body to the home of the deceased or to any place designated by the employee's next of kin, near relative, or legal representative.

Subpart E—Miscellaneous Provisions

§ 61.400 Custody of records relating to claims under the War Hazards Compensation Act.

All records, medical and other reports, statements of witnesses and other papers filed with the Office with respect to the disability, death, or detention of any person coming within the purview of the Act, are the official records of the Office and are not records of the agency, establishment, Government department, employer, or individual making or having the care or use of such records.

§ 61.401 Confidentiality of records.

Records of the Office pertaining to injury, death, or detention are confidential, and are exempt from disclosure to the public under section 552(b)(6) of Title 5, United States Code. No official or employee of the United States who has investigated or secured statements from witnesses and others pertaining to any case within the purview of the Act, or any person having the care or use of such records, shall disclose information from or pertaining to such records to any person, except in accordance with applicable regulations (see 29 CFR Part 70a).

§ 61.402 Protection, release, inspection and copying of records.

The protection, release, inspection and copying of the records shall be accomplished in accordance with the rules, guidelines and provisions contained in Part 70 and Part 70a of Title 29 of the Code of Federal Regulations and the annual notice of systems of records and routine uses as published in the **Federal Register.**

§ 61.403 Approval of claims for legal and other services.

(a) No claim for legal services or for any other services rendered in respect to a claim or award for compensation under the Act to or on account of any person shall be valid unless approved by the Office. Any such claim approved by the Office shall, in the manner and to the extent fixed by the Office, be paid out of the compensation payable to the claimant.

(b) The Office shall not recognize a contract for a stipulated fee or for a fee on a contingent basis. No fee for services shall be approved except upon application supported by a sufficient statement of the extent and character of the necessary work done on behalf of the claimant. Except where the claimant was advised that the representation would be rendered on a gratuitous basis, the fee approved shall be reasonably commensurate with the actual necessary work performed by the representative, and with due regard to the capacity in which the representative appeared, the amount of compensation involved, and the circumstances of the claimant.

§ 61.404 Assignments; creditors.

The right of any person to benefits under the Act is not transferable or assignable at law or in equity except to the United States, and none of the moneys paid or payable (except money paid as reimbursement for funeral expenses), or rights existing under the Act are subject to execution, levy, attachment, garnishment, or other legal process or to the operation of any bankruptcy or insolvency law.

PART 20—[REMOVED]

3. 20 CFR Part 62 is removed.

Signed at Washington, DC, this 27th day of May 1987.

William E. Brock,

Secretary of Labor.

[FR Doc. 87-12374 Filed 5-29-87; 8:45 am]

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federal register

Monday
June 1, 1987

Part IV

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, et al.

Surface Coal Mining and Reclamation Operations; Exemption for Coal Extraction Incidental to the Extraction of Other Minerals; Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, 702, 750, 870, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947

Surface Coal Mining and Reclamation Operations; Exemption for Coal Extraction Incidental to the Extraction of Other Minerals

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE or Office) of the United States Department of the Interior (DOI) proposes to amend its regulations relating to the exemption contained in § 701(28) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or Act) concerning the extraction of coal incidental to the extraction of other minerals.

The rule is being proposed in order to provide guidance to the coal and noncoal mining industry and coal regulatory authorities concerning the implementation of the exemption under section 701(28). The proposed rule would result in the administration of the exemption in a practical manner which would provide the exemption for legitimate operations and prevent the use of the exemption for operations that should be subject to the environmental protection measures of SMCRA.

DATES: *Written Comments:* OSMRE will accept written comments on the proposed rule until 5 p.m., Eastern time on August 10, 1987.

Public Hearings: Upon request, OSMRE will hold public hearings on the proposed rule in Washington, DC; and Columbus, Ohio at 9:30 a.m., local time on August 3, 1987. Upon request, OSMRE will also hold public hearings in the States of Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington, where Federal regulatory programs are in effect, at times and on dates to be announced prior to the hearings. OSMRE will accept requests for public hearings until 5:00 p.m., Eastern time on July 1, 1987. Individuals wishing to attend but not testify at any hearing should contact the person identified under "FOR FURTHER INFORMATION CONTACT" beforehand to verify that the hearing will be held.

ADDRESSES: *Written Comments:* Hand-deliver to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131, 1100 L Street, NW., Washington, DC; or mail to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131-L, 1951 Constitution Avenue, Washington, DC 20240.

Public Hearings: Department of the Interior Auditorium, 18th and C Streets, NW., Washington, DC, and Room 220 Federal Building, 85 Marconi Blvd., Columbus, Ohio. The addresses for any hearings scheduled in the States of Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington will be announced prior to the hearings.

Request For Public Hearings: Submit orally or in writing to the person and address specified under "FOR FURTHER INFORMATION CONTACT".

FOR FURTHER INFORMATION CONTACT: James Fary, Division of Abandoned Mine Land Reclamation, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202-343-3375 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

Written Comments

Written comments submitted on the proposed rule should be specific, should be confined to issues pertinent to the proposed rule, and should explain the reason for any recommended change. Where practical, commenters should submit three copies of their comments (see "ADDRESSES"). Comments received after the close of the comment period (see "DATES") may not necessarily be considered or included in the Administrative Record for the final rule.

Public Hearings

OSMRE will hold public hearings on the proposed rule by request only. The times, dates and addresses scheduled for hearings at two locations are specified previously in this notice (see "DATES" and "ADDRESSES"). The times, dates and addresses for the hearings at the remaining locations have not yet been scheduled, but will be announced in the **Federal Register** at least 7 days prior to any hearings which are held at these locations.

Any person interested in participation at a hearing at a particular location should inform Mr. Fary (see "FOR FURTHER INFORMATION CONTACT") either orally or in writing of the desired hearing location by 5:00 p.m., Eastern time on July 1, 1987. If no one has contacted My. Fary to express an interest in participating in a hearing at a given location by that date, the hearing will not be held. If only one person expresses an interest, a public meeting rather than a hearing may be held and the results included in the Administrative Record.

If a hearing is held, it will continue until all persons wishing to testify have been heard. To assist the transcriber and ensure an accurate record, OSMRE requests that persons who testify at a hearing give the transcriber a written copy of their testimony. To assist OSMRE is preparing appropriate questions, OSMRE also requests that persons who plan to testify submit to OSMRE at the address previously specified for the submission of written comments (see "ADDRESSES") an advance copy of their testimony.

II. Background

Section 701(28) of the Act, 30 U.S.C. 1291, excludes from the definition of surface coal mining operations the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the tonnage of minerals removed for purposes of commercial use or sale. Operations meeting the above standard are thereby not subject as surface coal mining operations to certain SMCRA provisions such as bonding, permitting and abandoned mine reclamation fee payment.

The incidental mining exemption first appeared in S. 425 introduced in the 93rd Congress. S. Rept. No. 93-402, 93rd Cong., 1st Sess. 160 (1973). Although subsequent minor changes were made in the text, this provision appeared in every major version of the Act that was considered from 1973 to 1977. Although the legislative history of this provision is limited, the Congressional reports indicate that it was aimed at operations, such as limestone quarries, where the primary mineral being sought is something other than coal and comparatively small proportions of coal are recovered incidental to those operations.

Regulations implementing this section of SMCRA were originally published in 30 CFR Part 700 on March 13, 1979 (44 FR 15315). This section addresses the activities exempted from the Act. With respect to the incidental exemption, § 700.11 simply lists such operations as exempt. Paragraph (c) of § 700.11 provides further that the regulatory authority may make a written determination, when requested, whether the operation is exempt and that the person requesting the exemption has the burden of establishing the exemption. If a written determination of exemption is reversed through subsequent administrative or judicial action, any person who, in good faith, has made a complete and accurate request for an exemption and relied upon the determination, will not be cited for violations which occurred prior to the date of reversal. For example, an operator's prereversal mining would not be cited as mining without a permit.

Because the regulations did not provide specific guidance concerning whether an operation is exempt, an advance notice of proposed rulemaking and request for public comment on section 701(28) of SMCRA were published in the **Federal Register** on May 7, 1984 (49 FR 19336). Also at that time, OSMRE published guidelines intended to assist operators and the States in implementing this exemption pending promulgation of final regulations.

An important objective for OSMRE is to involve major external groups more effectively in regulatory development. To help accomplish this objective, OSMRE has undertaken an outreach effort to obtain comments on initial drafts of significant rulemaking prior to developing proposed regulations for review and publication in the **Federal Register**. In consideration of the comments received on the advance notice of proposed rulemaking, and after further review of the issue, OSMRE solicited additional public comments during September 1986, as part of its outreach program. The resulting outreach comments were taken into consideration when preparing this proposed rulemaking.

Once a final rule governing the exemption for coal extraction incidental to the extraction of other minerals is promulgated, the States which have achieved primacy will need to amend their regulatory programs to include provisions which are no less effective than those set forth in the final Federal rules.

III. Discussion of Proposed Rule

Part 702

The rule would adopt a new Part 702 relating to the exemption for coal extraction incidental to the extraction of other minerals.

Section 702.1—Scope.

The proposed section 702.1 would explain that Part 702 implements the exemption contained in Section 701(28) of SMRCA concerning the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale over the life of the mining operation.

The operations exempt under section 701(28) of SMRCA and Part 702 are not subject to the environmental protection performance standards of Title V and abandoned mine reclamation fee provisions of Title IV of the Act. OSMRE does, however, retain the right of inspection and entry to verify the validity of claimed exemptions.

Section 702.3—Authority.

Under sections 201, 412, and 501 of OSMRE, the Secretary is directed to administer the program for controlling coal mining operations and to publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of SMCRA.

Under Section 701(28) of SMCRA, an exemption is provided from the requirements of SMCRA for the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale.

Section 702.5—Definitions.

The proposed rule would define "mining area" as an individual excavation site or pit from which minerals and overburden are removed. The primary purpose for the definition being limited to an individual excavation site or pit is to preclude an operator from averaging mineral tonnages from different locations to gain an otherwise unwarranted exemption from the Act. The proposed definition would also prohibit an operator from claiming an exemption by combining production from distinct non-coal and coal operations. Each excavation site or pit must individually qualify for the exemption in accordance with the requirements for exemption under § 702.14.

The proposed rule defines "other minerals" as any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste and fill material. The proposed definition requires that the substance be mined for its mineral value, and therefore, allows the regulatory authority the flexibility to consider local conditions in determining whether the mineral has commercial value.

The exclusion of waste and soil from the definition of other minerals is intended to take into account material which is spoiled or othewise disposed of in a manner that it is not used for its mineral value. Fill material is also excluded from the definition of other minerals. Including fill material as an other mineral, or commercial use of an other mineral, could result in the claiming of the exemption to avoid being subject to the environmental protection provisions of SMCRA. For example, a surface coal mining operator could haul "overburden" to a site outside the mining area and claim the material is being commericially piaced to prepare a site for construction, farming, etc. Allowing such claims could circumvent the provisions of SMCRA.

A more definitive list of materials to be excluded from the definition of other minerals is not provided, as any attempt to list specific materials that are not materials runs the risk of excluding materials which may serve specialized uses and which may legitimately be exempt.

The definition of other minerals as provided in section 701(14) of SMCRA is not used in the proposed rule. It is clear from the legislative history that the section 701(14) definition is intended for use under section 709 of SMCRA; *Study of Reclamation Standards for Surface Mining of Other Minerals.*

Section 702.11—Requirements for Filing Notice of Exemption.

The proposed rule distinguishes between new and existing operations in establishing timeframes for filing notices of exemption under this part. Under § 702.11(a), proposed operations must file a complete notice of exemption for each mining area at least 30 days prior to commencement of operations.

Existing operations, covered under § 702.11(b), must file a complete notice of exemption with the regulatory authority for each mining area within 60 days after the effective date of this part if they intend to continue operations after the end of the 60-day period. The 60-day timeframe for existing operations is provided to give an existing operator time to determine future plans and ensure compliance with the new regulations, whereas a new operator has the benefit of planning prior to commencing mining. Although each mining area must qualify on its own for exemption, one notice may contain information on more than one mining area.

Pursuant to proposed § 702.11(c)(1), the regulatory authority shall notify persons if the exemption is incomplete and may at any time require submittal of additional information. A complete notice of exemption would contain the information required under § 702.12 and would be sufficient to allow review for conformance with the requirements for exemption under § 702.14. There is no specific provision for an extension of time when a notice does not contain sufficient information; however, § 702.11(e) requires the operator to file a complete exemption notice which places the burben directly on the operator and eliminates the need for time extensions.

The regulatory authority is required by proposed § 702.11(c)(2) to make a written determination on whether the operation is exempt if so requested by the operator. This provision parallels § 702.11(c) which requires, in part, a written determination when requested and applies to other exemptions besides the 16⅔ percent exemption covered by this part.

To remain exempt under this Part, an operator is required to update the notice of exemption at the request of the regulatory authority or when changes in the information previously submitted are necessary, according to proposed § 702.11(d). No attempt was made to compile an all inclusive list of such changes, but anything which affects the mining operation or mining area, such as tonnage ratio, loss of market for other minerals, change in production, etc., would certainly be included. Also specified in this section, is that a separate notice of exemption is required for each new mining area. This wording again refers back to each mining area qualifying on its own for the exemption; however, as previously stated, one notice may contain information on more than one mining area.

Proposed § 702.11(e) states that failure to file a complete notice of exemption or update the notice of exemption precludes an operator from interposing the exemption as a defense in enforcement action taken under the Act.

Proposed § 702.11(f) states that the regulatory authority may find, based on the information contained in the notice, that the operation is not exempt under this part. Where OSMRE is the regulatory authority, such a determination would constitute a decision of the Director within the meaning of 43 CFR 4.1281 and would contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR Part 4. A decision by a State regulatory authority would also be appealable under State law.

Section 702.12—Contents of Notice of Exemption.

Proposed §§ 702.12 (a) through (k) lists minimum information that must be included in a notice of exemption. Name and address of the operator are required by § 702.12(a).

A list of the other minerals to be extracted for commercial use or sale, annual and total tonnages of all minerals including coal, and the basis of such tonnage estimates are required by § 702.12(b). By requesting the basis of such tonnage estimates, in addition to the figures themselves, the regulatory authority will be able to perform independent calculations based on actual data for comparisons.

Requirements of § 702.12 (c) and (d) are, respectively, a description, including county, township if any, and boundary of the land of sufficient certainty that the mining area may be located and distinguished from other mining areas and surface coal mining operations; and an acreage estimate composing the mining area over the proposed life of the mining operation. Public participation for this regulation is provided for in § 702.12(e). This section requires publication, at least once a week for two consecutive weeks in a newspaper of general circulation in the county of the mining area, of a public notice of filing of a notice of exemption with the regulatory authority, where the public notice identifies the persons claiming the exemption. One public notice may contain information on more than one mining area.

The next three requirements, §§ 702.12 (f), (g), and (h) are, respectively, representative cross-sections showing relative position and approximate thickness and density of all minerals including coal, and the relative position and thickness of any other materials to be extracted; a map of appropriate scale which clearly identifies the mining area; and a general description of mining and mineral processing activities. This information will allow the regulatory authority to evaluate the tonnage ratio of coal to other minerals.

In § 702.12(i), a summary of sales commitments, if any, or a description of potential markets, is required for minerals to be extracted from the mining area. The section also requires that minerals commercially used by the operator be so specified.

An additional information requirement for existing operations (i.e., operations subject to the notice submittal requirement of § 702.11(b)), is found at § 702.12(j). In addition to complying with the other requirements for this section for the mining area over the life of the mining operation, existing operations must also submit documentation of the total tonnage of coal and each other mineral that has been produced (prior to the submittal of the notice) from the mining area for commercial use or sale, and any relevant documents the operator has received from OSMRE or the regulatory authority documenting the exemption. As provided for in § 702.12(k), the regulatory authority may request any other information pertinent to the qualification of the operation as exempt.

Section 702.13—Public Availability of Information.

Proposed § 702.13(a) provides that except as provided for in § 702.13(b), all information submitted to the regulatory authority under this part shall be made available for public inspection and copying at the office of the regulatory authority having local jurisdiction over the mining operation claiming the exemption. The exception to this provision, proposed § 702.13(b), requires the regulatory authority to keep information confidential if the person submitting it requests in writing, at the time of submission, that it be kept confidential and the information concerns trade secrets or is privileged commercial or financial information relating to the competitive rights of the persons intending to conduct operations under this part. Proposed § 702.13(c) goes on to state that information requested to be held as confidential under § 702.13(b) shall not be made publicly available until after notice and opportunity to be heard is afforded persons both seeking and opposing disclosure of the information. The determination as to the proprietary nature of information will be made in accordance with the Freedom of Information Act (5 U.S.C. 552(b)), and Privacy Act (5 U.S.C. 552(a)), at 43 CFR Part 2.

Section 702.14—Requirements for Exemption.

This section lists three tests that must be satisfied in order for activities to be exempt from the requirements of the Act. Proposed § 702.14(a) specifies that the tonnage of coal extracted from the mining area will not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of bona fide sale or reasonable commercial use over the life of the mining operation. The key to preventing abuse under this provision is requiring that a bona fide market be established. This in turn will sufficiently ensure that the other minerals sought are commercially valuable.

The following simplified example illustrates the accepted computation procedure for determining the tonnage ratio: for every 100 tons of total minerals mined (coal and other minerals combined), up to 16⅔ tons of that total may be coal in an exempt operation.

The 16⅔ percentage test applies to the total coal and other mineral production achieved over the life of mining at each individual excavation. The life-of-mine concept is used to take into consideration the normal sequence of mining. Determining coal and other mineral percentages under a set period may result in an operation being exempt in one period and not the next. This situation could occur even though the operation would be exempt if the 16⅔ percentage test were applied over the life of the mine.

The second test, found at proposed § 702.14(b), requires coal to be produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use. Although other tests for determining whether the coal is incidental were considered, the proposed provision achieves a balance between environmental concerns and concerns for the full utilization and conservation of the coal. This will minimize the potential for future disturbance of the land to recover coal.

The third test to be satisfied, proposed § 702.14(c), requires that each of the other minerals upon which an exemption under this part is claimed is a commercially valuable mineral. This means that either a market presently exists or the mineral is mined in bona fide anticipation that a market will exist in the reasonably foreseeable future, but not to exceed twelve months.

Section 702.15—Conditions of Exemption and Right of Inspection and Entry.

Although operators qualifying under this part would be exempt from certain provisions of SMCRA, the regulatory authority would be able to exercise its authority to enter and inspect and impose certain conditions on persons claiming the exemption. These provisions provide the regulatory authority access to operations claiming the exemption to determine if the operations qualify for the exemption. Proposed § 702.15(a) requires that operators maintain on-site or at other locations available to authorized representatives of the regulatory authority or the Secretary all information relevant to the exemption including, but not limited to, commercial use and sales information, extraction tonnages, and a copy of the notice of exemption. Operators must also notify the regulatory authority upon the completion of the mining operation.

Inspection and entry rights are exercised and are covered in the remainder of this section. Proposed § 702.15(b) states that authorized representatives of the regulatory authority or the Secretary shall have the right to conduct inspections of operations claiming exemption under this part. Proposed § 702.15(c) follows with more specific inspection rights, providing that the authorized representatives: (1) Shall have a right of entry to, upon, and through any mining and reclamation operations without advance notice or a search warrant, upon presentation of appropriate credentials, (2) may at reasonable times and without delay, have access to any copy and records, and (3) shall have a right to gather physical and photographic evidence to document conditions, practices, or violation at a site. Proposed § 702.15(d) states that no search warrant shall be required with respect to any activity under § 702.15(b) except that a search warrant may be required for entry into a building.

Section 702.16—Stockpiling of Minerals.

The proposed rule gives flexibility to the regulatory authority concerning stockpiling of minerals. Proposed § 702.16 states that the regulatory authority may disallow all or part of an operator's tonnage figures of stockpiled minerals for purposes of meeting the requirements of this part if the operator fails to maintain adequate and verifiable records of the disposition (i.e., additions to and removal from stockpiles) or if the disposition of the stockpiles indicates the lack of commercial use or market for the minerals.

Section 702.17—Enforcement.

Proposed § 702.17 covers enforcement actions to be taken by the regulatory authority or OSMRE if an operation claiming exemption is in fact not exempt. If the regulatory authority or OSMRE has cause to believe that the mining operation claiming exemption is not exempt under the provisions of this part, appropriate enforcement action shall be taken under the relevant inspection, enforcement, and civil penalty provisions of either the applicable provisions of the State program or under Subchapter L of this Chapter, according to § 702.17(a). If the regulatory authority or OSMRE finds that activities conducted in the mining area constitute surface coal mining operations, the regulatory authority or OSMRE shall, in accordance with § 702.17(b): (1) Order the payment of abandoned mine reclamation fees in accordance with Part 870 of this Chapter, and (2) order the operator to cease surface coal mining operations and either obtain a valid surface coal mining permit or undertake and accomplish within a specified time period remedial reclamation in conformance with the standards of the regulatory program which the regulatory authority or OSMRE deems applicable to conditions existing on the mining area. As specified in § 702.17(c), the regulatory authority or OSMRE may require the operator to submit a reclamation bond pursuant to the regulatory program to ensure the performance of remedial reclamation.

Section 700.11(a)(4)—Applicability.

OSMRE proposes to include a cross-reference to the new Part 702 which contains specific rules implementing section 701(28) of SMCRA.

Section 870.11(d)—Applicability.

OSMRE also proposes to remove the words "in any twelve consecutive months" to correspond to use of no specific term in Part 702 which relies on the term "life of the mining operation." This removal would be prospective only and not relieve operators from existing obligations to pay reclamation fees.

Part 750 and Subchapter T—Effect on Indian Lands and in Federal Program States

Under the proposed rules, Part 702 would apply through cross-referencing to Indian lands under Federal programs for Indian lands as provided in 30 CFR Part 750. Proposed Part 702 would also apply through cross-referencing in those States with Federal programs. This includes Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal Programs for these States appear at 30 CFR Parts 910, 912, 921, 933, 937, 939, 941, 942, and 947 respectively.

IV. Procedural Matters

Federal Paperwork Reduction Act

The information collection requirements in the proposed Part 702 have been submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.* There are no information collection requirements for the other parts covered by this proposed rule. The collection of this information will not be required until it has been approved by the Office of Management and Budget. The information is needed to meet the requirements of sections 201 and 701(28) of Pub. L. 95–87, and will be used by the regulatory authority to implement the exemption under Part 702. The obligation to respond is required to obtain a benefit.

Executive Order 12291 and Regulatory Flexibility Act

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The rule would affect a relatively small number of noncoal mineral operations. The rule does not distinguish between small and large entities. The economic effects of the proposed rule are estimated to be minor and no incremental economic effects are anticipated as a result of the rule.

National Environmental Policy Act

OSMRE has prepared a draft environmental assessment of the proposed rule. This assessment indicates that the proposed rule will not significantly affect the environment. It is anticipated that a Finding of No Significant Impact (FONSI) will be approved for the final rule in accordance with OSMRE procedures under the National Environmental Policy Act of 1969. The environmental assessment for the proposed rule is on file in the OSMRE Administrative Record at the address previously specified (see "ADDRESSES"). An environmental assessment of the final rule will be completed and a final finding made on the significance of any impacts prior to promulgation of the final rule.

Author

The principal authors of this rule are James Fary, Division of Abandoned Mine Land Reclamation, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202–343–3375 (Commercial or FTS), and Kathleen Woodward, Casper Field Office, Office of Surface Mining Reclamation and Enforcement, Federal Building, 100 East "B" Street, Room 2128, Casper, Wyoming 82601–1918: 307–261–5826 Commercial or 328–5826 FTS.

List of Subjects

30 CFR Part 700

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 702

Administrative practice and procedures, Surface mining, Underground mining.

30 CFR Part 750

Indians-lands, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 870

Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 910

Administrative practice and procedure, Environmental protection, Intergovernmental relations, Penalties, Surety bonds, Surface mining, Underground mining.

30 CFR Part 912

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Parts 921 and 922

Administrative practice and procedure, Intergovernmental relations, Penalties, Surface mining, Underground mining.

30 CFR Part 933

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Parts 937 and 939

Administrative practice and procedure, Intergovernmental relations, Penalties, Surface mining, Underground mining.

30 CFR Part 941

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 942

Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 947

Intergovernmental relations, Surface mining, Underground mining.

Accordingly, it is proposed to amend 30 CFR Parts 700, 702, 750, 870, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 as set forth below:

Dated: April 7, 1987.

J. Steven Griles,

Assistant Secretary for Land and Minerals Management.

PART 700—GENERAL

1. The authority citation for Part 700 is revised to read as follows:

Authority: Pub. L. 95–87 (30 U.S.C. 1201 *et seq.*).

2. Section 700.11(a)(4) is revised to read as follows:

§ 700.11 Applicability.

(a) * * *

(4) The extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale in accordance with Part 702 of this chapter.

* * * * *

PART 702—EXEMPTION FOR COAL EXTRACTION INCIDENTAL TO THE EXTRACTION OF OTHER MINERALS

3. Part 702 is added to read as follows:

Sec.
702. 1 Scope.
702. 3 Authority.
702. 5 Definitions.
702.11 Requirements for filing notice of exemption.
702.12 Contents of notice of exemption.
702.13 Public availability of information.
702.14 Requirements for exemption.
702.15 Conditions of exemption and right of inspection and entry.
702.16 Stockpiling of minerals.
702.17 Enforcement.

Authority: Pub. L. 95–87 (30 U.S.C. 1201 *et seq.*).

§ 702.1 Scope.

This part implements the exemption contained in 701(28) of SMCRA concerning the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale over the life of the mining operation.

§ 702.3 Authority.

(a) Sections 201, 412, and 501 of SMCRA direct the Secretary to administer the program for controlling coal mining operations and to publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of SMCRA.

(b) Section 701(28) of SMCRA exempts from the requirements of SMCRA the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of commercial use or sale.

§ 702.5 Definitions.

As used in this part, the following terms have the meaning specified, except where otherwise indicated:

Mining area means an individual excavation site or pit from which minerals and overburden are removed.

Other minerals means any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste and fill material.

§ 702.11 Requirements for filing notice of exemption.

(a) Any person who plans to commence operations in reliance on the incidental mining exemption after the effective date of this part shall file a complete notice of exemption with the regulatory authority for each mining area at least 30 days prior to the commencement of operations.

(b) Any person who has commenced operations covered by this part prior to the effective date of this part may not continue operations after 60 days of the effective date of this part unless that person files a notice of exemption with the regulatory authority for each mining area within 60 days after the effective date.

(c) The regulatory authority shall:

(1) Notify persons if the notice of exemption is incomplete and may at any time require submittal of additional information; and

(2) Make a written determination on whether the operation is exempt if so requested by the operator.

(d) To remain exempt under this part, an operator shall update the notice of exemption at the request of the regulatory authority or when changes in the mining operation or mining area require changes in the information submitted with the notice. A separate notice of exemption is required for each new mining area.

(e) Failure to file a complete notice of exemption or to update the notice of exemption precludes an operator from interposing the exemption as a defense in enforcement action taken under the Act.

(f) The regulatory authority may find, based on the information contained in the exemption notice, that the persons claiming exemption are not exempt under this part. Where OSMRE is the regulatory authority, such a determination shall constitute a decision of the Office within the meaning of 43 CFR 4.1281 and shall contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR Part 4. Where the State is the regulatory authority, the decision shall be appealable under the provisions of the State program.

§ 702.12 Contents of notice of exemption.

A notice of exemption shall include at a minimum:

(a) The name and address of the operator;

(b) A list of the other minerals sought to be extracted, and an estimate of the annual and total tonnages of other minerals to be extracted for commercial use or sale and coal to be produced within the mining area, and the basis of such tonnage estimates;

(c) A description, including county, township if any, and boundary of the land of sufficient certainty that the mining area may be located and distinguished from other mining areas and surface coal mining operations;

(d) An estimate to the nearest acre of the number of acres that will compose the mining area over the proposed life of the mining operation;

(e) Evidence of publication, at least once a week for two consecutive weeks in a newspaper of general circulation in the county of the mining area, of a public notice of filing of a notice of exemption with the regulatory authority, where the public notice identifies the persons claiming the exemption;

(f) Representative stratigraphic cross-section(s) based on test borings or other information identifying and showing the relative position and approximate thickness and density of the coal and each other mineral to be extracted for commercial use or sale and the relative position and thickness of any material, not classified as other minerals, that will also be extracted during the conduct of mining activities;

(g) A map of appropriate scale which clearly identifies the mining area;

(h) A general description of mining and mineral processing activities;

(i) A summary of sales commitments, if any, which the operator has received for other minerals to be extracted from the mining area or a description of potential markets for such minerals. If the other minerals are to be commercially used by the operator, the summary should specify the use;

(j) For operations having extracted coal or other minerals prior to filing a notice of exemption, documentation of the total tonnage of coal and each other mineral that has been produced from the mining area for commercial use or sale, and any relevant documents the operator has received from the regulatory authority documenting the exemption; and

(k) Any other information pertinent to the qualification of the operation as exempt.

§ 702.13 Public availability of information.

(a) Except as provided in paragraph (b) of this section, all information submitted to the regulatory authority under this part shall be made available for public inspection and copying at the local offices of the regulatory authority having jurisdiction over the mining operation claiming exemption.

(b) The regulatory authority shall keep information confidential if the person submitting it requests in writing, at the time of submission, that it be kept confidential and the information concerns trade secrets or is privileged commercial or financial information relating to the competitive rights of the persons intending to conduct operations under this part.

(c) Information requested to be held as confidential under paragraph (b) of this section shall not be made publicly available until after notice and opportunity to be heard is afforded persons both seeking and opposing disclosure of the information.

§ 702.14 Requirements for exemption.

Activities are exempt from the requirements of the Act if all of the following are satisfied:

(a) The tonnage of coal extracted from the mining area will not exeed 16⅔ percent of the total tonnage of coal and other minerals removed for purposes of bona fide sale or reasonable commercial use over the life of the mining operation.

(b) Coal is produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fida sale or reasonable commercial use.

(c) Each other mineral upon which an exemption under this part is based is a commercially valuable mineral for which a market exists or which is mined in bona fide anticipation that a market will exist for the mineral in the reasonably foreseeable future, not to exceed twelve months.

§ 702.15 Conditions of exemption and right of inspection and entry.

(a) A person conducting activities covered by this part shall:

(1) Maintain on-site or at other locations available to authorized representatives of the regulatory authority and the Secretary all information relevant to the exemption including, but not limited to, commercial use and sales information, extraction

tonnages, and a copy of the notice of exemption; and

(2) Notify the regulatory authority upon the completion of the mining operation.

(b) Authorized representatives of the regulatory authority and the Secretary shall have the right to conduct inspections of operations claiming exemption under this part.

(c) Each authorized representative of the regulatory authority and the Secretary conducting an inspection under this part:

(1) Shall have a right of entry to, upon, and through any mining and reclamation operations without advance notice or a search warrant, upon presentation of appropriate credentials;

(2) May, at reasonable times and without delay, have access to and copy any records; and

(3) Shall have a right to gather physical and photographic evidence to document conditions, practices or violations at a site.

(d) No search warrant shall be required with respect to any activity under paragraphs (b) and (c) of this section, except that a search warrant may be required for entry into a building.

§ 702.16 Stockpiling of minerals.

The regulatory authority may disallow all or part of an operator's tonnage figures of stockpiled minerals for purposes of meeting the requirements of this part if the operator fails to maintain adequate and verifiable records of the disposition of stockpiles or if the disposition of the stockpiles indicates the lack of commercial use or market for the minerals.

§ 702.17 Enforcement.

(a) If the regulatory authority or the Office has cause to believe that the mining operation claiming exemption is not exempt under the provisions of this part, appropriate enforcement action shall be taken under the relevant inspection, enforcement, and civil penalty provisions of either the applicable State program or Subchapter L of this chapter.

(b) If the regulatory authority or the Office finds that activities conducted in the mining area constitute surface coal mining operations, the regulatory authority or the Office shall:

(1) Order the payment of abandoned mine reclamation fees in accordance with Part 870 of this chapter; and

(2) Order the operator to cease surface coal mining operations; and

(i) Obtain a valid surface coal mining permit; or

(ii) Undertake and accomplish within a specified time period remedial reclamation in conformance with the standards of the regulatory program which the regulatory authority or the Office deem applicable to conditions existing on the mining area.

(c) The regulatory authority or the Office may require the operator to submit a reclamation bond in an amount determined under the procedures of the regulatory program in order to ensure the performance of remedial reclamation.

PART 750—REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON INDIAN LANDS

4. The authority citation for Part 750 is revised to read as follows:

Authority: Pub. L. 95–87 (30 U.S.C. 1201 *et seq.*).

5. Part 750 is amended by adding § 750.21 as follows:

§ 750.21 Coal extraction incidental to the extraction of other minerals.

Part 702 of this chapter is applicable on Indian lands.

PART 870—ABANDONED MINE RECLAMATION FUND—FEE COLLECTION AND COAL PRODUCTION REPORTING

6. The authority citation for Part 870 is revised to read as follows:

Authority: Pub. L. 95–87, 30 U.S.C. 1201 *et seq.*

7. Section 870.11(d) is revised to read as follows:

§ 870.11 Applicability

* * * * *

(d) The extraction of coal incidental to the extraction of other minerals where coal does not exceed 16⅔ percent of the total tonnage of coal and other minerals removed for commercial use or sale; and

* * * * *

SUBCHAPTER T—PROGRAMS FOR THE CONDUCT OF SURFACE MINING OPERATIONS WITHIN EACH STATE

8. The authority citations for Parts, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 continue to read as follows:

Authority: Pub. L. 95–87, 30 U.S.C. 1201 *et seq.*

9. Parts 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 are amended by adding the following section (the wording for the section added is the same for each affected part):

§ ___.702 Exemption for coal extraction incidental to the extraction of other minerals.

Part 702 of this chapter, *Exemption for Coal Extraction Incidental to the Extraction of Other Minerals,* shall apply to any person who conducts coal extraction incidental to the extraction of other minerals for purposes of commercial use or sale.

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June 1, 1987

Part V

Department of Justice

Immigration and Naturalization Service

8 CFR Part 214

Nonimmigrant Classes; Interim Rule With Request for Comments

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

[INS No. 1008-87]

Nonimmigrant Classes

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: Section 301 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, amended section 101(a)(15)(H)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii), a nonimmigrant classification commonly called H-2. Prior to amendment this classification applied to an alien coming to perform *any* type of temporary service or labor. IRCA redesignated the H-2 classification as H-2B, and moved agricultural labor off into a new H-2A classification. This interim rule redesignates 8 CFR 214.2(h)(3), which sets special criteria for H-2 workers, as 8 CFR 214.2(h)(3a), and revises the title to indicate that agricultural workers are not included in the classification. It also adds a new paragraph (3) to establish special criteria for the admission, extension and maintenance of status of H-2A workers.

DATES: This interim rule is effective June 1, 1987. Comments must be received on or before July 31, 1987.

ADDRESS: Please submit written comments, in duplicate, to the Director, Office of Policy Directives and Instructions, Immigration and Naturalization Service, 425 I Street, NW., Room 2011, Washington, DC 20536.

FOR FURTHER INFORMATION CONTACT: Michael L. Aytes, Senior Examiner, Adjudications Division, Immigration and Naturalization Service, 425 I Street, NW., Room 7122, Washington, DC 20536. Telephone: (202) 633-3946.

SUPPLEMENTARY INFORMATION: The Immigration Reform and Control Act of 1986 (IRCA) imposes sanctions against employers who hire aliens not authorized to work. Since many of the nation's agricultural employers have become dependent upon such workers to meet production and harvesting needs, Congress created the Special Agricultural Workers (SAW) program and the Replenishment Agricultural Workers (RAW) program to provide permanent resident status to certain agricultural workers. To clarify the process through which employers can employ nonimmigrant seasonal and temporary agricultural workers, Congress moved agricultural employment from the H-2 classification into a separate H-2A class, and incorporated a labor certification process into the statute.

This interim rule establishes special H-2A regulatory criteria. It supplements the Department of Labor's rules covering the temporary agricultural labor certification process, published separately. It was developed after extensive discussions with employers, associations and labor and legal service organizations. Under this rule eligibility will still be determined by the filing of Form I-129B, "Petition to Classify Nonimmigrant as Temporary Worker or Trainee". This interim rule clarifies the filing process. It also clarifies what issues are to be tested in petition proceedings. To reduce the incidence of petitions returned for evidence, this rule also sets initial evidence requirements.

The Labor Certification Process

Some of the most significant changes made in the H-2A area deal with labor certification. There was no statutory certification requirement in the H-2 system. The process itself only existed by regulation, and in such a way that the Secretary of Labor's finding merely constituted advice. Thus denial of a certification did not preclude approval of an H-2 petition.

IRCA extended this structure to the H-2B system, but not to the H-2A system. Instead it incorporated a certification process into statute. The statute does not specifically require that a certification be obtained before a petition can be filed, only that it be applied for. This indicates that Congress intended to leave some room for INS to grant H-2A status even though a certification is denied.

But a number of factors indicate that this was intended to be a narrow role. Whereas certification determinations were previously treated as advice to INS, the incorporation of the certification requirement and process into statute gave independence and greater meaning to the process and its findings. This is underscored by the statute's expansion of the Secretary's authority to deny certification and the institutionalization of an appellate process within the Department of Labor.

In addition, the statute gives the Attorney General, in consultation with the Secretary of Agriculture, authority to approve the Secretary of Labor's regulations in this area. This general authority obviates the need for extensive INS involvement in individual certification determinations.

Therefore, this interim rule significantly reduces INS review of issues the Department of Labor tests in the labor certification process. Under this rule INS will not become involved in issues of proper wages, recruiting requirements, working conditions, housing standards, and other areas in which the Department of Labor has more extensive expertise. This rule limits INS review to where an appeal under section 216(e)(2) of the Act has been denied solely due to the availability of qualified domestic labor.

Consistent with this interpretation, this interim rule also significantly reduces INS case-by-case review of whether employment qualifies as seasonal or temporary. The Department of Labor has traditionally tested this issue in the H-2 labor certification process. However, again, since this process stemmed from INS regulations, and was designed to serve merely as advice regarding the issues tested, INS has separately tested this issue in petition proceedings.

With the incorporation of the Department of Labor's role into the statute, and the authority given to the Attorney General to approve the regulations which that department promulgates concerning the H-2A process, there is no longer a need for redundant review by both agencies of whether employment qualifies as temporary or seasonal. However, since INS has the authority to determine whether certain employment qualifies as a basis for nonimmigrant or immigrant status, this rule does not totally eliminate INS review. It generally defines seasonal and temporary employment, and then, in the interests of streamling the process, and to minimize two agencies independently reviewing the same issue and possibly reaching different conclusions, it structures INS review in such a way that the Department of Labor's certification would be accepted unless there is specific evidence in the record that the employment does not qualify. This will eliminate requests for additional information or justification for a claim that employment is temporary or seasonal after the Department of Labor has concluded that it is. At the same time it allows INS to reach a different finding where there is clear evidence the employment does not qualify as a basis for H-2A status. It structures the review process in much the same fashion as that found in permanent certification matters.

Petition Agreements

An alien cannot be admitted unless it is demonstrated that he or she will comply with the terms of admission. An alien can sometimes overcome doubts of admissibility by posting a bond to guarantee compliance. Historically, H-2 agricultural workers fail to comply with the terms of their status at higher rates than many other nonimmigrant classes. Because the requirement of individual bonds for large numbers of H-2 agricultural workers creates extensive problems for domestic employers, and administrative problems for the Service, a system was developed which allowed an employer to enter into an agreement in lieu of separate bonds being required of each worker. This I-320B agreement, as it is commonly called, also commits the employer to certain general employment practices.

The provisions of IRCA are intended to significantly reduce the incidence of aliens violating their status. However, given historical patterns, some form of liability system must remain for temporary agricultural workers.

This rule incorporates the present system as an integral part of the petition. It limits the agreement to compliance with the rules governing the employment of the H-2A worker. Damage amounts are unchanged pending an analysis of actual costs to the government, but are limited to the failure of the petitioner to notify the Service when employment ends more than five days before the designated date, or when it cannot demonstrate that the H-2A worker departed the United States prior to the expiration of status or that an authorized extension of status was obtained within a certain period.

Admission

This interim rule incorporates the IRCA prohibition on the acquisition of H-2A status by an alien who violated H-2A status during the five years preceding the application for such status. To allow an H-2A worker to be at the worksite on time, it provides for the admission of an H-2A worker up to one week before authorized employment is to begin. It also gives a limited means for H-2A workers to transfer employers at the conclusion of employment by providing that H-2A status shall extend for a short time beyond the petition's expiration.

H-2A eligibility requires that employment be seasonal or temporary, which is generally not longer than one year. It also requires that the beneficiary qualify as a nonimmigrant. An H-2A worker can move from job to job if separate petitions are approved, and theoretically could remain indefinitely by doing so. However, at some point he would no longer qualify as a nonimmigrant. There has traditionally been a three year limit on an H-2 alien's uninterrupted stay. This rule continues this limitation. To ensure that this limitation has meaning it also establishes what length of absence will be considered to interrupt an H-2A alien's employment in the United States. If a significant absence is not required, an alien would be able to effectively bypass the limitation and indefinitely work in the United States at various temporary jobs by vacationing abroad every three years.

Other

This rule clarifies How H-2A workers can be replaced, and allows a limited extension of stay without a new certification. It also precludes a finding that an employer will meet the terms of a job offer if within the prior two years it violated section 274(a) of the Act or employed an H-2A worker in a position other than that described in the relating petition.

This is an interim rule. A final rule will be published after consideration of written comments received during the comment period. We encourage interested parties to comment on this rule.

Regulatory Impact

In accordance with 5 U.S.C. 605(b), the Commissioner certifies that this rule will not have a significant economic impact on a substantial number of small entities.

This rule is not a major rule within the meaning of section 1(b) of E.O 12291.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the paperwork requirements included in this interim rule will be submitted to the Office of Management and Budget for approval.

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Employment.

Interim Rule

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 is revised to read:

Authority: 8 U.S.C. 1101, 1103 and 1184.

2. Section 214.2 is amended by redesignating paragraphs (h)(3) through (h)(15) as (h)(4) through (h)(16), revising the heading of newly redesignated (h)(4), and removing the citation "(h)(3)(ii)(A)" and adding in its place "(h)(4)(ii)(A)" in newly redesignated paragraph (h)(4)(ii)(B); and by adding a new paragraph (h)(3), to read as follows:

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

* * * * *

(h) * * *

(3) *Petition for alien to perform agricultural labor or services of a temporary or seasonal nature (H-2A)*—(i) *Filing a petition*—(A) *General.* An H-2A petition must be filed on Form I-129B. The petition must be filed with a single valid temporary agricultural labor certification. However, if a certification is denied, domestic labor subsequently fails to appear at the worksite, and the Department of Labor denies an appeal under section 216(e)(2) of the Act, the written denial of appeal shall be considered a certification for this purpose if filed with evidence which establishes that qualified domestic labor is unavailable. An H-2A petition may be filed by either the employer listed on the certification, the employer's agent, or the association of United States agricultural producers named as a joint employer on the certification.

(B) *Multiple beneficiaries.* The total number of beneficiaries of a petition or series of petitions based on the same certification may not exceed the number of workers indicated on that document. A single petition can include more than one beneficiary if the total number does not exceed the number of positions indicated on the relating certification, and all beneficiaries will obtain a visa at the same consulate or are not required to have a visa and will apply for admission at the same port of entry.

(C) *Unnamed beneficiaries.* The sole beneficiary of an H-2A petition must be named in the petition. In a petition for multiple beneficiaries, each must be named unless he or she is not named in the certification and is outside the United States. Unnamed beneficiaries must be shown on the petition by total number.

(D) *Evidence.* An H-2A petitioner must show that the proposed employment qualifies as a basis for H-2A status, and that any named beneficiary qualifies for that employment. A petition will be automatically denied if filed without the certification evidence required in paragraph (h)(3)(i)(A) of this section and, for each named beneficiary, the initial evidence required in paragraph (h)(3)(v) of this section.

(E) *Special filing requirements.* Where a certification shows joint employers, a petition must be filed with an attachment showing that each employer has agreed to the conditions of H–2A eligibility. A petition filed by an agent must be filed with an attachment in which the employer has authorized the agent to act on its behalf, has assumed full responsibility for all representations made by the agent on its behalf, and has agreed to the conditions of H–2A eligibility.

(ii) *Effect of the labor certification process.* The temporary agricultural labor certification process determines whether employment is as an agricultural worker, whether it is open to U.S. workers, if qualified U.S. workers are available, the adverse impact of employment of a qualified alien, and whether employment conditions, including housing, meet applicable requirements. In petition proceedings a petitioner must establish that the employment and beneficiary meet the requirements of paragraph (h)(3) of this section. In a petition filed with a certification denial, the petitioner must also overcome the Department of Labor's findings regarding the availability of qualified domestic labor.

(iii) *Ability and intent to meet a job offer*—(A) *Eligibility requirements.* An H–2A petitioner must establish that each beneficiary will be employed in accordance with the terms and conditions of the certification, which includes that the principal duties to be performed are those on the certification, with other duties minor and incidental.

(B) *Intent and prior compliance.* Requisite intent cannot be established for two years after an employer or joint employer, or a parent, subsidiary or affiliate thereof, is found to have violated section 274(a) of the Act or to have employed an H–2A worker in a position other than that described in the relating petition.

(C) *Initial evidence.* Representations required for the purpose of labor certification are initial evidence of intent.

(iv) Temporary and seasonal employment—(A) *Eligibility requirements.* An H–2A petitioner must establish that the employment proposed in the certification is of a temporary or seasonal nature. Employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.

(B) *Effect of Department of Labor findings.* In temporary agricultural labor certification proceedings the Department of Labor separately tests whether employment qualifies as temporary or seasonal. Its finding that employment qualifies is normally sufficient for the purpose of an H–2A petition, However, notwithstanding that finding, employment will be found not to be temporary or seasonal where an application for permanent labor certification has been filed for the same alien, or for another alien to be employed in the same position, by the same employer or by its parent, subsidiary or affiliate. This can only be overcome by the petitioner's demonstration that there will be at least a six month interruption of employment in the United States after H–2A status ends. Also, eligibility will not be found, notwithstanding the issuance of a temporary agricultural labor certification, where there is substantial evidence that the employment is not temporary or seasonal.

(v) *The beneficiary's qualifications*—(A) *Eligibility requirements.* An H–2A petitioner must establish that any named beneficiary met the stated minimum requirements and was fully able to perform the stated duties when the application for certification was filed. It must be established at time of application for an H–2A visa, or for admission if a visa is not required, that any unnamed beneficiary either met these requirements when the certification was applied for or passed any certified aptitude test at any time prior to visa issuance, or prior to admission if a visa is not required.

(B) *Initial evidence of employment/job training.* A petition must be filed with evidence that at the required time the beneficiary met the certification's minimum employment and job training requirements. Initial evidence must be in the form of the past employer's detailed statement or actual employment documents, such as company payroll or tax records. Alternately, a petitioner must show that such evidence cannot be obtained, and submit affidavits from people who worked with the beneficiary that demonstrate the claimed employment.

(C) *Initial evidence of education and other training.* A petition must be filed with evidence that at the required time each beneficiary met the certification's minimum post-secondary education and other formal training requirements. Initial evidence must be in the form of documents, issued by the relevant institution or organization, that show periods of attendance, majors and degrees or certificates accorded.

(vi) *Petition agreements*—(A) *Consent and liabilities.* In filing an H–2A petition, a petitioner and each employer consents to allow access to the site where the labor is being performed for the purpose of determining compliance with H–2A requirements. The petitioner further agrees to notify the Service in the manner specified within twenty-four hours if an H–2A worker absconds or if the authorized employment ends more than five days before the relating certification document expires, and to pay liquidated damages of ten dollars for each instance where it cannot demonstrate compliance with this notification requirement. The petitioner also agrees to pay liquidated damages of two hundred dollars for each instance where is cannot demonstrate that its H–2A worker either departed the United States or obtained authorized status based on another petition during the period of admission or within five days of early termination, whichever comes first.

(B) *Process.* Where evidence indicates noncompliance under paragraph (h)(3)(vi)(A) of this section, the petitioner shall be given written notice and given ten days to reply. If it does not demonstrate compliance, it shall be given written notice of the assessment of liquidated damages.

(C) *Failure to pay liquidated damages.* If liquidated damages are not paid within ten days of assessment, an H–2A petition may not be processed for that petitioner or any joint employer shown on the petition until such damages are paid.

(vii) *Validity.* An approved H–2A petition is valid through the expiration of the relating certification for the purpose of allowing a beneficiary to seek issuance of an H–2A nonimmigrant visa, admission or an extension of stay for the purpose of engaging in the specific certified employment.

(viii) *Admission*—(A) *Effect of violation of status.* An alien may not be accorded H–2A status who the Service finds to have violated the conditions of H–2A status within the prior five years. H–2A status is violated by remaining beyond the specific period of authorized stay or by engaging in unauthorized employment.

(B) *Period of admission.* Notwithstanding paragraph (h)(10) of this section, and except as provided in paragraph (h)(3)(ix)(C) of this section, an alien admissible as an H–2A shall be admitted for the period of the approved petition plus a period of up to one week before the beginning of the approved period for the purpose of travel to the worksite, and a period following the expiration of the H-2A petition equal to the validity period of the petition, but not more than ten days, for the purpose of departure or extension based on a subsequent offer of employment. However, this extended admission period does not affect the beneficiary's employment authorization. Such authorization only applies to the specific employment indicated in the relating petition, for the specific period of time indicated.

(C) *Limits on an individual's stay.* An alien's stay as an H-2A is limited by the term of an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H-2A status for a total of three years may not again be granted H-2A status, or other nonimmigrant status based on agricultural activities, until such time as he or she remains outside the United States for an uninterrupted period of six months. An absence can interrupt the accumulation of time spent as an H-2A. If the accumulated stay is eighteen months or less, an absence is interruptive if it lasts for at least three months. If more than eighteen months stay has been accumulated, an absence is interruptive if it lasts for at least one-sixth the accumulated stay. Eligibility under this subparagraph will be determined in admission, change of status or extension proceedings. An alien found eligible for a shorter period of H-2A status than that indicated by the petition due to the application of this subparagraph shall only be admitted for that abbreviated period.

(ix) *Substitution of beneficiaries after admission.* An H-2A petition may be filed to replace H-2A workers whose employment was terminated early. The petition must be filed with a copy of the certification document, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (h)(3)(i)(D) of this section. It must also be filed with a statement giving each terminated worker's name, date and country of birth, termination date, and evidence the worker has departed the United States. A petition for a replacement may not be approved where the requirements of paragraph (h)(3)(vi) of this section have not been met. A petition for replacements does not constitute the notice that an H-2A worker has absconded or has ended authorized employment more than five days before the relating certification expires.

(x) *Extensions without labor certification.* A single H-2A petition may be filed and approved without a certification if it is based on a continuation of the employment authorized by the approval of a previous H-2A petition filed with a certification (but not a certification extension granted under 30 CFR 655.106(b)(3)), and the proposed continuation of employment will last no longer than the previously authorized employment and also will not last longer than two weeks.

(4) *Petition for alien to perform temporary non-agricultural services or labor (H-2B).*

* * * * *

Dated: May 27, 1987.

Mark W. Everson,

Executive Associate Commissioner, Immigration and Naturalization Service.

[FR Doc. 87-12432 Filed 5-29-87; 8:45 am]

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