

filed or whether the ACWIA fee was paid on the initial petition or the first extension of stay.

(vi) *ACWIA fee exemption evidence.*

(A) *Employer claiming to be exempt.*²⁷⁰ An employer claiming to be exempt from the ACWIA fee must file the form prescribed by USCIS, in accordance with the form instructions, including supporting evidence establishing that it meets one of the exemptions described at paragraph (h)(19)(iii) of this section. A United States employer claiming an exemption from the ACWIA fee on the basis that it is a non-profit research organization must submit evidence that it has tax exempt status under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6), 26 U.S.C. 501(c)(3), (c)(4) or (c)(6). All other employers claiming an exemption must submit a statement describing why the organization or entity is exempt.

(B) *Exempt filing situations.* Any non-exempt employer who claims that the ACWIA fee does not apply with respect to a particular filing for one of the reasons described in paragraph (h)(19)(v) of this section must indicate why the ACWIA fee is not required.

(20) *Retaliatory action claims.* If credible documentary evidence is provided in support of a petition seeking an extension of H-1B stay in or change of status to another classification indicating that the beneficiary faced retaliatory action from his or her employer based on a report regarding a violation of that employer's labor condition application obligations under section 212(n)(2)(C)(iv) of the Act, USCIS may consider a loss or failure to maintain H-1B status by the beneficiary related to such violation as due to, and commensurate with, "extraordinary circumstances" as defined by §214.1(c)(4) and 8 CFR 248.1(b).

(21) *Change of employers during COVID-19 National Emergency.*²⁷¹

(i) If an H-2A nonimmigrant who is physically present in the United States seeks to change employers during the COVID-19 National Emergency, the prospective new H-2A employer may file an H-2A petition on Form I-129 or Form

I-129H2A, accompanied by a valid temporary agricultural labor certification, requesting an extension of the alien's stay in the United States. To be approved under this paragraph (h)(21), an H-2A petition must be received on or after August 19, 2020 but no later than December 17, 2020. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition for a period not to exceed the validity period of the temporary agricultural labor certification. Notwithstanding paragraph (h)(2)(i)(D) of this section and 8 CFR 274a.12(b)(21), an alien in valid H-2A nonimmigrant status on August 19, 2020, or lawfully obtaining such status thereafter pursuant to this paragraph (h)(21), is authorized to begin employment with the new petitioner after the petition described in this paragraph (h)(21) is received by USCIS, but no earlier than the start date of employment, indicated in the H-2A petition. The H-2A worker is authorized to commence employment with the petitioner before the petition is approved and subject to the requirements of 8 CFR 274a.12(b)(26) for a period of up to 45 days beginning on the Received Date on Form I-797 (Notice of Action) or, if the start date of employment occurs after the I-797 Received Date, 45 days beginning on the start date of employment indicated in the H-2A petition. If USCIS adjudicates the petition prior to the expiration of this 45-day period and denies the petition for extension of stay, or if the petition is withdrawn by the petitioner before the expiration of the 45-day period, the employment authorization associated with the filing of that petition under 8 CFR 274a.12(b)(26) will automatically terminate 15 days after the date of the denial decision or the date on which the petition is withdrawn.

(ii) Authorization to initiate employment changes pursuant to this paragraph (h)(21) begins at 12 a.m. on August 19, 2020, and ends at the end of December 17, 2020.

²⁷⁰ **Caveat: On 9/29/20, USCIS was enjoined from implementing the final rule on USCIS fees published at 85 FR 46788, which (*inter alia*) revised §214.2(h)(19)(vi)(A) (as corrected at 85 FR 53645). *ILRC v. Wolf*, No. 20-cv-05883-JWS (N.D. Cal.). See AILA Doc. 20092990 for more information.**

²⁷¹ **Sunset Note:** The temporary final rule adding §214.2(h)(21) is effective from 8/19/20 through 8/19/23. However, authorization to initiate employment changes under this rule ended 12/17/20. 85 FR at 51305. See paragraph (21)(ii).