

**DEPARTMENT OF LABOR****Employment and Training Administration****20 CFR Parts 655 and 656**

RIN 1205-AB54

**Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes**

**AGENCY:** Employment and Training Administration, Labor, in concurrence with the Wage and Hour Division, Employment Standards Administration, Labor.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** The Employment and Training Administration (ETA) of the Department of Labor (DOL or the Department) are proposing changes to modernize procedures for the issuance of labor certifications issued in connection with H-2B nonimmigrants admitted to perform temporary nonagricultural labor or services, and procedures to enforce compliance with attestations made by sponsoring employers. Specifically, the proposed rule re-engineers the application filing and review process by centralizing processing and by enabling employers to conduct pre-filing United States (U.S.) worker recruitment activities. In addition, the proposed rule makes changes that will enhance the integrity of the program through the introduction of post-adjudication audits and procedures for penalizing employers who fail to meet the requirements of the H-2B Program. In addition, through this proposed rule technical changes are being made to both the H-1B and the permanent labor certification regulations to reflect operational changes stemming from this regulation. Finally, although Congress has vested the Department of Homeland Security (DHS) with the statutory authority to enforce the H-2B Program requirements and the Department possesses no independent authority for such enforcement, this proposed rule describes potential H-2B enforcement procedures the Department could institute in the event that DHS and the Department work out a mutually agreeable delegation of enforcement authority from DHS to the Department.

**DATES:** Interested persons are invited to submit written comments on the proposed rule. Such comments must be

received on or before July 7, 2008. Interested persons are invited to submit comments on the proposed forms mentioned herein; such comments must be received on or before July 21, 2008.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB54, by only one of the following methods only:

- *Federal e-Rulemaking Portal* [www.regulations.gov](http://www.regulations.gov). Follow the Web site instructions for submitting comments.
- *Mail/Hand Delivery/Courier:* Please address all written comments (including disk and CD-ROM submissions) to Thomas Dowd, Administrator, Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210.

Please submit your comments by only one method. The Department will post all comments received on <http://www.regulations.gov> without making any change to the comments, including any personal information provided. The <http://www.regulations.gov> Web site is the Federal e-rulemaking portal and all comments posted there will be available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public via the <http://www.regulations.gov> Web site. It is the responsibility of the commenter to safeguard his or her information. Comments submitted through <http://www.regulations.gov> will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Department encourages the public to submit comments via the Web site indicated above.

**Docket:** For access to the docket to read background documents or comments received, go the Federal eRulemaking portal at <http://www.regulations.gov>. The Department will also make all the comments it receives available for public inspection during normal business hours at the Office of Policy Development and Research at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the rule available, upon

request, in large print and as electronic file on computer disk. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the Office of Policy Development and Research at (202) 693-3700 (VOICE) (this is not a toll-free number) or 1-877-889-5627 (TTY/TDD).

**FOR FURTHER INFORMATION CONTACT:** For information on the H-2B labor certification process proposed in 20 CFR 655.1 to 655.35 contact Sherril Hurd, Acting Team Leader, Regulations Unit, Employment and Training Administration (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210; Telephone (202) 693-3700 (this is not a toll-free number).

For information on the H-2B enforcement process proposed in 20 CFR 655.50 to 655.80 contact Michael Ginley, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3502, Washington, DC 20210. Telephone (202) 693-0745 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:****I. Background***A. Statutory Standard and Current Department of Labor Regulations*

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA or the Act) defines an H-2B worker as a nonimmigrant admitted to the U.S. on a temporary basis to perform temporary nonagricultural labor or services. 8 U.S.C. 1101(a)(15)(H)(ii)(b). The Department's role in the H-2B visa program stems from its obligation, outlined in the statute and the regulations of DHS, to certify—upon application and sufficient demonstration by a U.S. employer intending to petition DHS to allow it to hire H-2B workers—that there are not enough able and qualified U.S. workers available for the position sought to be filled and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 U.S.C. 1184(c)(1); see also 8 CFR 214.2(h)(6).

Section 214(c)(1) of the INA requires DHS to consult with appropriate

agencies of the Government before granting any H-2B visa petition submitted by an employer. 8 U.S.C. 1184(c)(1). The DHS regulations for the U.S. Citizenship and Immigration Services (USCIS), the agency in DHS charged with the adjudication of immigration benefits such as H-2B petitions, currently require, at 8 CFR 214.2(h)(6), that the intending employer (other than in the Territory of Guam) first apply for a temporary labor certification from the Secretary of Labor (the Secretary) advising USCIS whether U.S. workers capable of performing the services or labor are available, and whether the employment of the foreign worker(s) will adversely affect the wages and working conditions of similarly employed U.S. workers.

The Department's role in the H-2B process is currently advisory to DHS. 8 CFR 214.2(h)(6)(iii)(A). The INA and DHS regulations govern the H-2B petition process and set the broad parameters for labor certification pursuant to which the Department issues its own H-2B regulations and guidance. DHS H-2B regulations provide that an employer may not file a petition with DHS for an H-2B temporary worker unless it has received a labor certification from the Department (or the Governor of Guam, as appropriate), or received a notice from either that a certification cannot be issued. 8 CFR 214.2(h)(6)(iii)(C), (iv)(A), (vi)(A).

Currently, DOL regulations at 20 CFR Part 655, Subpart A, "Labor Certification Process for Temporary Employment in Occupations other than Agriculture, Logging or Registered Nursing in the United States (H-2B Workers)," govern the H-2B labor certification. Applications received by the Office of Foreign Labor Certification (OFLC) in the Department's ETA, the office to which the Secretary has delegated her advisory responsibilities described in the DHS H-2B regulations, are processed first through the State Workforce Agency (SWA) having jurisdiction over the area of intended employment.<sup>1</sup> The SWAs review the application and job offer, compare the wage offer against the prevailing wage for the position, supervise U.S. worker recruitment, and forward the completed

applications to OFLC for further review and final determination.

To obtain a temporary labor certification, the employer must demonstrate their need for the temporary services or labor meets one of the regulatory standards of (1) a one-time occurrence, (2) a seasonal need, (3) a peakload need, or (4) an intermittent need. 8 CFR 214.2(h)(6)(ii)(B). The employer or its authorized representative must submit to the SWA a detailed statement of temporary need and supporting documentation with the application for H-2B labor certification. Such documentation provides a description of the employer's business activities and schedule of operations throughout the year, explains why the job opportunity and the number of workers requested reflects its temporary need, and demonstrates how the employer's need meets one of these four regulatory "need" standards. The petitioning employer must also establish that the temporary position is full-time, and the period of need is less than three years (although a labor market test and certification must be obtained each year).

Additionally, the requesting employer must adequately test the U.S. labor market to determine if a qualified U.S. worker is available for the position. In order to ensure an adequate test of the labor market, the employer must offer and subsequently pay for the entire period of employment a wage that is equal to or higher than the prevailing wage for the occupation at the skill level and in the area of intended employment, and provide terms and conditions of employment that are not less favorable than those offered to the foreign worker(s) or otherwise inhibit the effective recruitment and consideration of U.S. workers for the job.

Historically, the Department's review and adjudication took place through ETA's Regional Offices. However, in December 2004, the Department opened two new National Processing Centers (NPCs), one each located in Atlanta, Georgia, and Chicago, Illinois, to centralize processing of permanent and temporary foreign labor certification cases at the Federal level. The Department published a notice in the **Federal Register** at 70 FR 41430 (Jul. 19, 2005), clarifying that employers seeking H-2B certifications must file two originals of Form ETA 750, Part A, directly with the SWA serving the area of intended employment. Once the application is reviewed by the SWA and after the employer conducts its required recruitment, the SWA sends the complete application to the appropriate

NPC. The NPC Certifying Officer (CO), on behalf of the Secretary, either issues a labor certification for temporary employment under the H-2B Program, denies the certification, or issues a notice that such certification cannot be made.

Currently, the Department has no enforcement authority or process to ensure H-2B workers are employed in compliance with the H-2B certification requirements. Congress vested DHS with that enforcement authority in 2005. 8 U.S.C. 1184, Public Law 109-13, 119 Stat. 231, 318. As described more fully below, the Department in this NPRM proposes an H-2B regulatory enforcement regime in the event that the Department and DHS are able, pursuant to 8 U.S.C. 1184(c)(14)(B), to work out a mutually agreeable delegation of enforcement authority from DHS to the Department.

#### *B. Earlier Efforts To Reform the H-2B Regulatory Process*

On January 27, 2005, DHS and the Department issued companion NPRMs to significantly alter H-2B procedures. 70 FR 3984, Jan. 27, 2005, 70 FR 3993, Jan. 27, 2005. As proposed, combined changes to both sets of regulations would have eliminated in whole the Department's adjudicatory role, ending the current labor certification process for most H-2B occupations and permitting employers to submit labor-related attestations directly to USCIS as part of a revised Supplement accompanying the H-2B petition. The Department's proposed rule would have authorized the Department to conduct random or selected audits of labor attestations approved by USCIS and to recommend debarment of employers from participation in the H-2B Program upon findings of misrepresentation or violations of those attestations. The Department would have established a new audit and debarment process at the Department, and USCIS would have established its own procedures to debar employers based on independent information. DHS regulations, as proposed in 2005, also would have required filing directly by employers, disallowing the filing of H-2B petitions by agents. *Id.*

The two agencies received numerous comments on the joint NPRMs. Most commenters opposed the proposals to move the program to a USCIS-based attestation system and to eliminate the Department's role in reviewing the need of employers and the recruitment of U.S. workers except in the context of a post-adjudication audit. These concerns focused in part on the loss of the Department's experience in adjudicating

<sup>1</sup> The SWAs comprise agencies of State Government that receive Federal Workforce Investment Act (WIA), Wagner-Peyser Act, and other funds to administer our nation's one-stop career system and, through those grants, perform certain activities on behalf of the Federal Government, such as administration of the job clearance system. With respect to this NPRM, they currently accept applications by employers for processing prior to their transmittal to the Department.

issues of temporary need and the potential adverse impact on U.S. workers. Based on the significant concerns posed in these comments, and after further deliberation within each agency, the Department and DHS have not pursued their original proposal to streamline the program in the manner suggested by the two companion NPRMs. Consequently, that NPRM published by the Department on January 27, 2005 (RIN 1205-AB36) was withdrawn in the Department of Labor Fall 2007 Regulatory Agenda. See <http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=221117>.

The Department has, however, continued to closely review its H-2B Program procedures in order to determine appropriate revisions to the H-2B labor certification process. This ongoing and systematic review has been accelerated in light of considerable workload increases for both the Department and the SWAs (an approximate 30 percent increase in applications in Fiscal Year (FY) 2007 over those received in FY 2006, and a comparable number during the first half of FY 2008) and limited appropriations. On April 4, 2007, ETA issued Training and Employment Guidance Letter (TEGL) No. 21-06, published in the **Federal Register**, Apr. 20, 2007, 72 FR 19961, to replace its previous guidance for the processing of H-2B applications (General Administration Letter No. 1-95, 60 FR 7216, Feb. 7, 1995) and updated procedures for SWAs and NPCs to use in the processing of temporary labor certification applications. The Department then held national briefing sessions in Chicago and Atlanta on May 1 and May 4, 2007, respectively, to inform employers and other stakeholders of the updated processing guidance contained in TEGL 21-06. Attendees at those briefing sessions raised important questions and concerns with regard to the effective implementation of TEGL 21-06 by the SWAs and NPCs. In response to the substantive concerns raised, the Department further refined the process of reviewing applications in TEGL 27-06 (June 12, 2007) providing special procedures for dealing with forestry related occupations, and TEGL No. 21-06, Change 1 (June 25, 2007) updating procedures by allowing the NPC CO to request additional information from employers to facilitate the processing of applications. 72 FR 36501, Jul. 3, 2007; 72 FR 38621, Jul. 13, 2007. Issues that were not addressed by these refinements, including those requiring regulatory changes, namely issues of increasing workload and processing

delays, remain of concern to the Department.

### *C. Current Process Involving Temporary Labor Certifications and the Need for a Redesigned System*

The process for obtaining a temporary labor certification has been described to the Department as complicated, time-consuming, inefficient, and dependent upon the expenditure of considerable resources by employers. In the H-2B Program, and particularly in recent years, the sequential process for filing a temporary labor certification first at the SWA, which reviews the application, compares the wage offer to the prevailing wage for the occupation, oversees the recruitment of U.S. workers, and then transfers the application to the applicable ETA NPC, has been criticized for its length, overlap of effort, and resulting delays. Application processing delays, regardless of origin, can lead to adverse results with serious repercussions for a business, especially given the cap on visas under this program, where any delay may prevent an employer from obtaining H-2B workers that year. This occurs because employer demand for the limited number of visas greatly exceeds their supply and all visas are typically allocated in the early weeks of availability. See 8 U.S.C. 1184(g)(1)(B) (setting H-2B annual visa cap at 66,000).

In addition, the Department's increasing workload poses a growing challenge to efficient and timely processing of applications. The H-2B foreign labor certification program continues to increase in popularity among employers. While the annual number of visas available is limited by statute, the number of certifications is not. The number of H-2B labor certification applications has increased 129 percent since FY 2000. In FY 2007, the Department experienced a nearly 30 percent increase in H-2B temporary labor certification application filings over the previous fiscal year. The INA does not authorize the Department to charge a fee to employers for processing H-2B applications<sup>2</sup>. At the same time, appropriated funds have not kept pace with the increased workload at the State or Federal level. This has resulted in disparities in processing rates—some significant—among SWAs receiving the initial H-2B employer applications. Some observers have noted these disparities among States unfairly

<sup>2</sup> The Department will be transmitting draft legislation to Congress that would amend the INA to provide the Department with authority to charge and retain a fee to recoup the costs of administering the H-2B program.

advantage one set of employers (those in which the SWAs are able to timely process applications) over others (those in which SWAs experience delays because of backlogs, inadequate staffing or funding, or for other reasons).<sup>3</sup>

In light of these recurring experiences, the Department is proposing several significant measures to re-engineer our administration of the program. These changes do not alter, in any substantive way, the current obligations and requirements of employers who file an application for H-2B. Rather, these proposals are designed to improve the process by which employers obtain labor certification in areas where our program experience has demonstrated that such efficiencies will not impair the integrity of the process or the Department's role in protecting the job opportunities and wages of U.S. workers. These proposals will also provide greater accountability for employers through penalties, up to and including debarment, to further protect against program abuse.

The redesigned process will require employers to complete recruitment steps similar to those now required, but will enable them to do so prior to filing the application for labor certification. Once the recruitment is complete, the paper application will be submitted directly to ETA instead of being filed with a SWA. To appropriately test the labor market, employers will be required to first obtain a prevailing wage rate from the appropriate NPC that will be used as the wage to be offered in the recruitment of U.S. and foreign workers. The employer will then follow recruitment steps similar to those required under the current program. The employer will be required to attest to and enumerate its recruitment efforts, but need not submit the documentation supporting those efforts with its application. To ensure the integrity of the process, the employer will be expected to retain evidence of its recruitment, as well as other documentation specified in the regulations, for 5 years from the date of certification, and will be required to provide it in response to a request by the CO for additional information made

<sup>3</sup> The growth in the number of applications is explained in part by the increasing desire of employers for a legal temporary workforce and by legislation that permitted greater numbers of H-2B workers into the U.S. by exempting from the 66,000 annual cap any H-2B worker who had been counted against the numerical cap in previous years. See, e.g., Save Our Small and Seasonal Businesses Act of 2005 (SOSSBA), Public Law 109-13, Div. B, Title IV, 119 Stat. 318 (May 11, 2005); see also Public Law 108-287 § 14006, 118 Stat 951, 1014 (August 6, 2004) (exempting some fish roe occupations from the cap).

either prior to certification or, in the event the application is selected for audit or for investigation by the Wage and Hour Division (WHD), after a determination on the application has been issued.

Employers or their authorized representatives (attorneys or agents) will be required to submit applications by U.S. Mail using a new form designed to evidence the employer's compliance with the obligations of the H-2B Program. The application form will collect, in the form of attestations, information similar to that required by—and that in given cases may be exchanged with SWA or NPC staff as part of—the current H-2B labor certification process. As we modernize the process, these additional attestations will be required from the employer to ensure adherence to program requirements and firmly establish accountability. As with recruitment, employers will be required to keep records reflecting their compliance with all program requirements. Assuming an application is complete and therefore accepted by the NPC for processing, it will undergo substantive Federal review by the Department.

In order to further protect the integrity of the program in light of the elimination of SWA oversight of recruitment, specific verification steps, such as verifying the employer's Federal Employer Identification Number (FEIN) to ensure the employer is a bona fide business entity, will be collected during processing to ensure the accuracy of the information supplied by the employer and the employer's compliance with program requirements. If an application does not appear to be approvable on its face but requires additional information in order to be adjudicated, the NPC will issue a Request for Further Information (RFI), a process the program already employs. After full Departmental review, an application will be certified or denied.

The introduction of new post-adjudication audits will serve as both a quality control measure and as a means of ensuring program compliance, along with WHD investigations. Audits will be conducted on adjudicated applications that meet certain criteria, as well as on randomly-selected applications. In the event of an audit (or WHD investigation), employers will be required to provide information supporting the attestations made in the application. Failure to meet the required standards or to provide information in response to an audit (or investigation) may result in an adverse finding for the application in question, and that could lead either to Departmental supervised

recruitment in future applications or WHD investigations or debarment from the program.<sup>4</sup>

The combination of modernized processing of applications, and replacement of the SWAs' current role in the recruitment and referral of U.S. workers with pre-filing recruitment by the employer and audits by the Department, should yield a considerable reduction in the overall average time needed to process H-2B labor certification applications. This process will reduce past processing times which have exceeded our historical 60-day combined State and Federal processing window timeframe.

#### *D. Compliance Investigations and Remedies for Violations*

Finally, this NPRM outlines a process to impose remedies for violations in the event that the Department and DHS are able to work out a mutually agreeable delegation of enforcement authority. The INA and its implementing regulations provide the Department no direct authority to enforce any conditions concerning the employment of H-2B workers, including the prevailing wage attestation. Consequently, current DOL H-2B regulations provide no substantive protections to ensure that employers fulfill their obligations concerning the terms and conditions of employment once the H-2B workers are employed.

Section 404 of Save Our Small and Seasonal Businesses Act of 2005, Public

<sup>4</sup> Further sanctions may be imposed by DHS under 8 U.S.C. 1184(c)(14):

“(14)(A) If the Secretary of Homeland Security finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant worker under section 101(a)(15)(H)(ii)(b) or a willful misrepresentation of a material fact in such petition—

“(i) The Secretary of Homeland Security may, in addition to any other remedy authorized by law, impose such administrative remedies (including civil monetary penalties in an amount not to exceed \$10,000 per violation) as the Secretary of Homeland Security determines to be appropriate; and

“(ii) the Secretary of Homeland Security may deny petitions filed with respect to that employer under section 204 or paragraph (1) of this subsection during a period of at least 1 year but not more than 5 years for aliens to be employed by the employer.

“(B) The Secretary of Homeland Security may delegate to the Secretary of Labor, with the agreement of the Secretary of Labor, any of the authority given to the Secretary of Homeland Security under subparagraph (A)(i).

“(C) In determining the level of penalties to be assessed under subparagraph (A), the highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers.

“(D) In this paragraph, the term ‘substantial failure’ means the willful failure to comply with the requirements of this section that constitutes a significant deviation from the terms and conditions of a petition.”

Law 109–13, 119 Stat. 231, 318, amended the INA to provide the Secretary of DHS with authority to impose certain sanctions when a sponsoring employer has been found, after notice and an opportunity for a hearing, to have committed “a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant [H-2B] worker \* \* \* or a willful misrepresentation of a material fact in such petition”. 8 U.S.C. 1184(c)(14)(A). When such violations are found, the Secretary of Homeland Security “may, in addition to any other remedy authorized by law, impose such administrative remedies (including civil monetary penalties in an amount not to exceed \$10,000 per violation) as the Secretary of DHS determines to be appropriate.” *Id.* at 1184(c)(14)(A)(i). The statute provides that the “highest penalties shall be reserved for willful failures to meet any of the conditions of the petition (which includes the labor certification) that involve harm to United States workers.” *Id.* at 1184(c)(14)(C). In addition, the Secretary of DHS is authorized to “deny petitions filed with respect to that employer under section 1154 of this title or paragraph (1) of this subsection during a period of at least 1 year but not more than 5 years for aliens to be employed by the employer.” *Id.* at 1184(c)(14)(A)(ii). These enforcement provisions became effective October 1, 2005.

The authority given to the Secretary of DHS under 8 U.S.C. 1184(c)(14)(A)(i) may be delegated to the Secretary of the Department, with the agreement of the Secretary of the Department. *Id.* at 1184(c)(14)(B). In addition, the INA contains other authority for the Secretary of DHS to delegate these functions. Under 8 U.S.C. 1103(a)(1) and (a)(3) the Secretary of DHS is “charged with the administration and enforcement of [INA] and all laws relating to the immigration and naturalization of aliens” and is authorized to “establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of [INA].” The Secretary of DHS “is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department \* \* \* under whose jurisdiction the employee is serving, any powers, privileges, or duties conferred or imposed by [the INA] or regulations issued thereunder upon officers or

employees of the Service.” *Id.* at 1103(a)(6).

Pursuant to authority in 8 U.S.C. 1103(a)(6) and 1184(c)(14)(B), the Department of Labor is currently in discussions with the Department of DHS regarding whether the two Departments can work out a mutually agreeable delegation of authority that would enable the Department to enforce the terms of an H-2B certification and petition. In the event such a delegation of authority can be worked out, the Department would like to be prepared to begin enforcement of the H-2B Program and accordingly this NPRM contains the Department’s proposed regulations implementing the enforcement of employer’s H-2B attestations, as well as the authority to impose appropriate sanctions. This NPRM proposes an enforcement process by which the Department will investigate employer compliance with H-2B attestations and impose remedies for violations that are found, if that delegation occurs.

As noted above, section 214(c)(14)(A) of the INA uses broad language in providing authority to impose “such administrative remedies (including civil money penalties in an amount not to exceed \$10,000 per violation) as the Secretary of Homeland Security determines to be appropriate \* \* \*.” The Department is considering the scope of remedies that may be assessed under this H-2B provision of the INA in the event a delegation is issued. For instance, although the assessment of back wage liability for the failure to pay the appropriate wage is a common remedy in Federal statutes that protect the rights of workers, *see, e.g.*, 29 U.S.C. 216 (Fair Labor Standards Act); 29 U.S.C. 1854(c) (Migrant and Seasonal Agricultural Worker Protection Act); 29 U.S.C. 2617 (Family and Medical Leave Act), the H-2B statutory provisions do not provide explicit authority to require the payment of back wages. It may be argued that an explicit statutory delegation of authority to award back pay is unnecessary where back pay is required to enforce the statute as Congress intended. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–418 (1975) (back pay award consistent with purposes of, and a necessary component of remedy for violations of Title VII of the Civil Rights Act of 1964); *United States v. Duquesne Light Co.*, 423 F. Supp. 507, 509 (W.D. Pa. 1976) (back pay appropriate remedy under Executive Order 11,246). On the other hand, the H-1B provisions of the INA contain language that is nearly identical

to the language found in H-2B,<sup>5</sup> and unlike the H-2B provisions, H-1B also contains explicit authorization for the assessment of back pay, *Id.* at 1182(n)(2)(D). It may be that where Congress intended the assessment of back wages under the INA, it said so explicitly and the lack of such explicit authority under the H-2B statute might preclude such an assessment. *See Beverly Enterprises v. Herman*, 119 F. Supp. 2d1 (D.D.C. 2000) (regulation requiring payment of prevailing wage in the absence of a statutory requirement found invalid). The Department solicits comments on the appropriateness of assessing back wages and other remedies under the H-2B provisions.

## II. Proposed Redesign To Achieve a Modern Attestation-Based Program

### A. Prevailing Wage Obtained Prior To Commencing Recruitment

In order for the Secretary to be able to certify that U.S. workers would not be adversely affected by the employment of H-2B workers, an adequate test of the labor market must be conducted. Such a test must include the employer offering and paying a wage that is equal to or higher than the available position’s prevailing wage, where the terms, duties and conditions of employment are normal and promote the effective recruitment and consideration of U.S. workers.

For many years, the Department has required H-2B employers to submit their applications for certification to the SWAs. The SWA then filled in the applicable prevailing wage for the job opportunity. Department regulations at 20 CFR 656.40, which the Department applies to prevailing wage determinations (PWD) for occupations under its permanent and temporary non-agricultural foreign labor certification programs, instructs SWAs to apply wage rates from the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) Survey to determine the prevailing wage rate, unless superseded by a wage set by a collective bargaining agreement or other statute. The BLS OES Survey results of prevailing wages have for several years been available to the SWAs and the public on the Department’s Web site at <http://www.foreignlaborcert.doleta.gov/>. Under current regulations and the Department’s prevailing wage guidance, SWAs may also accept employer-

provided alternatives from legitimate sources. See 20 CFR 656.40; see also *Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (May 9, 2005), at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

As part of the proposed reengineered process, employers will obtain the prevailing wage for the job opportunity directly from OFLC. The Department is proposing to allow employers to file prevailing wage requests no more than 90 days in advance of the recruitment process and to clarify the validity period for the wage determination. The OES database is updated annually for use in the foreign labor programs. Depending on the time of year that the PWD is obtained from the Department, relative to the date of the most recent update, the wage determination provided could be valid from several months up to 1 year.

Our program experience indicates that by federalizing the prevailing wage application component we can institute a high level of efficiency and consistency in the determination and provision of prevailing wages which has been a past problem. This increased efficiency and consistency will help ensure more accurate wage determinations, which result in improved protections for U.S. workers. The Department is especially interested in comments from employers who have utilized the program in the past on the efficacy of this proposed action.

The new system would federalize the issuance of prevailing wages, and delegate the authority for determining prevailing wage rates to the ETA NPCs. It is the Department’s goal to eventually allow this activity to be performed electronically between the NPC and the employer. However, initially it will be a manual paper process.

Shifting wage determination activities to NPC staff would reduce the risk of job misclassification because of centralized staff experience and consistency, thereby not only strengthening program integrity, but also ensuring consistency in classification across States, resulting in improved protections for U.S. workers. Until the new process can be implemented, the SWAs would continue to be responsible for providing prevailing wage determinations (PWDs).

The Department has received numerous reports that in cases where job descriptions are complex and contain more than one different and definable job opportunity, some SWAs have made inconsistent classifications, thereby resulting in inconsistent PWDs.

<sup>5</sup> 8 U.S.C. 1182(n)(2)(C)(i)(I)(H-1B) (“the Secretary \* \* \* may \* \* \* impose such other administrative remedies (including civil monetary penalties in an amount not to exceed \$1,000 per violation) as the Secretary determines to be appropriate \* \* \*”).

Furthermore, where H-2B workers need to work in several different geographic areas which may be in the jurisdiction of several different SWAs (examples include the New York, New Jersey, Connecticut "Tri-state Region" or the Washington, DC-Maryland-Virginia metropolitan area), questions have arisen about where to file a prevailing wage request and how that wage should be determined. Utilizing the federalized system discussed above would alleviate such confusion.

For consistency and greater efficiency across non-agricultural programs, the Department is proposing extending this new wage request processing model to the permanent labor certification program, as well as to the attestations required under the H-1B, H-1B1 and E-3 specialty occupation nonimmigrant programs. The new process will in no way alter the substantive requirements of foreign labor certification programs, and we anticipate that, at least in the foreseeable future, the methodology for determining an appropriate non-agricultural wage rate will remain much the same as it stands today; our intent is simply to modernize, centralize, and make more consistent the mechanics and analysis behind wage determination. Much as the SWAs do now, the NPCs will evaluate the particulars of the employer's job offer, such as the job duties and requirements for the position and the geographic area in which the job is located, to arrive at the correct PWD. In the near term, the Department will update and formalize its guidance for making prevailing wage determinations to confirm existing procedures. As our program experience administering the PWD process grows, the Department may revise its guidance to reflect improved processes or methodology.

To implement and standardize the new process, ETA has developed a new Prevailing Wage Determination Request (PWDR) form employers can use to make their respective requests regardless of program or job classification. The Department is considering means by which eventually—resources permitting—such a request could be submitted, and a prevailing wage provided, electronically.

For purposes of the permanent labor certification (PERM) program, the regulations at 20 CFR part 656 will be amended to reflect the transfer of prevailing wage determination functions from the SWAs to the NPCs. Currently, Department regulations governing permanent labor certification require an employer to obtain a PWD from the SWA before filing a labor certification

application with the Department or an I-140 immigrant worker petition with DHS under Schedule A or for shepherders. In addition to technical changes required in part 656—for example, we propose to change the definitions of "prevailing wage determination" and "State Workforce Agency" under § 656.3—Subpart D, "Determination of Prevailing Wage", to require that employers now seek a PWD directly from the NPC with jurisdiction over the area of intended employment and with which they will be filing their permanent labor certification application.

For purposes of the H-1B Program, the regulations at 20 CFR part 655 will be amended to reflect the transfer of PWD functions from the SWAs to the NPCs. Department regulations covering the H-1B Program (and by extension and reference both H-1B1 and E-3, which both utilize the filing and approval of a Labor Condition Application, or LCA) permit an employer to obtain a PWD from the SWA before filing an LCA with the Department in order to obtain a "safe harbor" from a determination of the validity of the prevailing wage. This proposal requires technical changes to § 655.731(a)(2) to permit employers to utilize a prevailing wage obtained from the NPC rather than the SWA. These changes would enable employers to seek a PWD directly from the NPC with jurisdiction over the area of intended employment and with which they will be filing their Labor Condition Application.

Under the new process, for purposes of H-2B job classifications, NPC staff will follow the requirements outlined under proposed §§ 655.10 and 655.11 when reviewing each position and determining the appropriate wage rate. These new regulatory sections are consistent with existing regulations at 20 CFR 656.40 and the Department's May 2005 *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs*, but would supersede current regulations and guidance for the H-2B Program to the extent there are any perceived inconsistencies.

In those cases where a job opportunity involves multiple worksites in an area of intended employment and crosses multiple counties or States and different prevailing wage rates exist because the worksites are located in different Metropolitan Statistical Areas (MSA), the NPC will analyze the different prevailing wage rates and determine the appropriate wage as the highest wage rate among all applicable MSAs. In these cases, the employer will not pay

different wage rates depending on the location of the work. The U.S. worker and the foreign worker are both entitled to know and rely on the wage to be paid for the entire period of temporary employment, and that wage will be the highest among the application wages for the various locations of work.

The NPRM continues the Department's policy of permitting employers to provide an independent wage survey under certain guidelines delineated in the proposed rule. It also continues to provide for an appeal process in the event of a dispute over the applicable prevailing wage (but makes that process easier to use).

The Department welcomes comments, especially from potential users of the system, on the proposals being presented. We are particularly interested in comments regarding the required use of an online prevailing wage system and form for interaction with the NPC.

#### *B. Direct Filing With the NPC*

Under the NPRM, the Department will continue to administer the application process for H-2B temporary foreign labor certification. However, the Department proposes to eliminate the role of the SWAs in accepting and reviewing H-2B applications, overseeing recruitment, and forwarding completed applications to the appropriate NPC. Instead, as with the permanent labor certification process, the employer will file applications directly with the Chicago NPC, as the Department will be specializing its two centers effective June 1, 2008. However, each employer will still be required to place a job order with the appropriate SWA as part of the pre-filing recruitment, and we expect SWAs will continue to place H-2B associated job orders in their respective Employment Service systems.

This re-engineered filing process should reduce the time it takes to process each application to conclusion. Under the current H-2B process, employers initially file with the appropriate SWA, which subsequently reviews the application, determines the prevailing wage, and authorizes the employer to undertake recruitment of U.S. workers. The SWA also places a job order in its Employment Service system and makes referrals of interested U.S. workers to the employer. The SWA receives the recruitment report and reviews it, forwarding the completed application on to the NPC with an adjudication recommendation. This last process of review is then duplicated at the Federal level.

Given these current multiple levels of Government review, any delays early in the process can have a ripple effect resulting in delays at the NPCs. For example, due to differing and increasing workload levels, local filing cycles, and declining resources, SWAs vary considerably in the amount of time required, to review applications, tell employers to initiate recruitment, review recruitment results and, finally, forward the application to the NPC. Consequently, the State (or even SWA jurisdiction) in which an application is filed can significantly impact the application's processing time. Employers can be disadvantaged through no fault of their own simply based on their location, depending upon a SWA's workload and available resources.

The disparity between demand for program services and processing resources has increased in recent years, sometimes significantly, the amount of time required to process even the most basic of applications. In FY 2007, the average processing time for the SWA portion of an H-2B labor certification application was 64 days, as compared to an average of 31 days at the NPC level. As our recent program experience shows, these delays have serious repercussions at the Federal level. The NPCs must attempt to compensate for State delays by borrowing staff from other non-H-2B processing activities. Shifting these finite resources has created new backlogs in one or more of the other labor certification programs. This is exacerbated by statutorily-mandated processing times in some of the other programs.

By focusing the SWAs' role in the initial stages of processing H-2B labor certification applications to the placement of job orders and handling referrals, the Department anticipates being able to sustain the processing of all applications on a first-in, first-out basis and more effectively and efficiently oversee the adjudication of applications. As a result of this proposed modernized and more efficient application procedure, processing times will be significantly more uniform across work locations.

We expect that the time savings gained from a process that removes duplicative functions and ensures adjudication by the NPC will improve the total time an employer must wait to obtain a labor certification from the Federal Government. Moreover, the Department's centralization of application review in its NPCs will permit greater consistency of adjudication with respect to substantive issues. All major determinations made

as part of the certification process will be consolidated from 53 agencies in the States and territories (except Guam) to one federally-run NPC, thereby gaining efficiency of scale and greater uniformity and accountability in training adjudicators and for consistently applying relevant law and policy.

### *C. Employer Conducted Pre-Filing Recruitment*

This NPRM proposes, under new § 655.15, that employers be required to conduct recruitment for U.S. workers prior to filing the new form currently in development, to be styled on the *Application for Temporary Employment Certification*. The purpose of the recruitment process is to fulfill the Department's obligation to ensure an adequate test of the availability of qualified U.S. workers to perform the work and to ensure foreign workers are not employed under conditions that adversely affect the wages and working conditions of similarly employed U.S. workers. Employers will continue to be required to test the labor market for qualified U.S. workers, at prevailing wages and working conditions, no more than 120 days before the date the work must begin ("date of need"), thus ensuring these jobs are made available, with notice, to the U.S. workers who are most likely to qualify.

The Department further proposes that prevailing wages be obtained from the NPC in advance of recruitment. The NPCs will issue prevailing wages valid for the duration of the described need up to 1 year. The employer will be obligated to ensure that the prevailing wage is valid upon commencement of recruitment or on the date it files the application with the Chicago NPC and that the appropriate wage is listed in all recruitment documents. Obtaining the prevailing wage in advance of initiating recruitment will help enable employers to begin their recruitment obligations in a timely manner and will ensure that the job is advertised and offered to U.S. workers at the appropriate wage.

U.S. worker recruitment will continue to consist of prescribed steps designed to reflect what the Department has determined, based on program experience, are most appropriate to the occupations that are the usual subjects of H-2B applications. These steps, which are discussed in more detail below, will include the placement of a job order with the SWA serving the area of intended employment; the placement of three advertisements, one of which must be on a Sunday, in the newspaper most appropriate for the occupation and most likely to reach the U.S. workers

who would apply and qualify for the job opportunity; and preparation of a recruitment report outlining the results of the recruitment to be submitted with the application. If the employer determines in good faith that use of a professional, trade or ethnic publication is more appropriate to the occupation, that qualified workers likely to apply for the job opportunity would be more likely to read that publication than a newspaper of general circulation, and that it is the most likely source to bring responses from qualified and available U.S. workers, the employer may use such a publication in place of two of the daily (but not Sunday) advertisements. This option would offer employers greater flexibility in meeting recruitment requirements for those jobs that are traditionally advertised in professional or trade journals (particularly for those unionized jobs for which publications are most likely to exist). In addition, in circumstances where it is appropriate for the occupation and customary to the industry, the use of union organizations as a recruitment source will continue to be required. Employers will have to attest under penalty of perjury that (1) they did, in fact, attempt to recruit U.S. workers in the manner described above, and (2) any potentially qualified U.S. workers that applied were rejected because in fact they were not qualified or for other lawful, job-related reasons.

These steps are very similar to those currently required under the current H-2B Program. The rule maintains the requirement that employers must conduct recruitment and consider potential U.S. workers. By having employers engage in these steps under their own direction rather than the SWA's, and by having the employer forward their recruitment report to the Department for review, we expect to improve application processing and consistency while ensuring protections for U.S. workers. Maintaining the Department's current requirement that recruitment take place no more than 120 days before the date of need continues to ensure jobs are advertised to U.S. workers with adequate notice given the temporary nature of the employment.

Employer recruitment efforts must be documented and preserved for production to the Department or other Federal agencies—for example, in the event of either a post-adjudication audit or a pre-adjudication RFI or an investigation by the WHD or another body. For purposes of this regulation, the recruitment documentation requirements will be satisfied by copies of the pages containing the advertisement from the newspapers in



which the job opportunity appeared and, if appropriate, correspondence signed by the employer demonstrating that labor or trade organizations were contacted and were either unable to refer qualified U.S. workers or non-responsive to the employer's request. Documentation of a SWA job order will be satisfied by copies of the job order downloaded from the Internet on the first and last day of the posting, or a copy of the job order provided by the SWA with the dates of posting listed.

Newspapers remain a potential recruitment source for U.S. workers likely to be affected by the introduction of H-2B labor. Permitting employers to place their own newspaper advertisements pursuant to the requirements outlined in the proposed regulation acknowledges industry practice and needs, while maintaining accountability and worker protection. One of the newspaper advertisements will be required to appear on a Sunday, unless the job opportunity is in an area in which the newspaper most likely to reach the most appropriate potential pool of U.S. workers does not have a Sunday edition. Employers will be required to list the specifics of the newspaper advertisement on the application but will not be required to submit tear sheets or other documentary evidence of that recruitment when the application is submitted. However, the employer will be required to maintain documentation of the actual advertisement(s) published and the results of the recruitment effort in the event of an audit or other review. Our recent program experience under the re-engineered PERM program has demonstrated the viability of this approach. See 20 CFR part 656.

At the same time, our program experience has shown that while most employers seek to comply with recruitment requirements, not all may do so. For example, the Department's experience has long demonstrated that there are employers who, if not provided with specific instructions, will seek to demonstrate apparent compliance with advertising requirements by placing the required newspaper advertisements in newspapers having low circulations and which are the least likely publications to be read by potentially available U.S. workers. In order for the employer's job opening to receive appropriate exposure to the widest pool of potentially available U.S. workers, the proposed regulation at new § 655.15(f) requires that the mandatory advertisements (now including a Sunday edition) appear in the newspaper of general circulation that the employer believes in good faith

is most appropriate to the occupation in the area of intended employment and the most likely to be read by workers who will apply for the job opportunity in the area of intended employment.

Under proposed § 655.17, the advertisements must: (1) Identify the employer with sufficient clarity to identify the employer to the potential pool of U.S. workers (by legal and trade name, for example); (2) provide a specific job location or geographic area of employment with enough specificity to apprise applicants of travel or commuting requirements, if any, and where applicants will likely have to reside to perform the services or labor; (3) provide a description of the job with sufficient particularity to apprise U.S. workers of the duties or services to be performed and whether any overtime will be available; (4) list minimum education and experience requirements for the position, if any, or state that no experience is required; (5) list the benefits, if any, and the wage for the position, which must equal or exceed the applicable prevailing wage as provided by the NPC; (6) contain the word "temporary" to clearly identify the temporary nature of the position; (7) list the total number of job openings that are available, which must be no less than the number of openings the employer lists on the ETA application; and (8) provide clear contact information to enable U.S. workers to apply for the job opportunity. The advertisement cannot contain a job description or duties which are in addition to or exceed the duties listed on the PWDR or on the application, and must not contain terms and conditions of employment which are less favorable than those that would be offered to an H-2B worker.

If the job opportunity is in an industry, region and occupation in which union recruitment is customary, the appropriate union organization must be contacted. 72 FR 38621, 38624, Jul. 13, 2007. This is a continuation of the current practice under TEGL 21-06, Ch. 1. 72 FR 382621, 38624, Jul. 13, 2007. Employer diligence will be required to determine whether the job opportunity is one which has traditionally been the subject of collective bargaining and whether it is therefore appropriate and customary to contact the union. Some positions, such as welders and drillers, have had a long history of collective bargaining interaction. Others, such as landscapers, are not traditionally unionized and there simply may be no collective bargaining unit to contact. Those jobs in which union contact has been customary will continue to be so; those in which there is no applicable union to contact would fall outside of

the job opportunities for which union contact is "appropriate to the occupation and customary to the industry." The nature of the employment, not the employer, will be the primary guide. Employers with uncertainties are invited to request guidance from the Chicago NPC regarding the applicability of union contact to their occupation during the recruitment period.

The SWA will continue to play an active role in the recruitment process by posting an employer's job order. The employer will need to contact the SWA to place the job order in its job posting system, rather than rely on the SWA to place it in the course of adjudicating the application, as is the case now. The job order will provide the same information as the newspaper advertisements contemplated by this NPRM. Under proposed § 655.15(e), employers whose applications involve worksites in multiple SWAs will place the job order with the SWA having jurisdiction over the place where the work is contemplated to begin. That SWA will post the job order and ensure the job order is circulated to other SWAs covering other worksites as required.

The Department proposes to maintain the length of time the SWA keeps the job order open to its current 10 consecutive calendar days. We consider this amount of time the minimum necessary to provide sufficient local involvement in placement and referrals.

To strengthen the integrity of the Secretary's determination of the availability of U.S. workers, and to help bolster employers' confidence in their local SWAs and the larger H-2B Program, the proposed rule states that SWAs are required to verify the employment eligibility of prospective U.S. workers before referring them under an H-2B job order. That such a process is appropriate under the INA is evident from the contemplation in section 274A(a)(5) (8 U.S.C. 1324a(a)(5)) of the ability of an employer to rely upon the employment eligibility verification conducted by a state employment agency (e.g., the SWA), if that agency conducts the verification and provides to the employer a certification that the agency has complied with the procedures required for verification.

The INA clearly contemplates that workers who are competing for jobs with H-2B foreign workers must be eligible to be employed in such positions. The INA provisions governing admission of foreign workers under the H-2B Program make employment eligibility of U.S. workers a core element of their availability for such



jobs. By statute, the Secretary is consulted as to the availability of persons in the U.S. "capable of performing such service or labor". 8 U.S.C. 1101(a)(15)(H)(ii)(b). USCIS regulations require, at 8 CFR 214.2(h)(6), that the intending employer must first apply for a temporary labor certification from the Secretary demonstrating that U.S. workers capable of performing the services or labor are unavailable, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. Employers are therefore not penalized for turning away U.S.-based applicants who are not authorized to work, and referred workers who are refused employment on the basis of not having work authorization are not counted as available for purposes of H-2B labor certification.

The Department notes that DHS regulations at 8 CFR 274a.6 provide the verification procedures for SWAs pursuant to INA section 274A(a)(5). The CIS regulations set out the procedures by which a SWA may verify and certify to the employer the employment eligibility of any referred worker. To confirm its continued eligibility to receive Alien Labor Certification grant funding, each State agency will be asked to submit proof of these procedures to the Department prior to the beginning of the 2009 fiscal year. The SWA's responsibility to perform threshold, pre-referral verification exists separate from each employer's independent obligation under the INA to verify the employment eligibility of every worker to whom it has extended a job offer. The INA provides that employers who accept referrals from SWAs that verify employment eligibility in compliance with the DHS process and provide referred employees with appropriate documentation certifying that employment eligibility verification has taken place are entitled to "safe harbor" in the event it is later discovered a referred worker was not authorized to work in the U.S. INA section 274A(a)(5); 8 U.S.C. 1324a(a)(5). To simplify the recruiting process and avoid unnecessary duplication of functions, SWAs are directed to provide all employers with adequate documentation that employment verification of a referred employee has taken place.

The Department is not insensitive to the resource and time constraints facing SWAs in their administration of H-2B activities and the difficulties inherent in making informed referrals on a population of workers that may be itinerant and difficult to contact.

However, we do not believe that this requirement has resulted or will result in a significant workload increase or administrative burden. Further, the mechanisms available for verification—including the E-Verify Web-based system operated by DHS—allow SWA staff to perform this function relatively quickly after training. Further, the performance of this duty is an allowable activity under Wagner-Peyser funding each SWA receives from ETA.

E-Verify is a program administered by USCIS. E-Verify electronically verifies a person's employment eligibility after the Employment Eligibility Verification Form (Form I-9) has been completed. SWAs that choose to use E-Verify refer a job seeker to an H-2B-related job only after job seekers complete a Form I-9 and SWAs submit information via E-Verify. The SWA will be required to follow the terms and conditions in the Memorandum of Understanding (MOU) that must be signed by the SWA and USCIS in order to gain access to E-Verify. The SWA may not refuse to make a referral and the employer may not refuse to accept a referral because of an E-Verify tentative nonconfirmation (TNC) of the employee's employment eligibility, unless the job seeker decides not to contest the TNC. SWAs and employers may not take any adverse action, such as delaying a referral or start date, against a job seeker or referred worker based on the fact that E-Verify may not have generated a final confirmation of employment eligibility. The SWA will be required to advise the employer when E-verify generates a final confirmation or nonconfirmation.

The requirement that SWAs verify employment eligibility prior to referral is designed to strengthen the integrity of the temporary labor certification process, afford employers a legal pool of applicants, protect U.S. workers, and improve confidence in and use of the H-2B Program. The policy is fully consistent with the Secretary's statutory authority to administer H-2B labor certification and the SWA's statutory responsibility to refer only eligible individuals.

The NPRM also clarifies the amount of time that U.S. workers should be considered after the closing of the job order and the end of recruitment before an employer is permitted to file an application. Under the current program, SWAs differ considerably in their instructions to employers (based on local practices) as to when recruitment, particularly recruitment under the job order, may end. The NPRM will make consistent such periods by requiring an employer to wait at least 2 calendar days after the job order is closed and at

least 5 calendar days after the last newspaper or journal advertisement to complete the recruitment process, and prepare a written recruitment report, listing the recruitment conducted, the applicants who came forward seeking the job opportunity, and the reasons for rejection, to be submitted with the application. By instituting a uniform time period for the consideration of referrals, the Department intends to permit employers an equitable time to complete their review of all referred U.S. workers and prepare the required recruitment report.

#### *D. Form Submission*

The Department proposes initially to require employers to submit applications on paper, through an information collection (form) to be modified significantly from the current form to reflect an attestation-based filing process. The use of a redesigned form would provide the necessary assurances for the Department to verify program compliance. The Department is considering, should resources become available, an eventual electronic submission system similar to that employed in other programs administered by the OFLC, such as the electronic-submission system in PERM.

The Department is proposing to eventually require electronic submission in explicit recognition of the fact that such a process will significantly modernize the application filing and review process. An electronic submission process will also improve the collection of key program data and better allow the Department to anticipate trends, investigate areas of concern, and focus on areas of needed program improvement. Improved data collection will also enable the Department to capture information regarding noncompliance and potential fraud that may lead to future administrative, civil, or criminal enforcement actions against unscrupulous or non-performing employers.

The Department recognizes that some H-2B employers may be concerned about their ability to comply with the requirements through use of an Internet-based submission process once it is implemented. The Department is committed to providing, based upon its previous experience and at the appropriate time, user-friendly electronic registration and filing processes that enable use by any employer with computer and Internet access. The Department invites comments, in particular from H-2B employers, on the concept of an electronic filing process.

### E. Attestation-Based Process

The Department is proposing to require employers to submit the new application directly to the Department by U.S. Mail or private mail courier to the Chicago NPC. The application will contain certain attestations to confirm employers' adherence to their obligations under the H-2B Program. The employer will be required to retain documentation confirming the contents of the attestations for the Department's review in audits or investigations. An employer will be required to attest, under penalty of perjury, that it has conducted the required recruitment, it has not found sufficient qualified U.S. workers, and it meets all of the requirements and obligations of the program, including temporary need and payment of the prevailing wages.

#### 1. Benefits From an Attestation-Based Process

The Department anticipates the shift to an attestation-based process will reduce processing times while maintaining program integrity. Employers will be expected to comply with all requirements and obligations of the program and maintain appropriate documentation evidencing their compliance. The Department retains for itself the right to request such documentation made either in the course of application consideration, after the adjudication of an application, or through other permitted investigative means such as an investigation by the WHD.<sup>6</sup> These attestations and other information required by the application form will elicit information similar to that required by the current H-2B labor certification process showing the employer has performed the necessary activities to establish eligibility for labor certification.

The proposed application form will require specific attestations from the employer consistent with new § 655.22 and similar to the attestations made on the Form ETA-750 currently in use. For example, the employer will have to attest that it is offering and will provide wages and working conditions normal to workers similarly employed in the area of intended employment; that it will offer and pay wages equal to or in excess of the higher of the prevailing and applicable minimum wages for the entire period of employment under the labor certification; there is no strike, lockout, displacement, or work stoppage in the course of a labor dispute in the

occupational classification in the place of employment; and, during the period of certified employment, the employer will comply with all Federal, State and local laws applicable to the employment opportunity.

An employer seeking to employ H-2B workers will attest that the wage is not based on commission, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage for the duration of the certified employment.

Several attestations will be added to those found on the current form. As a companion to enabling employers to conduct recruitment prior to filing the application, an employer will have to attest that it conducted the required recruitment before filing the application and was unsuccessful in locating sufficient numbers of qualified U.S. applicants and, moreover, it has rejected any U.S. workers only for lawful, job-related reasons. In the event of an RFI or audit, a CO may review the employer's documentation regarding U.S. applicants and determine whether these applicants were rejected only for lawful, job-related reasons.

As an additional condition of program participation, an employer will be required to attest that, upon the separation from employment of H-2B worker(s) employed under the certification, if such separation is prior to the end date of the employment as listed on the proposed *Application for Temporary Employment Certification*, the employer will notify the Department and DHS in writing of the separation from employment not later than 48 hours after the separation occurs. The notification is also required if an H-2B worker absconds from the employment prior to the end date of the employment on the application. The rationale for such notice is to ensure that when the basis for the foreign worker's status terminates, both the Department and DHS can take appropriate action.

Employers will, moreover, be required to inform foreign workers that they too have responsibilities under the H-2B Program. While most of the responsibilities attached to a foreign worker's status in the U.S. fall within the purview of DHS, it is within the Department's authority to establish employer requirements related to information to be provided new workers. To that end, with respect to foreign workers being employed under the H-2B Program, we find it warranted that employees be informed that a separation from employment triggers the requirement of departure, absent possession by the employee of

continued valid status consistent with DHS regulations. DHS will establish a new land-border exit system for H-2B and other foreign workers to help ensure that departure follows the end of work authorization, regardless of whether it flows from a premature end or from the end of the authorized labor certification.

In addition, under new §§ 655.21 and 655.22(j), an employer seeking to employ H-2B workers will be required to attest that the job opportunity is for a full-time, temporary position. The H-2B Program has always required that the positions being offered be temporary and full-time in nature. The Department recognizes that some industries, occupations and States have differing definitions of what constitutes full-time employment. For example, certain landscaping positions are often classified as full-time for a 35-hour work week. The Department under new § 655.4 has provided a basic definition of full-time employment, but will continue to use its considerable experience in determining whether work is full-time for foreign labor certification purposes, based upon the customary practice in the industry in any investigation of this attestation.

Under new § 655.22(k), an employer seeking to employ H-2B workers will attest that it is not displacing any similarly employed permanent U.S. worker(s) in the occupation in the area of intended employment within the period beginning 120 days before the date of need and throughout the entire employment of the H-2B worker(s). Again, this is a new attestation, but the Department has historically considered an employer's layoffs of permanent U.S. workers in determining the availability of workers in a given job opportunity. Considering the effect of a layoff in the area of intended employment, particularly in positions which require little or no experience and which are temporary (and thus could be filled on a transitional basis by a laid-off worker seeking new opportunities), is a long-standing practice in evaluating applications in the H-2B Program. The integrity of the program depends on legitimate employer need. An employer cannot lay off a permanent U.S. worker in an occupation and then attest with any truthfulness that it has a need for a foreign temporary worker for a position which the laid-off U.S. worker could possibly fill. If there has been a layoff by the employer in the area of intended employment within 120 days of the date of need (evidenced by the requested date for certification on the application), the employer must document, in writing, it has notified and considered each of its own laid-off U.S. workers in

<sup>6</sup> The ability for the WHD, rather than the Department of Homeland Security, to investigate is contingent upon the Department and DHS agreeing on a delegation of enforcement authority.

the occupation and area of intended employment and the results of the notification and consideration. By requiring an employer to consider laid-off former employees in the area of intended employment and in the very occupation which the employer now seeks to fill, the Department considers this attestation requirement a necessary obligation for any employer seeking to hire workers under the H-2B Program. An employer may reject a U.S. worker, including potential workers from the pool of laid-off workers, but only for lawful, job-related reasons.

Under new § 655.22(m), an employer must attest that if it will place its employees at the job sites of other employers, it has made a bona fide inquiry into whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the area of intended employment within the period beginning 120 days before and throughout the entire placement of the H-2B worker. In order to be able to honestly attest to this condition, the Department believes that the employer should inquire in writing to and receive a response in writing from the employer where the H-2B worker(s) will be placed. This can be done by exchange of correspondence or attested to by the secondary employer in the contract for labor services with the employer petitioning to bring in H-2B workers. This attestation at § 655.22(m) also requires the employer to attest that all worksites where the H-2B employee will work are listed on the *Application for Temporary Employment Certification*.

Under new § 655.22(l), an employer must attest that it has not and will not shift the costs of preparing or filing the application to the temporary worker, including the costs of domestic recruitment or attorneys' fees. The Department will continue to permit employers, consistent with the Fair Labor Standards Act (FLSA), to make reasonable housing and transportation deductions from a worker's pay for the reasonable cost of furnishing housing and transportation. The domestic recruitment, legal, and other costs associated with obtaining the labor certification are, however, business expenses necessary for or, in the case of legal fees, desired by, the employer to complete the labor certification application and labor market test. The employer's responsibility to pay these costs exists separate and apart from any benefit that may accrue to the foreign worker. Prohibiting the employer from passing these costs on to foreign workers allows the Department to protect the integrity of the process,

protect the wage of the foreign worker from deterioration by deduction and protect the wages of U.S. workers from depression.

An employer seeking to employ H-2B workers will be required to attest that it will not place any H-2B workers employed pursuant to a certification outside the area of intended employment as listed on the proposed *ETA Application for Temporary Employment Certification*. The required testing of the availability of U.S. workers and the effect on their wages and working conditions would be rendered meaningless if an employer could move an H-2B worker to a new worksite outside the area of intended employment certified on the application. Employers may file H-2B applications based upon more than one worksite; in fact, applications listing multiple worksites are a common occurrence. However, moving an H-2B worker to a worksite outside the area of intended employment specified on the application negates the test of the labor market undertaken with respect to that job opportunity, leaving the U.S. workers in the area of employment without the benefit of the opportunity to apply for that position. Further, to the extent that such relocation is not provided for or is inconsistent with the terms of entry authorized by DHS and the Department of State (DOS)—terms built on the original labor certification—such activity calls into question the continued admissibility of the foreign worker.

As part of its role in H-2B labor certification determinations, the Department will continue to determine whether the employer has demonstrated that it has a need for foreign labor, and that the need is temporary. The employer will be required to attest and provide a short narrative demonstrating its temporary need. Congress has mandated the H-2B Program be used to fill only the temporary needs of employers where no unemployed U.S. workers capable of performing the work can be found. 8 U.S.C.

1101(a)(15)(H)(ii)(b). Therefore, job opportunities that are permanent in nature do not qualify for the H-2B Program. In this NPRM, the Department is proposing to consider a position to be temporary as long as the employer's need for the duties to be performed is temporary or finite, regardless of whether the underlying job is temporary or permanent in nature, as long as the temporary need is less than 3 years. The controlling factor is the employer's temporary need and not the nature of the job duties. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982); Cf. *Global*

*Horizons, Inc. v. DOL*, 2007-TLC-1 (November 30, 2006)(upheld the Department's position that a failure to prove a specific temporary need precludes acceptance of temporary H-2A application); see also 11 U.S. Op. Off. Legal Counsel 39 (1987).

Determining "temporariness" within the context of labor certification is fundamental to the Department's statutory function. DHS regulations make the temporary nature of the services or labor to be performed a threshold requirement for eligibility in the H-2B Program, and a core element in the definition each foreign worker must meet to be admissible under the visa. By definition, an H-2B worker must: (1) Be entering the U.S. temporarily to perform temporary services or labor; (2) not displace U.S. workers capable of performing such services or labor, and (3) not, by virtue of the employment, adversely affect the wages and working conditions of U.S. workers.

The definition of H-2B temporary need, as defined by DHS regulations, sets the general situational criteria and conditions under which an employer is permitted to seek a foreign worker. The employer may have only one of four types of temporary need: (1) A *one-time occurrence*, in which an employer demonstrates it has not had a need in the past for the labor or service and will not need it in the future, but needs it at the present time; (2) *seasonal need*, in which the employer establishes that the services or labor is recurring and is traditionally tied to a season of the year; (3) *peakload*, in which the employer needs to supplement its permanent staff on a temporary basis due to a short-term demand; or (4) an *intermittent need*, in which the employer demonstrates it occasionally or intermittently needs temporary workers to perform services or labor for short periods.

The proposed regulation leaves to the employer the ability to choose the documentation that best demonstrates its chosen standard of temporary need, to be retained by the employer and submitted in the event of an RFI, a post-adjudication audit or a WHD investigation. For most employers participating in the H-2B Program, demonstrating a seasonal or peakload temporary need can best be evidenced by summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers employed, the total hours worked, and total earnings received. Such reports, however, are not the only means by

which employers can choose to document their temporary need. The proposed regulation accordingly leaves it to the employer to retain other types of documentation, including but not limited to work contracts, invoices, client letters of intent, and other evidence that demonstrates that the job opportunity that is the subject of the application is temporary. Contracts and other documents used to demonstrate temporary need would be required to plainly show the finite nature of that need by clearly indicating an end date to the activity requested.

The proposed Department application form will be designed to require both a short narrative of the nature of the temporary need and responses to questions to determine the time of need and the basis for the need. The narrative will enable the employer to demonstrate in its own words the scope and basis of the need in a way that will enable the Department to confirm the need meets the regulatory standard, with additional questions on the form providing context and clarification. If further clarification is still required, the RFI process will be employed. The form will also contain an attestation that will be signed under penalty of perjury to confirm the employer's temporary H-2B need.

Employers should be wary, however, of using documents demonstrating a "season" in general terms (hotel occupancy rates, weather charts, newspaper accounts); in the Department's experience, such generalized statements fail to link a season to a specific position sought to be filled by the employer, which is required under the program. The Department also recognizes that conventional evidence such as payroll information may not be sufficient to demonstrate a one-time or intermittent need, or seasonal or peakload need in cases in which the employer's need has changed significantly from the previous year. In such cases, the employer should retain other kinds of documentation with the application that demonstrates the temporary need.

The Department has explored means to ensure the continuing validity of the labor market test in those situations in which an employer's need is temporary but may be longer than one year. We readily recognize the importance of protecting U.S. worker access to such jobs. We have examined a number of approaches to operationalize the retesting of labor markets and the impact not only on the Department's administration of the program but the effect across Government agencies. We propose in this NPRM to require those employers having multiple-year

temporary needs (up to three years) to retest the labor market annually. We believe this is the best method by which to ensure U.S. worker access to these job opportunities while recognizing an employer's need, in some cases for workers to fill positions on a multi-year basis. However, we invite comment on whether an alternative approach that would not require annual retesting of the labor market in situations where an employer has a multi-year temporary need for labor, would be appropriate.

## 2. Retention of Supporting Documentation

Employers will be required to retain the documentation outlined in the proposed regulations for 5 years from the date of adjudication to demonstrate compliance with the requirements of the program and to provide it in the event of an RFI, post-adjudication audit, WHD investigation or other similar activity. The Department proposes a 5 year document retention requirement in the event a post-adjudication audit is necessary, or another agency (such as DHS) requires the documentation. The documents to be retained include proof of advertising and posting, PWD, resumes/applications received, contact made with applicants, and a copy of the written recruitment report submitted with the application with recruitment results and reasons for not hiring U.S. workers. The employer will also need to retain records to prove temporary need such as monthly payroll records, invoices, multi-year contracts, and other documents which can justify each month of the temporary need. It is to the benefit of the employer to retain the documents for a sufficient period to enable the employer to demonstrate full compliance in the program, but no less than 5 years.

The Department proposes to counteract potential fraud or abuse in the attestation-based process through a combination of approaches, including post-adjudication audit, supervised recruitment and/or debarment from future participation in the H-2B Program. All of these proposals are discussed below, as well as various other mechanisms for fraud detection and prevention, some of which are envisioned to be automated and some of which rely on human review. In addition, employers are reminded that any submission of materially false, fictitious, or fraudulent statements to any Federal Government agency constitutes a criminal violation under 18 U.S.C. 1001, subjecting anyone convicted of a violation to fines and/or imprisonment for up to 5 years.

## F. The RFI Process

The Department shall continue to employ the use of RFIs with some adjustments. If an application is deficient or unclear or does not appear to comply with Departmental policy, the CO will issue an RFI. The RFI could be for something as simple as correction of typographical errors or as complex as substantiation of temporary need or recruitment results.

The RFI process is explained in TEGL 21-06, change 1. The Department recognizes an RFI requires additional effort and may cause a delay in the issuance of a certification, and therefore intends, to the extent feasible, to make any such requests within 14 days of receiving a fully completed application. After full review of the documentation received in response to the RFI, an application will be certified and returned to the employer, or denied for failure to overcome the identified deficiencies.

Given the nature of the program, the limited time frame in which employers must advertise in relation to their dates of need, and the limited number of H-2B visas available under the INA, employers are cautioned to review carefully the application before filing with the Department. The Department expects that the RFI process and other tools available to ETA will educate employers on the requirements of the H-2B temporary labor certification program, and deter fraud and abuse. The Department will strive to conduct such reviews in a timely manner, recognizing that time is of the essence in the H-2B application process. When necessary the CO may issue an additional RFI before issuing a Final Determination.

## G. Appeals

In a separate H-2B rulemaking, USCIS may propose to no longer consider any H-2B petition filed without an approved labor certification application from the Department. Accordingly, the Department is amending its regulations to eliminate references to so-called "non-determinations," or a finding from the Department that no finding of unavailability and adverse impact can be made with respect to a particular *Application for Temporary Labor Certification*. In addition, the Department is creating an appeal process whereby employers receiving application denials can file a request for review with the Department's Board of Alien Labor Certification Appeals (BALCA). The BALCA's determination will be based exclusively on the record available to the CO. No further evidence will be considered. In order to ensure

expeditious adjudication of appeals, the proposed regulation provides relatively short time frames for the various parts of the appeal process.

#### H. Amendments

The Department recognizes a need to be flexible with regard to minor amendments of submitted and even certified applications. Such flexibility, however, must be measured against an increasing tendency by some employers to apparently artificially realign their true date of need with visa availability. The Department has noted with some consternation the apparent movement of "need" dates in recent years to correspond more closely with Congressionally-imposed visa availability dates. This apparent shift, however well-intentioned on the part of the employer, does a substantial disservice to U.S. workers who might otherwise take positions but may not be available for what actually may be incorrect employment start dates. The Department's mandate in the H-2B process, which is to ensure the selection and admission of the H-2B worker does not adversely affect U.S. workers, cannot permit an artificial movement of an employer's actual date of need for workers in order to suit visa availability.

The Department therefore proposes in this NPRM to accommodate an employer's requests for amendments to labor certification applications, including minor adjustments to a date of need. Any such requests for an amendment must be approved by the Department. In other words, unilateral amendments by other Federal agencies to the representations on the labor certification form will no longer be permitted.

In order to maintain the integrity of the labor market test and the Secretary's mandate under the INA, substantial adjustments in the date of need specified on an Application will not be granted after the certification of the Application. To do so would invalidate the validity of the test of the availability of U.S. workers central to the Application, compromising the offer of the job opportunity to U.S. workers and calling into question the recruitment process. The Department invites comment on the appropriate window of time between "minor" and "substantial" adjustments to an employer's date of need that would allow changes for legitimate unforeseen circumstances while preventing the potential gaming of visa limits by proposing artificially early dates of need that are later changed to reflect actual dates of need.

### III. Maintaining and Enhancing Program Integrity

#### A. The Use of Post-Adjudication Audits

The Department will, based upon various selection criteria, identify applications for audit review after the application has been adjudicated. The use of post-adjudication audits will permit the Department to ensure an employer's compliance with the terms and conditions of the H-2B Program and to fulfill the Department's statutory mandate to certify applications only where unemployed U.S. workers capable of performing such services cannot be found. INA section 101(15)(H)(ii)(b), 8 U.S.C. 1101(15)(H)(ii)(b). The attestations made by the employer and the information supplied on the form supporting the attestations will be the primary criteria used in the auditing program. Additionally, applications will also be randomly selected for audit without regard to any triggering criteria. The proposed rule will enable the Department to perform directed and random audits on any application after it has been adjudicated, regardless of whether the Department issued a certification or denial of the application. This model is based upon our successful program experience in administering the PERM Program, which was reengineered in 2005.

If an application is selected for audit, the employer will be notified in writing and required to submit, within 30 days, the documentation specified in the audit request to verify the information stated in or attested to on the application. Upon timely receipt of an employer's audit documentation, the audit information will be reviewed by the CO who will then determine whether the employer has complied with its obligations. Employers will be notified in writing of all outcomes.

If a completed audit reveals evidence of non-compliance with required attestations and/or other program requirements, the proposed rule provides the CO the authority to order supervised recruitment, initiate debarment proceedings, or refer the application to the Wage and Hour Division for investigation. In addition, other Government agencies may be notified, as appropriate, of the audit findings.

#### B. Supervised Recruitment

Supervised recruitment may be ordered for a specified period for future applications submitted by that employer or on its behalf as a sanction for prior violations of the H-2B Program. This could include cases previously selected

for audit where a deficient response was provided, as well as cases where an employer's test of the labor market for the availability of U.S. workers is found to be deficient. Supervised recruitment will be applied in such cases to ensure that such employers accurately and adequately test the labor market to demonstrate a lack of U.S. workers capable of performing such services. INA section 101(15)(H)(ii)(b), 8 U.S.C. 1101(15)(H)(ii)(b). As proposed, advertising requirements under supervised recruitment will be similar to those for non-supervised recruitment. Under supervised recruitment, however, the advertisements will instruct applicants to send resumes or applications to the CO for referral to the employer, and will include an identification number and an address designated by the CO. The employer will notify the CO of the date when the advertisement will be published in accordance with the time frame established by the CO.

At the completion of the supervised recruitment efforts, the employer will be required to provide to the CO a written and signed report of the employer's supervised recruitment. The recruitment report must detail each recruitment source by name, the number of workers who responded to the employer's recruitment, each applicant's contact information, and an explanation, with specificity, of the lawful, job-related reasons for not hiring each U.S. worker who applied. Failure to provide the CO with the required recruitment report will result in denial of the application and possible subsequent supervised recruitment and/or program debarment.

#### C. Debarment

The Department is proposing a mechanism allowing it to debar an employer/attorney/agent from the H-2B Program for a period of up to 3 calendar years. Debarment from the program is a necessary and reasonable mechanism to enforce H-2B labor certification requirements and ensure compliance with the Secretary's statutory objectives. The proposed rule would permit the Department to debar an employer, attorney, and/or agent for a period of up to 3 calendar years for misrepresenting a material fact or to making a fraudulent statement on an H-2B application, for a material or substantial failure to comply with the terms of the attestations, for failure to cooperate with the audit process or ordered supervised recruitment, or if the employer/attorney/agent has been found by a court of law, WHD, DHS, or the DOS to have committed fraud or willful misrepresentation involving any OFLC

employment-based immigration program. The OFLC Administrator will notify the debarred employer/attorney/agent in writing and will state the reason for the debarment findings. The notification will also state the start and termination date of the debarment, and offer the employer/attorney/agent an opportunity to request review before BALCA.

The employer will be accorded 30 calendar days from the date of notice of debarment to file a request for review before BALCA. Upon request for review, the OFLC will assemble an indexed Appeal File and send a copy to BALCA. The BALCA will affirm, reverse, or modify the OFLC's debarment determination. The BALCA decision will be the final decision of the Department. After the appeal process is completed, if a debarment determination is affirmed, the Department will inform DHS of its findings, and add the debarred entity to a list available upon request for public review that contains the names and addresses of the debarred entities. A notification of debarment is not the same as a denial of an application.

The Department acknowledges that the proposed sanctions of supervised recruitment or debarment may not be proportionate to some violations, and accordingly, has authority to impose lesser sanctions (such as requirements to submit documentation) as appropriate. The Department encourages comments on this issue to be considered in the potential implementation of such additional sanctions in a final rule.

#### IV. Investigating Compliance With H-2B Attestations

##### A. Delegation of Enforcement Authority

The INA and its implementing regulations provide DOL no direct authority to enforce any conditions concerning the employment of H-2B workers, including the prevailing wage attestation. Pursuant to authority vested in the Secretary of Homeland Security under sections 103(a)(6) and 214(c)(14)(B) of the INA, 8 U.S.C. 1103(a)(6), 1184(c)(14)(B), the Department and DHS are discussing whether to delegate authority to the Department to establish an enforcement process to investigate employers' compliance with H-2B requirements and to seek remedies for violations discovered by any resulting investigations.

Assuming such a delegation of enforcement could successfully be worked out between the agencies, the Department proposes here and seeks

public comment on the enforcement regime that tracks the limited statutory enforcement authority Congress provided DHS. The Department notes, however, that DHS's statutory authority to enforce the terms and conditions of the H-2B Program is significantly narrower than the Department's authority to enforce the terms and conditions of other temporary worker programs such as H-2A and H-1B. Congressional action to change the limited statutory grant of authority currently provided to DHS, or to provide statutory authority to the Department, would be required in order for the Department to have investigative and remedial authority comparable to what the Department possesses with regard to the other temporary worker programs, such as H-1B.

##### B. Compliance With Application Attestations

DOL proposes a WHD enforcement program addressing an H-2B employer's compliance with employer attestations made as a condition of securing authorization to employ H-2B workers. Additionally, the proposed enforcement program will also cover statements made to DHS as part of the petition for an H-2B worker on the DHS Form I-129, Petition for a Nonimmigrant Worker. Compliance with attestations and the DHS petition are designed to protect U.S. workers and will be reviewed in WHD enforcement actions.

##### C. Remedies for Violations of H-2B Attestations

*Assessment of civil money penalties.* Under this proposed rule, the WHD may assess civil money penalties in an amount not to exceed \$10,000 per violation for a willful failure to meet conditions of the H-2B labor condition application or of the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker or for a willful misrepresentation of a material fact on the application or DHS petition, or a failure to cooperate with a Department of Labor audit or investigation.

*Reinstatement of illegally displaced U.S. workers.* The WHD will seek reinstatement of similarly employed, permanent U.S. workers who were illegally laid off by the employer in the area of intended employment. Such unlawful terminations are prohibited if they occur less than 120 days before the date of requested need for the H-2B workers or during the entire period of employment of the H-2B workers.

*Other appropriate remedies.* WHD may seek remedies under other laws that may be applicable to the work situation including, but not limited to,

remedies available under the FLSA (29 U.S.C. 201 *et seq.*), the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801, *et seq.*), and the McNamara-O'Hara Service Contract Act (41 U.S.C. 351 *et seq.*). WHD also may seek other appropriate remedies for violations as it determines to be necessary. As noted above, the Department requests public comments on what other remedies might be appropriate under the H-2B provisions including, for instance, back wages for failures to pay the prevailing wage rate.

##### E. Debarment

Under proposed § 655.80, the Wage and Hour Administrator will notify DHS and ETA of any final determination where the appropriate remedy is for the Department to recommend to DHS that it not approve petitions filed by an employer. The Wage and Hour Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions. The Wage and Hour Administrator will notify DHS and ETA upon the earliest of the following events: (1) Where the Administrator determines that there is a basis for a finding of a violation by an employer, and no timely request for a hearing is made; (2) where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review is filed with the Department's Administrative Review Board (Board); (3) where a timely petition for review is filed from an administrative law judge's decision finding a violation and the Board either declines within 30 days to entertain the appeal, or the Board reviews and affirms the administrative law judge's determination; or (4) where the administrative law judge finds that there was no violation by an employer, and the Board, upon review, issues a decision, holding that a violation was committed by an employer.

DHS, upon receipt of notification from the Administrator pursuant to this section, shall determine whether to deny petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) and, if so, the time period of such denials. Additionally, DHS may pursue additional investigations to determine if additional penalties within DHS jurisdiction are appropriate.

## V. Other Regulatory Changes

### A. Special Procedures

The proposed revisions to 20 CFR Part 655, Subpart A—the redesigned H–2B Program—do not apply to temporary employment in the Territory of Guam, because the Department does not certify to DHS the temporary employment of nonimmigrant foreign workers under H–2B visas in the Territory of Guam. Pursuant to regulations issued by DHS, that function is performed by the Governor of Guam, or the Governor’s designated representative within the Territorial Government of Guam. Hence, the Department does not intend for these regulations to reach the H–2B Program as it exists in Guam. 8 CFR 214.2(h)(6)(iii).

There are other special longstanding situations where the Department recognizes that special procedures for H–2B labor certification are appropriate, specific to the industry and/or occupation. These include, for example, occupations in sports, logging<sup>7</sup>, reforestation and entertainment, as well as certain international freight rail activities in northern New England, and employment in small U.S. exclaves. Accordingly, the Department reserves the right to, in its discretion, develop and implement special procedures for H–2B applications relating to specific occupations. Such special procedures will supplement the procedures herein described for all H–2B applications.

### B. Definitions

We have added definitions of the terms used in Part 655, Subpart A, in an effort to ensure consistent use of terms in the H–2B Program. Many definitions in that section are similar to the definition of terms used throughout the labor certification process, specifically the H–1B, H–2A and PERM Programs.

The definition of “agent” has been historically used in the H–2B Program for those representatives of H–2B employers. It includes any person, other than the employer, representing and authorized by the employer to act on behalf of the employer during the H–2B processing of a labor certification application. The term “agent” specifically excludes associations or other organizations of employers.

The terms “employed by an employer” and “employee” are as defined under common law standards have the same meaning given them in section 203 of the FLSA. “Employer”

has the same meaning provided in regulations pertaining to other OFLC programs, specifically those found at 20 CFR 656.3 regarding the PERM Program. The Department recognizes the distinct need for the employer filing the application to have an actual employment relationship with the H–2B employee, again to maximize protection to the U.S. workers who must first be recruited and considered by the employer for the job opportunity. In the past, job contractors’ demonstration of this relationship to potential employees has been of concern to the Department. While many job contractors or consulting firms maintain a legitimate employment relationship with their H–2B employees, with other job contractors the employment relationship may all but disappear once the worker arrives at the worksite. A labor certification cannot be granted when filed on behalf of an independent contractor, rather than an employee, as that term is defined in the Internal Revenue Code.

The definition of “job contractor” proposed by the NPRM is the same that has been historically used throughout the H–2B Program. Job contractors, which typically supply labor to one or more clients under contract, may file applications as employers. However, the Department recognizes that job contracting entities may seek large numbers of H–2B workers without providing a defined temporary need for such workers. A job contractor will by definition have an ongoing need on behalf of all of its clients. Therefore, the Department’s position continues to be that the temporary or permanent nature of the work of a job contractor will be determined by examining the job contractor’s need for such workers, rather than the needs of its employer customers. A job contractor that has an ongoing need for workers in the occupation, spanning one or more contracts, most likely will be determined to have a permanent need, resulting in a denial of the H–2B labor certification application. A job contractor applying for certification for H–2B workers must demonstrate that the employment is not speculative, that is, it must demonstrate it has the need before it has the workers, by demonstrating its own need to supply such workers (by signed work contracts and other verification). The practice known in the industry as “benching” of workers will not be permitted. In other words, jobs must be real and available in a specified area of intended employment in order that a legitimate

test of the labor market may be conducted.

“Job opportunity” has been a term historically used throughout the H–2B Program. A job opportunity is considered temporary under the H–2B classification only if the employer’s need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary. It is the nature of the employer’s need, not the nature of the duties, which is controlling.

The definition of “layoff” has been a term historically used throughout the H–2B Program. A layoff shall be considered any involuntary separation of one or more employees without cause or prejudice. It has been the Department’s traditional position that COs have the authority to consider the availability of laid-off workers under the employer’s mandate to test the labor market for qualified U.S. workers. The proposed rule requires employers, if there has been a layoff by the employer in the occupation in area of intended employment within 120 days prior to the date of need for an H–2B worker, to attest to and document notification and consideration of potentially qualified U.S. workers involved in the layoff and the results of such notification.

The Department has defined in this rulemaking the term “professional athlete” to track the meaning given the term in the INA. The Department intends to issue guidance detailing the procedures to be followed in filing applications on behalf of foreign workers to be employed in professional team sports. Those positions that do not meet the definitional criteria of professional athletes will not be able to avail themselves of these special procedures.

### C. Other Changes

The Department in this NPRM has also removed the requirement that DHS submit back to the Department copies of the submitted approved application or Schedule A occupations. These applications are handled by DHS rather than by the Department. We have been sent a copy of each application by DHS, pursuant to regulation. The Department no longer sees any justification for this duplication of effort and seeks to streamline the filing process for employers with this change.

## V. Administrative Information

### A. Executive Order 12866—Regulatory Planning and Review

The Department has determined that this rule is not an “economically significant regulatory action” within the

<sup>7</sup> A recent Notice of Proposed Rulemaking issued by the Department contemplates the effective transfer of logging activities from H–2B to H–2A by expanding the definition of agricultural activities. 73 FR 8538 (Feb. 13, 2008).



meaning of Executive Order 12866. The procedures for filing an *Application for Temporary Employment Certification* under the H-2B visa category on behalf of nonimmigrant temporary workers, as proposed under this regulation, will not have an economic impact of \$100 million or more.

The direct incremental costs employers will incur because of this proposed rule, above and beyond the current costs required by the program as it is currently implemented, are not economically significant. The only additional costs on employers resulting from this proposed rule are those involved in the placement of a Sunday advertisement rather than one daily advertisement. The cost range for advertising and recruitment is taken from a recent (August 2007) sample of newspapers in various urban and rural U.S. cities, and reflects approximate costs for placing one 10-line advertisement in those newspapers. The increased cost of advertising in a Sunday paper instead of during the week is approximately \$130. The additional total cost for the 12,000 employers utilizing the H-2B Program of one Sunday ad would average approximately \$1,500,000 assuming that such ads would not have been placed by the business as part of its normal practices to recruit U.S. workers. Any additional record retention costs are minimal, as records will require a burden of approximately 10 minutes per year per application to retain an application and required supporting documentation in the 4 years following the 1 year mandated for companies already subject to such burdens. This will result in a total cumulative burden of 2,000 hours, at a total cost of \$114,940.

The Department anticipates that the increase in recruitment and recordkeeping costs associated with the proposed rule will be offset by cost savings from eliminating the time employers currently spend working directly with SWAs to meet regulatory requirements. For example, the additional half hour spent by a human resources professional or office manager working with the SWA will be a quantifiable cost saving; based on the median hourly wage rate for a Human Resources Manager (\$40.47), as published by the Department's Occupational Information Network, O\*Net OnLine, and increased by a factor of 1.42 to account for employee benefits and other compensation, employers could expect to save approximately \$344,880. Further, the expected reduction in average processing time for applications will lead to a reduction in

the resources employers currently spend for expedited processing of applications with USCIS, and may eliminate, for most employers, the need to file petitions with USCIS with an additional expedite fee, for a savings of \$9,120,000.<sup>8</sup>

Employers will also experience significant time savings as a result of the streamlining of the process. The Department estimates the average time savings to employers will be at least 28 days from the current process, based on the current average H-2B application processing time of 73 days in the last fiscal year. While the Department cannot estimate the cost savings as a result of this time saved, it acknowledges employers will experience a variety of economic benefits, including benefits from predictability of workforce size of given dates and workforce availability regardless of geographic area, as a result of this streamlining of the application process. These benefits could be partially offset, however, by the effect on employment due to the cap on H-2B visas being reached early in the season, which leaves employers requiring workers in the latter part of the season without needed access to H-2B foreign workers, except those who are present in the U.S. and who could be transferred pursuant to a new petition until the maximum stay is reached. The Department welcomes comments on the costs and benefits of this reengineered approach.

#### B. Regulatory Flexibility Analysis

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to prepare a regulatory flexibility analysis and make it available for public comment. The RFA must describe the impact of the proposed rule on small entities. (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have significant economic impact on a substantial number of small entities. ETA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), and certifies under the RFA at 5 U.S.C. 605(b), that this proposed rule will not have a significant economic impact on a substantial number of small entities.

The factual basis for such a certification is that, even though this proposed rule can and does affect a

<sup>8</sup> USCIS has informed the Department, for example, approximately 76 percent of all employers filed H-2B petitions in FY 2007 using the USCIS premium processing option, at the additional cost of \$1000 per petition.

substantial number of small entities, there will not be a significant economic impact on them. The Department receives more than 10,000 applications a year under this program. In FY 2006 (October 1, 2005–September 30, 2006), ETA received from SWAs 11,267 applications from employers seeking temporary labor certification under the H-2B Program. According to the SBA, there were approximately 25.7 million small businesses in the U.S. in 2005. The Department does not maintain statistics on the size of the businesses requesting H-2B workers, therefore, for the purposes of this analysis the Department is willing to assume that all applicants are small businesses.<sup>9</sup>

The Department believes, however, that the costs incurred by employers under the proposed rule will not be substantially different from those incurred under the current application filing process. Employers seeking to hire foreign workers on a temporary basis under the H-2B Program must continue to establish to the Secretary's satisfaction that their recruitment attempts have not yielded enough qualified and available U.S. workers. Similar to the current process, employers under this proposed H-2B process will file a standardized application but will retain recruitment documentation, a recruitment report, and any supporting evidence or documentation justifying the temporary need for the services or labor to be performed. To estimate the cost of this reformed H-2B process on employers, the Department calculated each employer will likely pay in the range of \$500 to \$1,850 to meet the advertising and recruitment requirements for a job opportunity, and spend 2 hours and 40 minutes of staff time preparing the standardized application, narrative statement of temporary need, final

<sup>9</sup> Even though the Department is assuming it is not required to perform the analysis, the Department is unable to classify the employers by industry or by the two methods used by the SBA to determine whether or not a business is a small entity as defined in 13 CFR 121.201. The RFA requires the Department to perform its RFA analysis based on the size standards defined in 13 CFR 121.201. The SBA utilizes annual revenue in some industries, while utilizing number of employees in others to determine whether or not a business is considered a small business. However, the Department has historically not collected information about an employer's industry classification, annual revenues, or number of employees currently on payroll in the H-2B Program, and therefore cannot accurately and comprehensively categorize each applicant-employer for the purpose of conducting the RFA analysis by industry and size standard. In lieu of the industry and size standard analysis, the Department based the estimated costs of the reformed H-2B process assuming all employers-applicants were small entities.

recruitment report, and retaining all other required documentation (e.g., newspaper ads, business necessity) for audit purposes. In estimating employer staff time costs, the Department used the median hourly wage rate for a Human Resources Manager (\$40.47), as published by the Department's Occupational Information Network, O\*Net OnLine, and increased by a factor of 1.42 to account for employee benefits and other compensation.

The overall costs of the H-2B program, which the Department estimates to average \$1,200 for advertising and personnel, will rarely eliminate more than 10 percent of the businesses' profits; exceed one percent of the gross revenue of the entities in a particular sector; or exceed five percent of the labor costs of the entities in the sector. The Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act (SBREFA), which amended the RFA, require that an agency promulgating regulations segment and analyze industrial sectors into several appropriate size categories for the industry being regulated. However, the foreign labor certification programs are open to all industries. In this particular instance it is the H-2B Program that is being regulated, not a particular industry. Therefore, in analyzing the number of small businesses that might be affected, the Department looked at all small entities that had gross receipts of \$120,000 or less and profits of \$12,000 or less and determined that they do not make up a substantial number of small entities.

The Department acknowledges that there might be some extremely small businesses, such as bed & breakfast establishments, which may incur additional costs in order to file their application online as envisioned in the future by this rule. However, employers physically unable to file electronically (again in the envisioned future), who might face a greater cost to arrange electronic filing, will be able to request permission to engage in manual filings.

In summary, the total costs for any small entities affected by this program will be reduced or stay the same as the costs for participating in the current program. Even assuming that all entities who file H-2B labor certification applications qualify as small businesses, there will be no net negative economic effect.

The Department invites comments from members of the public who believe there will be a significant impact on a substantial number of small entities or who disagree with the size standard used by the Department in certifying that this rule will not have significant

impact on a substantial number of small entities.

#### *C. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. This proposed rule has no "Federal mandate," which is defined in 2 U.S.C. 658(6) to include either a "Federal intergovernmental mandate" or a "Federal private sector mandate." A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H-2B worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

The SWAs will experience a direct impact on their foreign labor certification activities in the elimination of certain H-2B activities, which are proposed to be eliminated under the NPRM. These activities are currently funded by the Department pursuant to grants provided under the Wagner-Peyser Act. 29 U.S.C. 49 *et seq.* The net effect of this NPRM will likely be to reduce the amounts of such grants available to each State in an amount corresponding to its relative workload under the H-2B Program in the receipt, processing and monitoring of each application, to be reduced on a transitional basis upon implementation of a final rule. Such reduction will be offset by a reduction in the actual workload involved.

#### *D. Small Business Regulatory Enforcement Fairness Act of 1996*

The Department was not required to produce a Regulatory Flexibility analysis; therefore, it is also not required to produce any Compliance Guides for Small Entities as mandated by SBREFA (5 U.S.C. 801). The Department has similarly concluded that this rule is not a "major rule" requiring review by the Congress under SBREFA because it will not likely result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to

compete with foreign-based enterprises in domestic or export markets.

#### *E. Executive Order 13132—Federalism*

This proposed rule will not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of Government as described by Executive Order 13132. Therefore, the Department has determined that this proposed rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

#### *F. Assessment of Federal Regulations and Policies on Families*

This proposed rule does not affect family well-being.

#### *G. Executive Order 12630*

The Department certifies that this proposed rule does not have property taking implications, i.e., eminent domain.

#### *H. Executive Order 12988*

This regulation has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The regulation has been written so as to minimize litigation and provide clear legal standards for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

#### *I. Plain Language*

The Department drafted this NPRM in plain language.

#### *J. Paperwork Reduction Act*

This NPRM proposes to significantly change the method of collecting information for the H-2B Program for which the current collection instruments do not suffice. Employers are currently required to file a Form ETA 750A (Office of Management and Budget (OMB) Control Number 1205-0015) when requesting a labor certification for temporary non-agricultural workers. Additionally, each SWA has its own form for its offered wage rate determinations. This proposed rule revises the current process for applying by requiring petitioners to file a revised form by U.S. Mail and envisions a future electronic filing requirement where employers will attest to certain terms, conditions, and obligations. These attestations are made to the U.S. Government in accordance with these proposed regulations streamlining the processing. To further

re-engineer the process, the proposed rule mandates the offered wage rate determination requests be filed with the Department instead of the individual SWAs. Under the Paperwork Reduction Act (PRA) of 1995, the Office of Management and Budget (OMB) considers the attestations and the wage rate determination requests an information collection requirement subject to review. Accordingly, this information collection in this proposed rule has been submitted to OMB for review under section 3507(d) of the PRA. Copies of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice or at this Web site: <http://www.doleta.gov/OMB/CN/OMBControlNumber.cfm> or <http://www.reginfo.gov/public/dol/pramain>. Written comments are encouraged and will be accepted until July 21, 2008.

When submitting comments on the two information collections, your comments should address one or more of the following four points.

*Review Focus:* The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

## I. Overview of Information Collection Form Number 1

*Type of Review:* New.

*Agency:* Employment and Training Administration.

*Title:* *Application for Temporary Employment Certification.*

*OMB Number:* 1205-NEW1.

*Agency Number(s):* (Proposed) Form ETA 9142.

*Recordkeeping:* On occasion.

*Affected Public:* Individuals, households, businesses, farms, Federal, State, local and tribal governments.

*Total Respondents:* 12,000.

*Estimated Total Burden Hours:* 33,200.

*Total Burden Cost (capital/startup):* 0.

*Total Burden Cost (operating/maintaining):* 0.

## II. Overview of Information Collection Form Number 2

*Type of Review:* New.

*Agency:* Employment and Training Administration.

*Title:* *Job Offer and Required Wage Request Form.*

*OMB Number:* 1205-NEW2.

*Agency Number(s):* (Proposed) Form ETA 9141.

*Recordkeeping:* On occasion.

*Affected Public:* Individuals, households, businesses, farms, Federal, State, local and tribal governments.

*Total Respondents:* 12,000.

*Estimated Total Burden Hours:* 9,675.

*Total Burden Cost (capital/startup):* 0.

*Total Burden Cost (operating/maintaining):* 0.

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

All comments and suggestions or questions regarding additional information should be directed to the Federal e-Rulemaking Portal at: <http://www.regulations.gov> and a copy sent to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for Employment and Training Administration, and to Darrin King, Departmental Clearance Officer, Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210 or e-mail:

[King.Darrin@dol.gov](mailto:King.Darrin@dol.gov). The information collection aspects of the proposed rulemaking will not take effect until published in a final rule and approved by OMB. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(k)(1).

## K. Catalog of Federal Domestic Assistance Number

This program is listed in the *Catalog of Federal Domestic Assistance* at Number 17-273, "Temporary Labor Certification for Foreign Workers."

## List of Subjects

### 20 CFR Part 655

Administrative practice and procedure, Foreign workers, Employment, Employment and training,

enforcement, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

### 20 CFR Part 656

Administrative practice and procedure, Agriculture, Aliens, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Guam, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Students, Unemployment, Wages, Working conditions.

For reasons stated in the preamble, the Department of Labor proposes that 20 CFR Parts 655 and 656 be amended as follows:

## PART 655—[AMENDED]

1. The authority citation for part 655 is revised to read as follows:

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); § 3(c)(1), Public Law 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); § 221(a), Public Law 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); § 303(a)(8), Public Law 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); § 323(c), Public Law 103-206, 107 Stat. 2428; § 412(e), Public Law 105-277, 112 Stat. 2681; and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart A issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c); and 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart C issued under 8 CFR 214.2(h). Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and § 323(c), Public Law 103-206, 107 Stat. 2428.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); § 303(a)(8), Public Law 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); § 412(e), Public Law 105-277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K issued under § 221(a), Public Law 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); § 2(d), Public Law 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Public Law 109-423, 120 Stat. 2900; and 8 CFR 214.2(h).

2. Revise the heading of Part 655 to read as follows:

## PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

3. Revise subpart A to read as follows:

**Subpart A—Labor Certification Process and Enforcement of Attestations for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers)**

Sec.

- 655.1 Purpose and scope of subpart A.
- 655.2 Territory of Guam.
- 655.3 Special procedures.
- 655.4 Definitions of terms used in this subpart.
- 655.5 [Reserved]
- 655.6 Temporary need.
- 655.7–655.9 [Reserved]
- 655.10 Determination of prevailing wage for temporary labor certification purposes.
- 655.11 Certifying officer review of prevailing wage determinations.
- 655.12–655.14 [Reserved]
- 655.15 Required pre-filing recruitment.
- 655.17 Advertising requirements.
- 655.18–655.19 [Reserved]
- 655.20 Applications for temporary employment certification.
- 655.21 Supporting evidence for temporary need.
- 655.22 Obligations of H–2B employers.
- 655.23 Receipt and processing of applications.
- 655.24 Audits.
- 655.25–655.29 [Reserved]
- 655.30 Supervised recruitment.
- 655.31 Debarment.
- 655.32 Labor certification determinations.
- 655.33 Administrative.
- 655.34 Validity of temporary labor certifications.
- 655.35 Required departure.
- 655.50 Enforcement process.
- 655.55 [Reserved]
- 655.60 Violations.
- 655.65 Remedies for violations.
- 655.70 Administrator's determination.
- 655.71 Request for hearing.
- 655.72 Hearing rules of practice.
- 655.73 Service of pleadings.
- 655.74 Conduct of proceedings.
- 655.75 Decision and order of administrative law judge.
- 655.76 Appeal of administrative law judge decision.
- 655.80 Notice to ETA and DHS.

**Subpart A—Labor Certification Process and Enforcement of Attestations for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers)**

**§ 655.1 Purpose and scope of subpart A.**

(a) Before granting the petition of an employer to import nonimmigrant workers on H–2B visas for temporary nonagricultural employment in the United States (U.S.), the Secretary of Homeland Security is required to consult with appropriate agencies regarding the availability of U.S. workers. Immigration and Nationality Act of 1952 (INA), as amended, sections 101(a)(15)(H)(ii)(b) and 214(c)(1), 8

U.S.C. 1101(a)(15)(H)(ii)(b) and 1184(c)(1).

(b) Regulations of the Department of Homeland Security (DHS) for the U.S. Citizenship and Immigration Services (USCIS) at 8 CFR 214.2(h)(6) require that the petitioning H–2B employer attach to its visa petition a determination from the Secretary of Labor (Secretary) that:

(1) There are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of application for a visa and admission into the U.S. and at the place where the foreign worker is to perform the work; and

(2) The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(c)(1) The regulations under this subpart set forth the procedures through which employers may apply for H–2B labor certifications, how such applications are considered and how they are granted or denied. This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the U.S. in occupations other than agriculture and registered nursing.

(2) Certain investigatory, inspection, and law enforcement functions to assure compliance with the terms and conditions of employment under the H–2B program have been delegated by the Secretary of DHS to the Secretary of Labor and re-delegated to the Employment Standards Administration (ESA) Wage and Hour Division (WHD). This subpart sets forth the Wage and Hour Division's investigation and enforcement actions.

**§ 655.2 Territory of Guam.**

Subpart A of this part does not apply to temporary employment in the Territory of Guam, and the Department of Labor (Department or DOL) does not certify to the USCIS of DHS the temporary employment of nonimmigrant foreign workers under H–2B visas in the Territory of Guam. Pursuant to DHS regulations, that function is performed by the Governor of Guam, or the Governor's designated representative.

**§ 655.3 Special procedures.**

(a) *Systematic process.* This subpart provides systematic and accessible procedures for the processing of applications from employers for the certification of non-agricultural employment of nonimmigrant workers on a temporary basis, usually in relation

to certain classes of occupations within an industry.

(b) *Establishment of special procedures.* To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the INA, while not deviating from statutory requirements to determine U.S. worker availability and make a determination as to adverse effect, the Administrator of the Office of Foreign Labor Certification (OFLC) has the authority to establish or to revise special procedures in the form of variances for processing certain H–2B applications when employers can demonstrate upon written application to and consultation with the OFLC Administrator that special procedures are necessary. Special procedures have been used to augment the filing of applications for H–2B foreign workers, for example, in certain tree planting and related reforestation activities, in professional athletics, for boilermakers coming to the U.S. on an emergency basis, and professional entertainers. Prior to making determinations under this section, the OFLC Administrator may consult with employer representatives and worker representatives.

(c) *Construction.* This section shall be construed to permit the OFLC Administrator, where the OFLC Administrator deems appropriate, to devise, continue, revise, or revoke special procedures where circumstances warrant. These include procedures previously in effect for the handling of applications for tree planting and related reforestation activities, sports and professional entertainment, cross-border freight rail transportation in northern New England, in small U.S. exclaves, and other programs.

**§ 655.4 Definitions of terms used in this subpart.**

For the purposes of this subpart:

*Act* means the Immigration and Nationality Act or INA, as amended, 8 U.S.C. 1101 et. seq.

*Administrator, Office of Foreign Labor Certification (OFLC)* means the primary official of the Office of Foreign Labor Certification, or the Administrator's designee.

*Agent* means a legal entity or person which is authorized to act on behalf of the employer for temporary agricultural labor certification purposes, and is not itself an employer as defined in this subpart. The term "agent" specifically excludes associations or other organizations of employers.

*Applicant* means a U.S. worker who is applying for a job opportunity for which an employer has filed an

*Application for Temporary Employment Certification* (Form ETA 9142).

*Application for Temporary Employment Certification* means the form submitted by an employer to secure a temporary non-agricultural labor certification determination from DOL.

*Area of intended employment* means the geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, quality of regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

*Attorney* means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia, and who is not under suspension or disbarment from practice before any court or before DHS or the U.S. Department of Justice's Executive Office for Immigration Review. Such a person is permitted to act as an attorney or representative for an employer under this part; however, an attorney who acts as a representative must do so only in accordance with the definition of "representative" in this section.

*Board of Alien Labor Certification Appeals (BALCA or Board)* means the permanent Board established by Part 656 of this chapter, chaired by the Chief Administrative Law Judge, and consisting of Administrative Law Judges assigned to the Department and designated by the Chief Administrative Law Judge to be members of BALCA. The Board is located in Washington, DC, and reviews and decides appeals in Washington, DC.

*Center Director* means a DOL official to whom the Administrator has delegated his authority for purposes of National Processing Center (NPC) operations and functions.

*Certifying Officer (CO)* means the person designated by the Administrator,

OFLC with making programmatic determinations on employer-filed applications under the H-2B Program.

*Date of need* means the first date the employer requires services of the H-2B workers.

*Employ* means to suffer or permit to work.

*Employee* means employee as defined under the general common law. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors should be considered and no one factor is dispositive.

*Employer* means

(1) A person, firm, corporation or other association or organization:

(i) Which has a physical location within the U.S. to which U.S. workers may be referred for employment;

(ii) Which has an employer relationship with respect to employees employed pursuant to the part as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and

(iii) Which possesses a valid Federal Employer Identification Number (FEIN).

(2) Where two or more employers each have the definitional indicia of employment with respect to an employee, those employers shall be considered to jointly employ that employee.

(3) Persons who are temporarily in the U.S., including but not limited to, foreign diplomats, intra-company transferees, students, and exchange visitors, visitors for business or pleasure, and representatives of foreign information media can not be employers for the purpose of obtaining a labor certification.

*Employment and Training Administration or ETA* means the agency within the Department which includes the OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the Act.

*ETA National Processing Center (NPC)* means a National Processing Center established under the OFLC for the processing of applications submitted in connection with the Department's mandate pursuant to the INA.

*Full time*, for purposes of temporary labor certification employment, means 35 or more hours per week, except where a State or an established practice

in an industry has developed a definition of full-time employment for any occupation that is less than 35 hours per week, that definition shall have precedence.

*Job Contractor* means a person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one or more employers unaffiliated with the job contractor as part of signed work contracts or labor services agreements. A job contractor may be responsible for hiring, paying, and firing the foreign worker but then places that worker with one or more unaffiliated employers.

*Job opportunity* means one or more job openings with the petitioning employer for temporary employment at a place in the U.S. to which U.S. workers can be referred. Job opportunities consisting solely of job duties that will be performed totally outside the U.S., its territories, possessions, or commonwealths cannot be the subject of an *Application for Temporary Employment Certification*.

*Layoff* means any involuntary separation of one or more U.S. employees without cause or prejudice.

*Metropolitan Statistical Area (MSA)* means those geographic entities defined by the U.S. Office of Management and Budget (OMB) for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but less than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

*Offered wage* means the highest of the prevailing wage, Federal minimum wage, the State minimum wage, and local minimum wage.

*Office of Foreign Labor Certification (OFLC)* means the organizational component within ETA that provides national leadership and policy guidance and develops regulations and procedures by which it carries out the responsibilities of the Secretary under the INA, as amended, concerning foreign workers seeking admission to the U.S. in order to work under section 101(a)(15)(H)(ii)(b) of the INA, as amended.

*Occupational Employment Statistics Survey (OES)* means that program under the jurisdiction of the Bureau of Labor Statistics (BLS) that provides annual

wage estimates for occupations at the state and MSA levels.

*Prevailing Wage Determination (PWD)* means the prevailing wage for the position that is the subject of the *Application for Temporary Employment Certification*.

*Professional Athlete* shall have the meaning ascribed to it in INA section 212(a)(5)(A)(iii)(II), which defines "professional athlete" as an individual who is employed as an athlete by—

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed \$10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

*Representative* means the official employed by or authorized to act on behalf of the employer with respect to the recruitment activities entered into for and attestations made with respect to the *Application for Temporary Employment Certification*. In the case of an attorney who acts as the employer's representative and who interviews and/or considers U.S. workers for the job offered to the foreign worker, such individual must be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered in the application, but which do not involve labor certifications.

*Secretary* means the Secretary of Labor, the chief official of the U.S. Department of Labor (Department or DOL), or the Secretary's designee.

*Secretary of Homeland Security* means the chief official of the Department of Homeland Security or the Secretary of Homeland Security's designee.

*Secretary of State* means the chief official of the U.S. Department of State (DOS) or the Secretary of State's designee.

*State Workforce Agency (SWA)*, formerly known as State Employment Security Agency, means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer the public labor exchange delivered through the State's one-stop delivery system in accordance with the Wagner-Peyser Act, 29 U.S.C. 49 *et. seq.*

*United States, when used in a geographic sense*, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.

*United States worker* means any worker who is:

(1) A U.S. citizen;

(2) A U.S. national;

(3) Lawfully admitted for permanent residence;

(4) Granted the status of an foreign worker lawfully admitted for temporary residence under 8 U.S.C. 1160(a) or 1255a(a)(1);

(5) Admitted as a refugee under 8 U.S.C. 1157; or

(6) Granted asylum under 8 U.S.C. 1158.

#### § 655.5 [Reserved]

#### § 655.6 Temporary need.

(a) To utilize the H-2B Program, the employer's need for non-agricultural services or labor described in an *Application for Temporary Employment Certification* must be temporary.

Temporary employment is full-time employment that is not permanent in nature. A job opportunity is considered temporary under this subpart if the employer's need for the duties to be performed is temporary, regardless of whether the underlying job is permanent or temporary.

(b) The temporary need must be justified to the Secretary under one of the following standards:

(1) *One-Time Occurrence*. The employer must establish that either it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or it has an employment situation that is otherwise permanent, but a temporary event of less than 3 years in duration has created the need for a temporary worker(s);

(2) *Seasonal Need*. The employer must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees;

(3) *Peakload Need*. The employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand, and the temporary additions to staff will not become a part of the petitioner's regular operation; or

(4) *Intermittent Need*. The employer must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

(c) Except in the case of a One-Time Occurrence, an employer's need cannot exceed 10 months.

(d) The temporary nature of the work or services to be performed in applications filed by job contractors will be determined by examining the job contractor's own need for the services or labor to be performed, rather than the needs of each individual employer with whom the job contractor has agreed to provide workers as part of a signed work contract or labor services agreement.

(e) The employer filing the application must maintain documentation evidencing the temporary need and be prepared to submit this documentation in response to a Request for Further Information (RFI) from the CO prior to rendering a Final Determination or in the event of an audit examination. The documentation required in this section to be retained by the employer must be retained for a period of no less than 5 years from the date of the certification or, if such application was denied or the Department could not make a determination, no less than 5 years from the date of notification from the Department of such denial or no finding.

#### §§ 655.7–655.9 [Reserved]

#### § 655.10 Determination of prevailing wage for temporary labor certification purposes.

(a) *Application process*. (1) The employer must request a prevailing wage determination from the Chicago NPC before commencing any recruitment under this part.

(2) The employer must obtain a prevailing wage determination that is valid either on the date recruitment begins or the date of filing the *Application for Temporary Employment Certification* with the Department.

(3) The employer must offer and advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPC.

(b) *Determinations*. The Chicago NPC shall determine the prevailing wage as follows:

(1) Except as provided in paragraph (e) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms' length between the union and the employer, the wage rate set forth in the CBA is considered as not adversely affecting the wages of U.S. workers, that is, it is considered the "prevailing wage" for labor certification purposes.

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided

in paragraph (b)(4) of this section, of the wages of workers similarly employed at the skill level in the area of intended employment. The wage component of the DOL Occupational Employment Statistics Survey (OES) shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (f) of this section. The wage shall be determined in accordance with section 212(t) of the INA.

(3) If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist, i.e. multiple MSAs, the Chicago NPC will determine the prevailing wage based on the highest wage among all applicable MSAs.

(4) If the employer provides a survey acceptable under paragraph (f) of this section that provides a median but does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of U.S. workers similarly employed in the area of intended employment.

(5) The employer may utilize a current wage determination in the area determined under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq.*

(6) The Chicago NPC must enter its wage determination on the form it uses for these purposes, indicate the source, and return the form with its endorsement to the employer. The employer must offer this wage (or higher) to both its U.S. and H-2B workers.

(c) *Similarly employed.* For purposes of this section, similarly employed means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the occupational category cannot be obtained in the area of intended employment, similarly employed means:

(1) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(d) *Validity period.* The Chicago NPC must specify the validity period of the prevailing wage, which in no event may be more than 1 year and no less than 3 months from the determination date.

(e) *Professional athletes.* In computing the prevailing wage for a professional athlete (defined in section

212(a)(5)(A)(iii)(II) of the INA) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage (see section 212(p)(2) of the INA).

(f) *Employer-provided wage information.* (1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the Chicago NPC will consider wage information provided by the employer in making a PWD. An employer survey can be submitted either initially or after NPC issuance of a PWD derived from the OES survey.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the Chicago NPC with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the Chicago NPC to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the ETA OFLC national office.

(3) The survey submitted to the Chicago NPC must be based upon recently collected data:

(i) The published survey must have been published within 24 months of the date of submission to the Chicago NPC, must be the most current edition of the survey, and the data upon which the survey is based must have been collected within 24 months of the publication date of the survey.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted to the Chicago NPC.

(4) If the employer-provided survey is found not to be acceptable, the Chicago NPC must inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for the Chicago NPC's consideration is not acceptable, may file supplemental information as provided in paragraph (g) of this section, file a new request for a PWD, appeal under § 655.11, or, if the initial PWD was requested prior to submission of the employer survey, acquiesce to the initial PWD.

(g) *Submission of supplemental information by employer.* (1) If the employer disagrees with the skill level assigned to its job opportunity, or if the Chicago NPC informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review,

the employer may submit supplemental information to the Chicago NPC.

(2) The Chicago NPC must consider one supplemental submission about the employer's survey or the skill level assigned to the job opportunity or any other legitimate basis for the employer to request such a review. If the Chicago NPC does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, it must inform the employer of the reasons for its decision.

(3) The employer may then apply for a new wage determination, appeal under § 655.11, or acquiesce to the initial PWD provided if one was requested prior to submission of the employer survey.

(h) *Wage cannot be lower than required by any other law.* No PWD for labor certification purposes made under this section permits an employer to pay a wage lower than the highest wage required by any applicable Federal, State, or local law.

(i) *Retention of Documentation.* The PWD shall be retained by the employer for 5 years and submitted to a CO in the event it is requested in the course of an RFI or an audit or a Wage and Hour representative in the event of a Wage and Hour investigation.

#### **§ 655.11 Certifying officer review of prevailing wage determinations.**

(a) *Review of NPC prevailing wage determinations.* Any employer desiring review of a Chicago NPC PWD must make a request for such review within 10 days of the date from when the PWD was issued. The request for review must be sent (postmarked) to the Chicago NPC no later than 10 days after determination, which begins with the date of issuance listed on the PWD; clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include all the materials pertaining to the PWD submitted to the Chicago NPC up to the date that the PWD was issued.

(b) *Transmission of request to processing center.* Upon the receipt of a request for review, the Chicago NPC prevailing wage unit must review the employer's request and accompanying documentation, and add any supplementary material submitted by the employer, including any material sent to the employer up to the date the PWD was issued.

(c) *Designations.* The Director of the Chicago NPC will determine which CO will review the employer's request for review.

(d) *Review on the record.* The CO shall review the PWD solely on the basis



upon which the PWD was made and after review may:

(1) Affirm the PWD issued by the Chicago NPC; or

(2) Modify the PWD.

(e) *Request for review by BALCA.* Any employer desiring review of a Certifying Officer PWD must make a request for review of the determination by BALCA within 30 days of the date of the decision of the CO. The CO must receive the request for BALCA review no later than the 30th day after its final determination including the date of the final determination.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the affirmation of the PWD by the Chicago NPC was based.

(2) The request for review must be in writing and addressed to the CO who made the determination. Upon receipt of a request for a review, the CO must immediately assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The CO must send the Appeal File to the Office of Administrative Law Judges, Board of Alien Labor Certification Appeals, 800 K Street, NW., Suite 400-N, Washington, DC 20001-8002.

(4) The BALCA shall handle appeals in accordance with § 655.31 of this part.

#### §§ 655.12-655.14 [Reserved]

#### § 655.15 Required Pre-filing Recruitment.

(a) *Time of Filing of Application.* An employer may not file an *Application for Temporary Employment Certification* before all of the pre-filing recruitment steps set forth in this section have been fully satisfied. The employer must conduct all required recruitment no more than 120 days before the date of its need for foreign workers.

(b) *General Attestation Obligation.* An employer must document recruitment efforts, must provide evidence of these efforts on the application form, and must attest to performing all necessary steps of the recruitment process as specified in this section and having rejected any eligible U.S. workers who have applied only for lawful reasons.

(c) *Retention of documentation.* The employer filing the *Application for Temporary Employment Certification* must maintain documentation of its advertising and recruitment efforts as required in this subpart and be prepared to submit this documentation in response to a RFI from the CO prior to

rendering a Final Determination or in the event of an audit examination. The documentation required in this section to be retained by the employer must be retained for a period of no less than 5 years from the date of the certification or, if such application was denied no less than 5 years from the date of notification from the Department of such denial.

(d) *Recruitment Steps.* (1) An employer filing an application must:

(i) Post a job order with the SWA; and

(ii) Run three print advertisements on three separate days, except as indicated in paragraph (f)(4) (one of which must be on a Sunday, except as outlined in paragraph (f)(4)).

(iii) The start date of advertising for the steps outlined in (1) and (2) must be no more than 120 days before the date of need.

(2) The use of union organizations as a recruitment source is also required, in addition to the mandatory recruitment steps, if it is appropriate for the occupation and customary to the industry and area of intended employment.

(e) *SWA Posting.* (1) The employer shall place an active job order with the SWA serving the area of intended employment for a period of no less than 10 days. The job order cannot be placed more than 120 days before the date of need. Documentation of this step shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting. If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State, the employer shall place a job order with the SWA having jurisdiction over the place where the work is contemplated to begin. Upon placing a job order, the SWA receiving the job offer under this paragraph shall promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the application as anticipated worksites.

(2) The job order contents submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.17(a). In the job order, the SWA shall disclose that only eligible workers shall be referred and list the name of the employer and location(s) of work with as much geographic specificity as possible to apprise U.S. workers of where the work will be performed and any travel requirements.

(3) SWAs shall refer for employment only those individuals whom they have verified are employment-eligible U.S. workers.

(f) *Newspaper Advertisements.*

(1) Within the same period of time the job order is actively posted by the SWA serving the area of intended employment, the employer shall place an advertisement on three separate days, which may be consecutive, one of which is to be a Sunday advertisement (except as provided in paragraph (g)(2) of this section), in a newspaper of general circulation serving the area of intended employment, which may be a daily local newspaper, that the employer believes in good faith is most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, available, and qualified U.S. workers. The first newspaper advertisement must be printed no more than 120 days before the date of need.

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer shall use, in place of a Sunday edition advertisement, the regularly published edition with the widest circulation in the area of intended employment.

(3) The newspaper advertisements must satisfy the requirements under § 655.17(a) of this part. Documentation of this step shall be satisfied by maintaining copies of newspaper pages (with date of publication and full copy of ad), tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements furnished by the newspaper for each day in which the advertisement appeared.

(4) If the employer believes in good faith that the use of a professional, trade or ethnic publication is more appropriate to the occupation and the workers likely to apply for the job opportunity than the use of a general circulation newspaper and is the most likely source to bring responses from able, willing, qualified, and available U.S. workers, the employer may use a professional, trade or ethnic publication in place of two of the newspaper advertisements, but shall not replace the Sunday advertisement, or the substitute outlined in (f)(1), as appropriate.

(g) *Labor Organizations.* Within the same period of time the job order is actively posted by the SWA serving the area of intended employment and where the position typically or traditionally is represented by organized labor (union) in the area of intended employment, the

required union contact can be documented by providing copies of pages from newsletters or trade journals in which the job opportunity appeared or copies of official correspondence signed and dated by the employer demonstrating such organizations were contacted and either unable to refer a qualified U.S. worker or non-responsive to the employer's request.

(h) *Layoff*. If there has been a layoff of U.S. workers by the importing employer in the occupation in the area of intended employment within 120 days of the first date on which a foreign worker is needed as indicated on the submitted *Application for Temporary Employment Certification* and throughout the entire employment of the H-2B worker(s), the employer must document it has notified and considered, or will notify and consider, each laid-off worker of the job opportunity involved in the application and the result of the notification and consideration.

(i) *Recruitment Report*. No earlier than 2 calendar days after the last date on which the job order was posted and no earlier than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign, and date a written recruitment report. The employer may not submit the application until the recruitment report is completed. The recruitment report must be submitted to the Department with the application. The employer must retain a copy of the recruitment report for a period of no less than 5 years and must provide that copy to the Department upon request. The CO may share the recruitment report with the Office of Special Counsel for Immigration-related Unfair Employment Practices of the Department of Justice Civil Rights Division, if there is any reason to believe that the employer has deterred eligible U.S. workers to apply for the position filled by an H-2B worker, or discriminated against the eligible U.S. worker in the hiring process. The recruitment report must:

(1) Identify each recruitment source (place where advertisement appeared) by name;

(2) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report for consideration by the employer, and the disposition of each U.S. worker who applied or was referred to the job opportunity;

(3) If applicable, explain the lawful job-related reason(s) for not hiring each U.S. worker.

(4) The employer shall retain resumes of and evidence of contact with each U.S. worker who applied or was referred to the job opportunity. Such documentation may be required in response to an RFI from the CO prior to rendering a Final Determination or in the event of an audit or a Wage and Hour investigation.

#### **§ 655.17 Advertising requirements.**

All advertising conducted to satisfy the required recruitment steps under § 655.15 before filing the *Application for Temporary Employment Certification* must:

(a) Identify the employer's name and appropriate contact information for applicants to report or send resumes directly to the employer;

(b) Indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements or whether transportation to work will be provided in order to perform the services or labor;

(c) Describe the job opportunity (including the job duties and responsibilities) with particularity to apprise U.S. workers of services or labor to be performed for which certification is sought and which do not exceed the duties listed on the *Application for Temporary Employment Certification*;

(d) State the employer's minimum education and experience requirements and whether or not on-the-job training will be available;

(e) State the work hours and days, and the start and end dates of employment as listed on the *Application for Temporary Employment Certification* and indicate whether or not overtime and/or benefits will be available;

(f) Offer a rate of pay that is no less than the prevailing wage, the Federal minimum wage, State minimum wage, or local minimum wage applicable throughout the duration of the certified employment;

(g) Indicate that the position is temporary and the total number of job openings the employer intends to fill as listed on the *Application for Temporary Employment Certification*;

(h) Contain benefits, terms and conditions of employment which are not less favorable than those offered to the foreign worker(s); and

(i) Contain no unduly restrictive job requirements.

#### **§§ 655.18–655.19 [Reserved]**

#### **§ 655.20 Applications for temporary employment certification.**

(a) An employer who desires to apply for certification of temporary employment of one or more nonimmigrant foreign workers may file

a completed *Application for Temporary Employment Certification* form and send it by U.S. Mail or private mail courier to the Chicago NPC. The Department shall publish a Notice in the **Federal Register** identifying the address, and any future address changes, to which paper applications must be mailed, and shall also post these addresses on the DOL Internet Web site at <http://www.foreignlaborcert.doleta.gov/>.

The form must bear the original signature of the employer (and that of the employer's authorized agent or representative) at the time it is submitted.

(b) Except where otherwise permitted under § 655.3, an association or other organization of employers is not permitted to file master applications on behalf of its membership under the H-2B Program.

(c) More than one foreign worker may be requested on the application as long as all foreign workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment. In circumstances where the job opportunity requires the services or labor to be performed at multiple work locations, the employer must include the names, physical addresses and appropriate periods of employment of each work location on the *Application for Temporary Employment Certification*.

(d) Except where otherwise permitted under § 655.3, only one Application may be filed for worksite(s) within one area of intended employment for each job opportunity.

#### **§ 655.21 Supporting evidence for temporary need.**

(a) Each *Application for Temporary Employment Certification* must include attestations regarding temporary need in the appropriate section of the *Application for Temporary Employment Certification*. The employer must include a detailed statement of temporary need, which must contain the following:

(1) A description of the employer's business history and activities (i.e., primary products or services) and schedule of operations throughout the year;

(2) An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; and

(3) An explanation regarding how the request for temporary labor certification meets one of the standards of a one-time occurrence, seasonal, peakload, or

intermittent need defined under § 655.6(b).

(b) *Supplemental information request.* In circumstances where the CO requests supplemental information through an RFI under § 655.23(c) to support a Final Determination, or notifies the employer that its application is to be audited under § 655.24, the employer must furnish the requested supplemental information or required supporting documentation. Such documentation becomes part of the record of the application.

(c) *Retention of documentation.* The documentation required in this section and any other supporting evidence justifying the temporary need required to be retained by the employer filing the *Application for Temporary Employment Certification* must be retained for a period of no less than 5 years from the date of the certification or, if such application was denied, the date of notification from the Department of such denial.

#### § 655.22 Obligations of H-2B employers.

An employer seeking to employ H-2B foreign workers shall attest to the following:

(a) There are no U.S. workers available in the areas of intended employment capable of performing the temporary services or labor in the job opportunity.

(b) It is offering terms and working conditions normal to workers similarly employed in the area of intended employment and which are not less favorable than those offered to the foreign worker(s), and that it is offering a job that contains no unduly restrictive job requirements.

(c) There is not, at the time the labor certification application is filed, a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification at the place of employment.

(d) The job opportunity is clearly open to any U.S. worker and that it conducted the required recruitment prior to filing the labor certification application and was unsuccessful in locating qualified U.S. applicants for the job opportunity for which certification is sought and has rejected any U.S. worker applicants only for lawful, job-related reasons.

(e) During the entire period of employment that is the subject of the labor certification application, it will comply with all Federal, State or local laws applicable to the employment opportunity.

(f) Upon the separation from employment of any H-2B worker(s) employed under the labor certification

application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing of the separation from employment not later than 48 hours after such separation is effective.

(g) The offered wage equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage and the employer will pay the offered wage to the foreign worker(s) during the entire time the foreign worker is employed under the labor certification application. Failure to pay the offered wage will be considered a willful failure to comply with the requirements of the labor certification application and a deviation from the terms and conditions of the certification.

(h) The offered wage is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage. For purposes of this provision, the offered wage shall be held to exclude any deductions for reimbursement of the employer or any third party by the employee for expenses in connection with obtaining or maintaining the H-2B employment including but not limited to international recruitment, legal fees not otherwise prohibited by this section, visa fees, items such as tools of the trade, and other items not expressly permitted by law.

(i) The job opportunity is open to all qualified individuals regardless of race, creed, color, national origin, age, sex, religion, handicap, or citizenship.

(j) The job opportunity is a bona fide, full-time temporary position.

(k) The employer has not laid off and will not lay off any similarly employed U.S. worker(s) in the occupation that is the subject of the application in the area of intended employment within the period beginning 120 days before the date of requested need of the first H-2B worker(s) and throughout the entire employment of the H-2B worker(s), except that such layoff shall be permitted where the employer also attests that it offered the opportunity to the laid-off U.S. worker(s) and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons.

(l) The employer has not sought or received payment of any kind for any activity related to obtaining the labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or

as a reimbursement for costs incurred in recruiting the foreign worker or in preparing or filing the application, from the employee or any other party. For purposes of this paragraph (l), payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.

(m) If the employer is a job contractor, it will not place any H-2B workers employed pursuant to the labor certification application with any other employer or at another employer's worksite unless:

(1) The employer applicant first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the area of intended employment within the period beginning 120 days before and throughout the entire placement of the H-2B worker, the other employer provides written confirmation that it has not so displaced and does not intend to displace such U.S. workers, and

(2) the worksite is listed on the certified *Application for Temporary Employment Certification*.

(n) It will not place any H-2B workers employed pursuant to this application outside the area of intended employment listed on the *Application for Temporary Employment Certification* unless the employer has obtained a new temporary labor certification from the Department.

(o) It will inform foreign workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required in § 655.35 and that if dismissed by the employer prior to the end of the period, the employer is liable for return transportation.

(p) The dates of temporary need, reason for temporary need, and number of workers needed have been truly and accurately stated on the application.

#### § 655.23 Receipt and processing of applications.

(a) *Filing Date.* Applications received by U.S. Mail shall be considered filed when determined by the Chicago NPC to be complete. Incomplete applications shall not be accepted for processing or assigned a receipt date, but shall be returned to the employer or the employer's representative as incomplete.

(b) *Processing.* (1) The CO will review applications for completeness and for compliance with the requirements of the program.

(2) Each *Application for Temporary Employment Certification* shall be screened and will be certified or denied.

*(c) Request for Further Information.*

(1) Upon review of the application, if the CO determines that the application appears ineligible for temporary labor certification because the employer's description of need for the services or labor to be performed is insufficient or because the employer did not comply with a specific DOL policy or procedure, the CO must issue an RFI to the employer. The CO will issue the RFI within 14 days of the receipt of the application.

(2) The RFI must:

(i) Specify the reason(s) why the application is not sufficient to grant temporary labor certification;

(ii) Indicate the specific DOL policy(ies) with which the employer does not appear to have complied;

(iii) Specify a date, no later than 14 calendar days from the date of the written RFI, by which the supplemental information and documentation must be received by the CO to be considered. Employers must provide all evidence on which they intend to rely in their response to the RFI, as their response will be their only opportunity to submit additional evidence; and

(iv) Advise that, upon receipt of a response to the written RFI, or expiration of the stated deadline for receipt of the response, the CO will review the existing application as well as any supplemental materials submitted by the employer and issue a Final Determination. If circumstances warrant, the CO may issue one or more additional RFIs prior to issuing a Final Determination.

(3) The CO should issue the Final Determination or the additional RFI within 14 days of receipt of the employer's response.

(4) Compliance with an RFI does not guarantee that the employer's application will be certified after submitting the information. The employer's documentation must justify its chosen standard of temporary need or otherwise overcome the stated deficiency in the application.

(d) Failure to comply with an RFI, including not providing documentation within the specified time period, will result in a denial of the application. Such failure to comply with an RFI may also result in a finding by the CO requiring supervised recruitment under § 655.30 in future filings of temporary labor certification applications.

**§ 655.24 Audits.**

(a) The Department may, in its discretion, conduct audits of temporary

labor certification applications, regardless of whether the Department has issued a certification, denial or non-determination on the application.

(b) In circumstances where an application is selected for audit, the CO shall issue an audit letter. The audit letter will:

(1) State the documentation that must be submitted by the employer;

(2) Specify a date, no more than 30 days from the date of the audit letter, by which the required documentation must be received by the CO; and

(3) Advise that failure to comply with the audit process, including providing documentation within the specified time period, may result in a finding by the CO to (i) requiring the employer to conduct supervised recruitment under § 655.30 in future filings of H-2B temporary labor certification applications for a period of up to 2 years, or (ii) debaring the employer from future filings of H-2B temporary labor certification applications for a period of up to 3 years.

(c) During the course of the audit examination, the CO may request supplemental information and/or documentation from the employer to complete the audit.

(d) If, as a result of the audit or otherwise, the CO determines the employer failed to produce required documentation, or determines a material misrepresentation was made with respect to the application, or if the CO determines the employer failed to adequately conduct recruitment activities or failed to comply with any obligation required by this part, the employer may be required to conduct supervised recruitment under section § 655.30 in future filings of temporary labor certification applications for up to 2 years; may be subject to debarment pursuant to § 655.31 or other sanctions; or may be required to comply with other recruitment or documentation standards in filing future applications, including but not limited to additional advertising. The CO will provide the audit report and underlying documentation to DHS or another appropriate enforcement agency.

**§§ 655.25–655.29 [Reserved]**

**§ 655.30 Supervised recruitment.**

(a) *Supervised recruitment.* Where an employer is found to have been in violation of the program requirements in the previous year or years, or the employer failed to adequately conduct recruitment activities or failed in any obligation of this part, the CO may require pre-filing supervised recruitment.

(b) *Requirements.* Supervised recruitment shall consist of advertising for the job opportunity in accordance with the required recruitment steps outlined under § 655.15, except as otherwise provided below.

(1) The CO will direct where the advertisements are to be placed.

(2) The employer must supply a draft advertisement and job order to the CO for review and approval no less than 150 days before the date on which the foreign worker(s) will commence work unless notified by the CO of the need for Supervised Recruitment less than 150 days before the date of need, in which case the employer must supply the drafts within 30 days of receipt of such notification.

(3) Each advertisement must comport with the requirements of § 655.17(a).

*(c) Timing of advertisement.*

(1) The advertisement shall be placed in accordance with guidance provided by the CO.

(2) The employer will notify the CO when the advertisements are placed.

(d) *Additional recruitment.* The CO may require the employer to contact a union organization as an additional recruitment source if the CO determines it is appropriate for the occupation and customary in the industry in the geographical area. The employer will provide proof of correspondence and mailing by certified mail to the CO in the course of the supervised recruitment.

(e) *Recruitment report.* No earlier than 2 days after the last day of the posting of the job order and no earlier than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare a detailed written report of the employer's supervised recruitment, signed by the employer as outlined in § 655.15(i) of this part. The employer must submit the recruitment report to the CO as outlined in paragraph (f) below and must retain a copy for a period of no less than 5 years. The recruitment report must contain a copy of the advertisements placed and a copy of the job order, including the dates so placed.

(f) The employer shall supply the CO with the required documentation or information within 30 days of the date of the first advertisement. If the employer does not do so, the CO may deny any applications filed by this employer for the remainder of the Federal Government fiscal year for which the recruitment was being conducted. The CO shall share the recruitment report with the Office of Special Counsel for Immigration-related Unfair Employment Practices of the

Department of Justice Civil Rights Division, if there is any reason to believe that the employer has deterred eligible U.S. workers to apply for the position filled by an H-2B worker, or discriminated against the eligible U.S. worker in the hiring process.

#### § 655.31 Debarment.

(a) *Findings.* (1) The Administrator, OFLC will notify the employer promptly after the discovery of a violation, but in no event later than 5 years from the date of the occurrence of the violation, that the Department has found it necessary to debar the employer, attorney or agent for a period of up to 3 years from filing H-2B temporary labor certification applications if the employer, attorney or agent is found to have engaged in any of the following:

(i) The willful provision or willful assistance in the provision of false or inaccurate information in applying for temporary labor certification;

(ii) A pattern or practice of a failure to comply with the terms of the *Application for Temporary Employment Certification*;

(iii) A pattern or practice of failure to comply with the audit process pursuant to § 655.24;

(iv) A pattern or practice of failure to comply with the supervised recruitment process pursuant to § 655.30; or

(v) Conduct resulting in a determination by a court, DHS, DOS, or Department of Justice of fraud or willful misrepresentation involving a temporary labor certification application or a violation of 8 U.S.C. 1324b.

(2) The Notice of Debarment shall be in writing; shall state the reason for the debarment finding, including a detailed explanation of how the employer, attorney or agent has participated in or facilitated one or more of the actions listed in paragraphs (a)(1)(i) through (v) of this section; shall state the start date and term of the debarment; and shall offer the employer an opportunity to request review before the BALCA. The notice shall state that to obtain such a review or hearing, the employer, within 30 calendar days of the date of the notice, shall file a written request to the Board of Alien Labor Certification Appeals, 800 K Street, NW., Suite 400-N, Washington, DC 20001-8002, and simultaneously serve a copy to the Administrator, OFLC. If such a review is requested, the hearing shall be conducted pursuant to the procedures set forth in 29 CFR Part 18.

(b) The debarment shall take effect on the start date identified in the Notice of Debarment unless a request for review is filed within the time permitted by this subpart. The timely filing of the request

for review will stay the debarment pending the outcome of the review proceedings before BALCA.

(c) *False Statements.* To knowingly and willfully furnish any false information in the preparation of the *Application for Temporary Employment Certification* and any supporting documentation, or to aid, abet, or counsel another to do so, is a Federal offense, punishable by fine or imprisonment up to 5 years, or both, under 18 U.S.C. 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents, including but not limited to *Applications for Temporary Labor Certification*, and to perjury with respect to such documents under 18 U.S.C. 1546 and 1621.

(d) *Appeal File.* Whenever an employer has requested an administrative review before the BALCA of a debarment finding, the Administrator, OFLC, shall:

(1) Assemble an indexed Appeal File; and

(2) Send a copy of the Appeal File to the BALCA.

(e) *Final Appeal.* The BALCA shall affirm, reverse, or modify the Administrator, OFLC's determination, and the Board's decision shall be provided to the employer, the Administrator, OFLC, and the DHS. The Board's decision shall be the final decision of the DOL.

(f) *Inter-Agency Reporting.* After completion of the appeal process, the DOL will inform the DHS and other appropriate enforcement agencies of the findings.

#### § 655.32 Labor certification determinations.

(a) The Administrator, OFLC, is the Department's National CO. The Administrator and the CO(s) in the NPC(s) have the authority to certify or deny temporary labor certification applications. If the Administrator has directed that certain types of temporary labor certification applications or specific applications be handled by the National OFLC, or another OFLC NPC, the Director(s) of the ETA NPC(s) shall refer such applications to the Administrator who may then direct another NPC process the Application.

(b) A CO making a determination shall either grant or deny the temporary labor certification application on the basis of whether or not:

(1) The employer has complied with the requirements of this subpart.

(2) The nature of the employer's need is temporary and justified based on a one-time occurrence, seasonal, peakload, or intermittent basis. To

determine this, the CO shall take into account, among other things, the duration of employment as listed on the application, the statement of temporary need contained therein, and any other documentation submitted to substantiate the chosen standard of temporary need, if requested in the course of reviewing the application.

(3) The job opportunity does not contain duties, requirements or other conditions that preclude consideration of U.S. workers or otherwise inhibit their effective recruitment for the temporary job opportunity. To determine this, the CO shall consider the following factors as attested to by the employer:

(i) The job opportunity is not vacant because the former occupant(s) is or are on strike or locked out in the course of a labor dispute involving a work stoppage or the job is at issue in a labor dispute involving a work stoppage;

(ii) The job opportunity's terms, conditions, and/or occupational environment are not contrary to Federal, State, or local law(s);

(iii) The employer has a physical location within the U.S. to which domestic workers can be referred and hired for employment;

(iv) The employer is paying the wage required by § 655.22(g) for the job to be performed for the duration of the approved certification; and

(v) The requirements of the job opportunity are not unduly restrictive or represent a combination of duties not normal to the occupation being requested for certification, unless the highest wage for the jobs being combined is being paid.

(4) There are not one or more U.S. workers who are capable and available for the temporary job opportunity. The total number of job openings that are available to U.S. workers must be no less than the number of openings the employer has listed on the application.

(5) The employment of the foreign worker will not otherwise adversely affect the wages and working conditions of similarly employed U.S. workers.

(c) The CO shall notify the employer in writing of the labor certification determination.

(d) If temporary labor certification is granted, the CO must send the certified application and a Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney, indicating the employer may file all the documents with the appropriate USCIS office.

(e) If temporary labor certification is denied, the Final Determination letter will:

(1) Detail the reason(s) why certification cannot be made;

(2) If applicable, address the availability of U.S. workers in the occupation as well as the prevailing wages and working conditions of similarly employed U.S. workers in the occupation;

(3) Indicate the specific DOL policy(ies) with which the employer should have, but does not appear to have, complied; and

(4) Advise the employer of the right to appeal the decision or to file a new application in accordance with specific instructions provided by the CO.

(f) *Partial Certification.* The CO may, in his/her discretion, issue a partial certification, reducing either the period of need or the number of foreign workers being requested for certification, limiting the certification to the actual need demonstrated by the employer, based upon information the CO receives in the course of processing the temporary labor certification application, an audit, or otherwise.

#### § 655.33 Administrative review.

(a) *Request for review.* If a temporary labor certification is denied, in whole or in part, under § 655.32, the employer may request review of the denial by the BALCA. The request for review:

(1) Must be sent to the BALCA, with a copy simultaneously sent to the CO who denied the application, within 10 days of the date of determination;

(2) Must clearly identify the particular temporary labor certification determination for which review is sought;

(3) Must set forth the particular grounds for the request;

(4) Must include a copy of the Final Determination; and

(5) May contain only legal argument and such evidence as was actually submitted to the CO in support of the application.

(b) Upon the receipt of a request for review, the BALCA will issue a docketing statement to the employer, the CO, and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210. The docketing statement will set the briefing schedule for the review within the following timeframes:

(1) The CO must assemble and submit the Appeal File within 10 days of receipt of the docketing statement using means to ensure same day or overnight delivery;

(2) The employer's brief must be filed within 10 days after the day the Appeal File is submitted;

(3) The CO's brief must be filed within 10 days after the day the employer's brief is due; and

(4) Reply briefs are not permitted.

(c)(1) The Appeal File must be in chronological order, must have the index on top followed by the most recent document, and must have consecutively numbered pages. The Appeal File must contain the request for review, the complete application file, and copies of all the written material upon which the denial was based.

(2) The CO must send the Appeal File to the employer and the BALCA, Office of Administrative Law Judges.

(d) The Chief Administrative Law Judge may designate a single member or a three member panel of the BALCA to consider a particular case.

(e) The BALCA must review a denial of temporary labor certification only on the basis of the Appeal File, the request for review, and any Statements of Position or legal briefs submitted and must:

(1) Affirm the denial of the temporary labor certification; or

(2) Direct the CO to grant the certification; or

(3) Remand to the CO for further action,

(f) The BALCA should notify the employer, the CO, and the Solicitor of Labor of its decision within 20 days of the filing of the CO's brief.

#### § 655.34 Validity of temporary labor certifications.

(a) *Validity Period.* A temporary labor certification shall be valid only for the duration of the job opportunity for which certification is being requested by the employer. The validity period shall be the beginning and ending dates of certified employment, as listed on the application. The beginning date of certified employment cannot be earlier than the date certification was granted by the CO.

(b) *Scope of Validity.* A temporary labor certification is valid only for the number of foreign workers, the area of intended employment, the specific occupation and duties, the beginning and ending dates of employment, and the employer specified on the application.

(c) *Amendments to Applications.*

(1) Applications may be amended to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers of less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO

only when the request is submitted in writing, the need for additional workers could not have been foreseen, and the services or products will be in jeopardy prior to the expiration of an additional recruitment period.

(2) Applications may be amended to make minor changes in the period of employment, as stated in the application, including the job offer, only when a written request is submitted to the CO and approved in advance. In considering whether to approve the request, the CO shall review the reason(s) for the request, determine whether each reason is justified, and take into account the effect(s) of a decision to approve on the adequacy of the underlying test of the domestic labor market for the job opportunity.

(3) Other minor technical amendments to the application, including the job offer, may be requested if the CO determines the proposed amendment(s) are justified and will have no significant effect upon the CO's ability to make the labor certification determination required under this paragraph.

(4) An employer may not change the date of need without obtaining written approval of such amendment in accordance with this section.

(5) The CO may change the date of need to reflect an amended date when delay occurs in the adjudication of the Application, through no fault of the employer, and a certification would begin after the initial date of need.

#### § 655.35 Required departure.

(a) *Limit to worker's stay.* As defined further in DHS regulations, a temporary labor certification shall limit the authorized period of stay for any H-2B worker whose admission is based upon it. 8 CFR 214.2(h). A foreign worker may not remain beyond the validity period of admission by DHS in H-2B status nor beyond separation from employment, whichever occurs first, absent any extension or change of such worker's status pursuant to DHS regulations.

(b) *Notice to worker.* Upon establishment of a program by DHS for registration of departure, an employer must notify any H-2B worker starting work at a job opportunity for which the employer has obtained labor certification that the H-2B worker, when departing the U.S. by land at the conclusion of employment as outlined in paragraph (a) of this section, must register such departure at the place and in the manner prescribed by DHS.

#### § 655.50 Enforcement process.

(a) *Authority of the WHD Administrator.* The Administrator shall

perform all the Secretary's investigative and enforcement functions under sections 101(a)(15)(H)(ii)(b), 214(c) and (g) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(b), 1184(c) and (g)), pursuant to the delegation of authority from the Secretary of DHS to the Secretary of DOL.

(b) *Conduct of investigations.* The Administrator shall conduct such investigations as may, in the judgment of the Administrator, be appropriate and in connection therewith, enter and inspect such places and such records (and make transcriptions or copies thereof), question such persons and gather such information as deemed necessary by the Administrator to determine compliance regarding the matters which are the subject of investigation.

(c) *Employer cooperation/availability of records.* An employer shall at all times cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions of sections 101(a)(15)(H)(ii)(b) and 214(c) of the INA and/or of this subpart shall interfere with any official of the Department performing an investigation, inspection, or law enforcement function pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(b) or 1184(c). Any such interference shall be a violation of the labor certification application and of this part, and the Administrator may take such further actions as the Administrator considers appropriate. (Federal criminal statutes prohibit certain interference with a Federal officer in the performance of official duties. 18 U.S.C. 111 and 18 U.S.C. 1114.)

(d) *Confidentiality.* The Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the Department in confidence in the course of an investigation or otherwise under this subpart.

#### § 655.55 [Reserved]

#### § 655.60 Violations.

(a) The WHD Administrator, through investigation, shall determine whether an employer has—

- (1) Filed a petition with ETA that willfully misrepresents a material fact.
- (2) Substantially failed to meet any of the conditions of the labor certification application attested to, as listed in § 655.22, or any of the conditions of the DHS Form I-129, Petition for a

Nonimmigrant Worker for an H-2B worker, listed in 8 CFR 214.2(h), including to provide working conditions normal to workers similarly employed in the area of intended employment and not less favorable than those offered to the foreign workers and that it is offering a job that contains no unduly restrictive job requirements. Such working conditions shall include, but are not limited to: hours; shifts; vacation periods; seniority-based preferences for training programs; and work schedules.

#### § 655.65 Remedies for violations.

(a) Upon determining that an employer has willfully failed to pay wages, in violation of the attestation required by § 655.22(g) or willfully required employees to pay for fees or expenses prohibited by § 655.22(l), or willfully made impermissible deductions from pay as provided in § 655.22(h), the WHD Administrator shall assess civil money penalties equal to the difference between the amount that should have been paid and the amount that actually was paid to such nonimmigrant(s), not to exceed \$10,000.

(b) Upon determining that an employer has terminated by layoff or otherwise any employee described in § 622.55(k), within the period described in that section, the Administrator shall assess civil money penalties equal to the wages that would have been earned but for the layoff at the H-2B rate for that period, not to exceed \$10,000. No civil money penalty shall be assessed, however, if the employee refused the job opportunity, or was terminated for lawful, job-related reasons.

(c) The Administrator may assess civil money penalties in an amount not to exceed \$10,000 per violation for any substantial failure to meet the conditions provided in the labor condition application or the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker, or any willful misrepresentation in the application or petition, or a failure to cooperate with a Department audit or investigation.

(d) Substantial failure in (c) above shall mean a willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application or the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker.

(e) For purposes of this subpart, "willful failure" means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to section 214(c) of the INA, or this subpart. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988);

see also *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).

(f) The provisions of this subpart become applicable upon the date that the employer's labor condition application is certified and/or upon the date employment commences, whichever is earlier. The employer's submission and signature on the labor certification application and DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker constitutes the employer's representation that the statements on the application are accurate and its acknowledgment and acceptance of the obligations of the program. The employer's acceptance of these obligations is re-affirmed by the employer's submission of the petition (Form I-129), supported by the labor certification.

(g) In determining the amount of the civil money penalty to be assessed pursuant to (c) above, the Administrator shall consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, the highest penalties shall be reserved for willful failures to meet any of the conditions of the application that involve harm to U.S. workers. Other factors which may be considered include, but are not limited to, the following:

- (1) Previous history of violation, or violations, by the employer under the INA and this subpart, and 8 CFR 214.2;
- (2) The number of workers affected by the violation or violations;
- (3) The gravity of the violation or violations;
- (4) Efforts made by the employer in good faith to comply with the INA and regulatory provisions of this subpart and at 8 CFR 214.2(h);
- (5) The employer's explanation of the violation or violations;
- (6) The employer's commitment to future compliance; and
- (7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

(h) *Disqualification from approval of petitions.* Where the Administrator finds a substantial failure to meet any conditions of the application or in a DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker or a willful misrepresentation of a material fact in an application or in a DHS Form I-129, the Administrator may recommend that DHS disqualify the employer from the approval of any petitions filed by, or on behalf of, the employer pursuant to sections 204 and 214(c) of the INA for a period of no less than 1 year, and no more than 5 years.



(i) If the Administrator finds a violation of the provisions specified in this subpart, the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including but not limited to reinstatement of displaced U.S. workers or other appropriate legal or equitable remedies.

(j) The civil money penalties determined by the Administrator to be appropriate are immediately due for payment upon the assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested, or upon the decision by the Secretary where review is granted. The employer shall remit the amount of the civil money penalty by certified check or money order made payable to the order of "Wage and Hour Division, Labor." The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. The payment or performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator.

(k) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), requires that inflationary adjustments to civil money penalties in accordance with a specified cost-of-living formula be made, by regulation, at least every 4 years. The adjustments are to be based on changes in the Consumer Price Index for all Urban Consumers (CPI-U) for the U.S. City Average for All Items. The adjusted amounts will be published in the **Federal Register**. The amount of the penalty in a particular case will be based on the amount of the penalty in effect at the time the violation occurs.

#### **§ 655.70 Administrator's determination.**

(a) The WHD Administrator's determination shall be served on the employer by personal service or by certified mail at the employer's last known address. Where service by certified mail is not accepted by the employer, the Administrator may exercise discretion to serve the determination by regular mail.

(b) The Administrator shall file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the Administrator's determination.

(c) The Administrator's written determination shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefore, and in the case of a finding of violation(s) by an employer, prescribe the amount of any civil money penalties assessed and the reason therefore.

(2) Inform the employer that a hearing may be requested pursuant to § 655.71 of this part.

(3) Inform the employer that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

(4) Set forth the procedure for requesting a hearing, give the addresses of the Chief Administrative Law Judge (with whom the request must be filed) and the representative(s) of the Solicitor of DOL (upon whom copies of the request must be served).

(5) Where appropriate, inform the employer that the Administrator will notify ETA and the DHS of the occurrence of a violation by the employer.

#### **§ 655.71 Request for hearing.**

(a) An employer desiring review of a determination issued under § 655.70, including judicial review, shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge at the address stated in the notice of determination. If such a request for an administrative hearing is timely filed, the WHD Administrator's determination shall be inoperative unless and until the case is dismissed or the Administrative Law Judge issues an order affirming the decision.

(b) An employer may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party, and the employer shall be the respondent.

(c) No particular form is prescribed for any request for hearing permitted by this section. However, any such request shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the employer believes such determination is in error;

(5) Be signed by the employer making the request or by an authorized representative of such employer; and

(6) Include the address at which such employer or authorized representative desires to receive further communications relating thereto.

(d) The request for such hearing shall be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination,

no later than 15 calendar days after the date of the determination. An employer which fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge.

(e) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service. For the requesting employer's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the employer or authorized representative, shall be filed within ten days.

(f) Copies of the request for a hearing shall be sent by the employer or authorized representative to the WHD official who issued the Administrator's notice of determination, to the representative(s) of the Solicitor of DOL identified in the notice of determination.

#### **§ 655.72 Hearing rules of practice.**

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR Part 18 shall apply to administrative proceedings under this subpart.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR Part 18, Subpart B) shall not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

#### **§ 655.73 Service of pleadings.**

(a) Under this subpart, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the administrative law judge may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the WHD

Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-2716, Washington, DC 20210, and one copy shall be served on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

#### **§ 655.74 Conduct of proceedings.**

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.71 of this subpart, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.

(b) The administrative law judge shall notify all parties of the date, time and place of the hearing. All parties shall be given at least 14 calendar days notice of such hearing.

(c) The administrative law judge may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement shall be served upon each other party. Post-hearing briefs will not be permitted except at the request of the administrative law judge. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge, shall be due within the time prescribed by the administrative law judge, and shall be served on each other party.

#### **§ 655.75 Decision and order of administrative law judge.**

(a) The administrative law judge shall issue a decision. If any party desires review of the decision, including judicial review, a petition for Secretary's review thereof shall be filed as provided in § 655.76 of this subpart. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Secretary issues an order affirming the decision, or, unless and until 30 calendar days have passed after the Secretary's receipt of the petition for review and the Secretary has not issued notice to the parties that the Secretary will review the administrative law judge's decision.

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material

issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision.

(c) In the event that the Administrator assesses civil money penalties for wage violation(s) of §§ 655.22(g), 655.22(l), or 655.22(h) based upon a PWD obtained by the Administrator from ETA during the investigation and the administrative law judge determines that the Administrator's request was not warranted, the administrative law judge shall remand the matter to the Administrator for further proceedings on the Administrator's determination. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept as final and accurate the wage determination obtained from ETA or, in the event the employer filed a timely complaint through the Employment Service complaint system, the final wage determination resulting from that process. Under no circumstances shall the administrative law judge determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the PWD.

(d) The administrative law judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision.

(e) The decision shall be served on all parties in person or by certified or regular mail.

#### **§ 655.76 Appeal of administrative law judge decision.**

(a) The WHD Administrator or an employer desiring review of the decision and order of an administrative law judge, including judicial review, shall petition the Department's Administrative Review Board (Board) to review the decision and order. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

(b) No particular form is prescribed for any petition for the Board's review permitted by this subpart. However, any such petition shall:

- (1) Be dated;
- (2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the Board in determining whether review is warranted.

(c) Whenever the Board determines to review the decision and order of an administrative law judge, a notice of the Board's determination shall be served upon the administrative law judge, upon the Office of Administrative Law Judges, and upon all parties to the proceeding within 30 calendar days after the Board's receipt of the petition for review. If the Board determines that it will review the decision and order, the order shall be inoperative unless and until the Board issues an order affirming the decision and order.

(d) Upon receipt of the Board's notice, the Office of Administrative Law Judges shall within 15 calendar days forward the complete hearing record to the Board.

(e) The Board's notice shall specify:

(1) The issue or issues to be reviewed;

(2) The form in which submissions shall be made by the parties (e.g., briefs);

(3) The time within which such submissions shall be made.

(f) All documents submitted to the Board shall be filed with the Administrative Review Board, Room S-4309, U.S. Department of Labor, Washington, DC 20210. An original and two copies of all documents shall be filed. Documents are not deemed filed with the Board until actually received by the Board. All documents, including documents filed by mail, shall be received by the Board either on or before the due date.

(g) Copies of all documents filed with the Board shall be served upon all other parties involved in the proceeding.

(h) The Board's final decision shall be served upon all parties and the administrative law judge.

#### **§ 655.80 Notice to the ETA and DHS.**

(a) The WHD Administrator shall notify the DHS and ETA of the final determination of any violation recommending that DHS not approve

petitions filed by an employer. The Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions.

(b) The Administrator shall notify the DHS and ETA upon the earliest of the following events:

(1) Where the Administrator determines that there is a basis for a finding of violation by an employer, and no timely request for hearing is made; or

(2) Where, after a hearing, the administrative law judge issues a decision and order finding a violation by an employer, and no timely petition for review is filed with the Department's Administrative Review Board (Board); or

(3) Where a timely petition for review is filed from an administrative law judge's decision finding a violation and the Board either declines within 30 days to entertain the appeal, pursuant to or the Board reviews and affirms the administrative law judge's determination; or

(4) Where the administrative law judge finds that there was no violation by an employer, and the Board, upon review, issues a decision, holding that a violation was committed by an employer.

(c) DHS, upon receipt of notification from the Administrator pursuant to paragraph (a) of this section, shall determine whether to deny petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) and, in the event such petitions are denied, the time period of such denials.

4. Amend 655.715 by adding a definition for the "Center Director" to read as follows:

**§ 655.715 Definitions.**

\* \* \* \* \*

*Center Director* means a DOL official to whom the Administrator has delegated his authority for purposes of NPC operations and functions.

\* \* \* \* \*

5. Amend § 655.731 to revise paragraphs (a)(2) introductory text and (a)(2)(ii) to read as follows:

**§ 655.731 What is the first LCA requirement regarding wages?**

\* \* \* \* \*

(a) \* \* \*

(2) The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information

available as of the time of filing the application. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a wage obtained from an ETA NPC, an independent authoritative source, or other legitimate sources of wage data. One of the following sources shall be used to establish the prevailing wage:

\* \* \* \* \*

(ii) If the job opportunity is in an occupation, which is not covered by paragraph (a)(2)(i) of this section, the prevailing wage shall be the arithmetic mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(2), and (b)(3)(iii)(C)(2) of this section. The prevailing wage rate shall be based on the best information available. The Department believes the following prevailing wage sources are, in order of priority, the most accurate and reliable:

(A) *ETA National Processing Center (NPC) determination.* Upon receipt of a written request for a PWD, the NPC will determine whether the occupation is covered by a collective bargaining agreement, which was negotiated at arms length, and, if not, determine the arithmetic mean of wages of workers similarly employed in the area of intended employment. The wage component of the Bureau of Labor Statistics Occupational Employment Statistics survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey. The NPC shall determine the wage in accordance with section 212(t) of the INA. If an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a PWD, the Chicago NPC will follow § 656.40 of this chapter and other administrative guidelines or regulations issued by ETA. The Chicago NPC shall specify the validity period of the PWD, which in no event shall be for less than 90 days or more than 1 year from the date of the determination.

(1) An employer who chooses to utilize an NPC PWD shall file the labor condition application within the validity period of the prevailing wage as specified in the PWD. Any employer desiring review of an NPC PWD, including judicial review, shall follow the appeal procedures at § 656.41 of this chapter. Employers which challenge an NPC PWD under § 656.41 must obtain a

ruling prior to filing an LCA. In any challenge, the Department and the NPC shall not divulge any employer wage data, which were collected under the promise of confidentiality. Once an employer obtains a PWD from the Chicago NPC and files an LCA supported by that PWD, the employer is deemed to have accepted the PWD (as to the amount of the wage) and thereafter may not contest the legitimacy of the PWD by filing an appeal with the CO (see § 656.41 of this chapter) or in an investigation or enforcement action.

(2) If the employer is unable to wait for the Chicago NPC to produce the requested prevailing wage for the occupation in question, or for the CO and/or the BALCA to issue a decision, the employer may rely on other legitimate sources of available wage information as set forth in paragraphs (a)(2)(ii)(B) and (C) of this section. If the employer later discovers, upon receipt of the PWD from the Chicago NPC, that the information relied upon produced a wage below the prevailing wage for the occupation in the area of intended employment and the employer was paying below the NPC-determined wage, no wage violation will be found if the employer retroactively compensates the H-1B nonimmigrant(s) for the difference between wage paid and the prevailing wage, within 30 days of the employer's receipt of the PWD.

(3) In all situations where the employer obtains the PWD from the Chicago NPC, the Department will deem that PWD as correct (as to the amount of the wage). Nevertheless, the employer must maintain a copy of the NPC PWD. A complaint alleging inaccuracy of an NPC PWD, in such cases, will not be investigated.

(B) *An independent authoritative source.* The employer may use an independent authoritative wage source in lieu of an NPC PWD. The independent authoritative source survey must meet all the criteria set forth in paragraph (b)(3)(iii)(B) of this section.

\* \* \* \* \*

6. Amend paragraph 655.731 to revise paragraph (b)(3)(iii) to read as follows:

**§ 655.731 What is the first LCA requirement, regarding wages?**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(iii) \* \* \*

(A) A copy of the prevailing wage finding from the NPC for the occupation within the area of intended employment.

\* \* \* \* \*

7. Amend § 655.731 to revise paragraph (d)(2) and (d)(3) to read as follows:

**§ 655.731 What is the first LCA requirement, regarding wages?**

\* \* \* \* \*

(d) \* \* \*

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, and the employer desires review, including judicial review, the employer shall challenge the ETA prevailing wage only by filing a request for review under § 656.41 of this chapter within 30 days of the employer's receipt of the PWD from the Administrator. If the request is timely filed, the decision of ETA is suspended until the Center Director issues a determination on the employer's appeal. If the employer desires review, including judicial review, of the decision of the NPC Center Director, the employer shall make a request for review of the determination by the Board of Alien Labor Certification Appeals (BALCA) under § 656.41(e) of this chapter within 30 days of the receipt of the decision of the Center Director. If a request for review is timely filed with the BALCA, the determination by the Center Director is suspended until the BALCA issues a determination on the employer's appeal. In any challenge to the wage determination, neither ETA nor the NPC shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where an employer timely challenges an ETA PWD obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling. Upon such a final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's PWD serving as the conclusive determination for all purposes.

(ii) [Reserved]

(3) For purposes of this paragraph (d), ETA may consult with the appropriate NPC to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

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8. The authority citation continues to read as follows:

**Authority:** 8 U.S.C. 1182(a)(5)(A), 1189(p)(1); section 122, Public Law 101-649, 109 Stat. 4978; and Title IV, Public Law 105-277, 112 Stat. 2681.

9. Amend § 656.3 by revising the definitions of "Prevailing wage determination (PWD)" and "State Workforce Agency (SWA)" to read as follows:

**§ 656.3 Definitions, for purposes of this part, of terms used in this part.**

\* \* \* \* \*

*Prevailing wage determination (PWD)* means the prevailing wage provided or approved by an ETA National Processing Center (NPC), in accordance with ETA guidance governing foreign labor certification programs. This includes PWD requests processed for purposes of employer petitions filed with DHS under Schedule A or for sheepherders.

\* \* \* \* \*

*State Workforce Agency (SWA), formerly known as State Employment Security Agency (SESA),* means the state agency that receives funds under the Wagner-Peyser Act to provide employment-related services to U.S. workers and employers and/or administers the public labor exchange delivered through the state's one-stop delivery system in accordance with the Wagner-Peyser Act.

\* \* \* \* \*

**§ 656.15 [Amended]**

10. Amend § 656.15 as follows:

A. Amend paragraph (a) by removing the words "in duplicate".

B. Remove paragraph (f) and redesignate paragraph (g) as paragraph (f).

11. Amend § 656.40 by revising paragraphs (a), (b) introductory text, (c), (g), (h) and (i) to read as follows:

**§ 656.40 Determination of prevailing wage for labor certification purposes.**

(a) *Application process.* The employer must request a PWD from the ETA NPC having jurisdiction over the proposed area of intended employment, on a form or in a manner prescribed by ETA. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with section 212(t) of the INA. Unless the employer chooses to appeal the center's PWD under § 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

(b) *Determinations.* The National Processing Center will determine the appropriate prevailing wage as follows:

\* \* \*

(c) *Validity Period.* The National Processing Center must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a prevailing wage rate provided by the NPC, employers must file their applications or begin the recruitment period required by §§ 656.17(e) or 656.21 within the validity period specified by the NPC.

\* \* \* \* \*

(g) *Employer-provided wage information.*

(1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the NPC will consider wage information provided by the employer in making a PWD. An employer survey can be submitted either initially or after NPC issuance of a PWD derived from the OES survey. In the latter situation, the new employer survey submission will be deemed a new PWD request.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the NPC with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the NPC to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the ETA national office.

(3) The survey submitted to the NPC must be based upon recently collected data:

(i) A published survey must have been published within 24 months of the date of submission to the NPC, must be the most current edition of the survey, and the data upon which the survey is based must have been collected within 24 months of the publication date of the survey.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted to the NPC.

(4) If the employer-provided survey is found not to be acceptable, the NPC will inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for NPC consideration is not acceptable, may file supplemental information as provided by paragraph (h) of this section, file a new request for a PWD, or appeal under § 656.41.

(h) *Submittal of supplemental information by employer.*

(1) If the employer disagrees with the skill level assigned to its job opportunity, or if the NPC informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer may submit supplemental information to the NPC.

(2) The NPC will consider one supplemental submission about the employer's survey or the skill level the NPC assigned to the job opportunity or any other legitimate basis for the employer to request such a review. If the NPC does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, it will inform the employer of the reasons for its decision.

(3) The employer may then apply for a new wage determination or appeal under § 656.41.

(i) *Frequent users.* The Secretary will issue guidance pursuant to which employers receiving a PWD from an NPC may directly obtain a wage determination to apply to a subsequent application, when the wage is for the same occupation, skill level, and area of intended employment. In no case may the wage rate the employer provides the NPC be lower than the highest wage required by any applicable Federal, state, or local law.

\* \* \* \* \*

12. Revise § 656.41 to read as follows:

**§ 656.41 Review of prevailing wage determinations.**

(a) *Review of NPC PWD.* Any employer desiring review of a PWD made by a CO must make a request for such review within 30 days of the date from when the PWD was issued. The request for review must be sent to the director of the NPC that issued the PWD within 30 days of the date of the PWD; clearly identify the PWD from which review is sought; set forth the particular grounds for the request; and include all the materials pertaining to the PWD submitted to the NPC up to the date of the PWD received from the NPC.

(b) *Processing of request by NPC.* Upon the receipt of a request for review, the NPC will review the employer's request and accompanying documentation, and add any material that may have been omitted by the employer, including any material the NPC sent the employer up to the date of the PWD.

(c) *Review on the record.* The director will review the PWD solely on the basis upon which the PWD was made and, upon the request for review, may either affirm or modify the PWD.

(d) *Request for review by BALCA.* Any employer desiring review of the director's determination must make a

request for review by the BALCA within 30 days of the date of the director's decision.

(1) The request for review, statements, briefs, and other submissions of the parties and amicus curiae must contain only legal arguments and only such evidence that was within the record upon which the director made his/her affirmation of the PWD.

(2) The request for review must be in writing and addressed to the director of the NPC making the determination. Upon receipt of a request for a review, the director will assemble an indexed appeal file in reverse chronological order, with the index on top followed by the most recent document.

(3) The director will send the Appeal File to the Office of Administrative Law Judges, BALCA. The BALCA handles the appeals in accordance with §§ 656.26 and 656.27 of this part.

Signed in Washington, DC, this 13th day of May, 2008.

**Brent R. Orell,**

*Acting Assistant Secretary, Employment and Training Administration.*

**Alexander J. Passantino,**

*Acting Administrator, Wage and Hour Division, Employment Standards Administration.*

[FR Doc. E8-11214 Filed 5-21-08; 8:45 am]

**BILLING CODE 4510-FP-P**