

**DEPARTMENT OF LABOR****Employment and Training Administration****20 CFR Part 655****Wage and Hour Division****29 CFR Part 501**

RIN 1205-AB55

**Temporary Agricultural Employment of H-2A Aliens in the United States**

**AGENCY:** Employment and Training Administration, and Wage and Hour Division, Employment Standards Administration, Labor.

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

**SUMMARY:** The Department of Labor (the Department or DOL) is proposing to amend its regulations governing the certification of temporary employment of nonimmigrant workers in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. This Notice of Proposed Rulemaking (NPRM or Proposed Rule) reexamines the process by which employers obtain a temporary labor certification from the Department for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2A status. The Department also proposes to amend the regulations at 29 CFR part 501 to provide for sufficient enforcement under the H-2A program so that workers are appropriately protected when employers fail to meet the requirements of the H-2A program.

**DATES:** Interested persons are invited to submit written comments on the Proposed Rule on or before October 5, 2009. Interested persons are invited to submit comments on the proposed form mentioned herein; such comments must be received on or before November 3, 2009.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB55, by any one of the following methods:

- *Federal e-Rulemaking Portal at [www.regulations.gov](http://www.regulations.gov):* Follow the Web site instructions for submitting comments.

- *Mail:* Please submit all written comments (including disk and CD-ROM submissions) to Thomas Dowd, Administrator, Office of Policy Development and Research, Employment and Training

Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210.

- *Hand Delivery/Courier:* Please submit all comments to Thomas Dowd, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210.

Please submit your comments by only one method. Comments that are received by the Department through means beyond those listed in this Proposed Rule or that are received after the comment period has closed will not be reviewed in consideration of the Final Rule. 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 are 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 on the <http://www.regulations.gov> Web site. It is the commenter's responsibility 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 <http://www.regulations.gov> Web site.

*Docket:* For access to the docket to read background documents or comments received, go to the Federal e-Rulemaking 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 Employment and Training Administration (ETA) 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 further information on 20 CFR part 655, contact William L. Carlson, PhD, Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (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.

For further information on 29 CFR part 501 contact James Kessler, Farm Labor Branch Chief, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3510, Washington, DC 20210; Telephone (202) 693-0070 (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. Revisions to 20 CFR Part 655 Subpart B***A. Statutory Standard and Regulatory History*

The H-2A nonimmigrant worker visa program enables United States (U.S.) agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services in the absence of U.S. labor. Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA or the Act) defines an H-2A nonimmigrant as one admitted to the U.S. on a temporary or seasonal basis to perform agricultural labor or services. 8 U.S.C. 1101(a)(15)(H)(ii)(a); see also 8 U.S.C. 1184(c)(1) and 1188. The H-2A class of admission is rooted in the Immigration and Nationality Act of 1952, which created an H-2 visa for nonimmigrant admission for all types of temporary labor. The Immigration Reform and Control Act of 1986 (IRCA), three decades later, amended the INA to establish a separate H-2A visa classification for agricultural labor under INA sec. 101(a)(15)(H)(ii)(A). Public Law 99-603, Title III, 100 Stat. 3359 (November 6, 1986).

The INA authorizes the Secretary of DHS to permit employers to import foreign workers to perform temporary agricultural services or labor of a seasonal or temporary nature if the Secretary of the United States Department of Labor (Secretary) certifies that:

(A) There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and

(B) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. 1188(a)(1).

The INA also sets out the conditions under which a certification may not be granted, including:

(1) There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification.

(2)(A) The employer during the previous two-year period employed H-2A workers and the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers.

(B) No employer may be denied certification under subparagraph (A) for more than three years for any violation described in such subparagraph.

(3) The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

(4) The Secretary determines that the employer has not made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer. The obligation to engage in positive recruitment under this paragraph shall terminate on the date the H-2A workers depart for the employer's place of employment.

8 U.S.C. 1188(b).

The Secretary has delegated these responsibilities, through the Assistant Secretary, Employment and Training Administration (ETA), to ETA's Office of Foreign Labor Certification (OFLC).

The statute applies strict timelines to the processing of requests for certification. The Secretary may not require that such a request, or *Application for Temporary Labor Certification*, be filed more than 45 days before the employer's date of need, and certification must occur no later than 30 days before the date of need, provided that all the criteria for certification are met. 8 U.S.C. 1188(c). If the *Application for Temporary Labor Certification* fails to meet threshold requirements for certification, notice must be provided to the employer within 7 days of the date of filing, and a timely opportunity to cure deficiencies must be provided to the employer.

To obtain a temporary labor certification, the employer must demonstrate that the need for the services or labor is of a temporary or seasonal nature. The employer must also establish that the job opportunity for the temporary position is full-time. The statute also institutes certain employment-related protections, including workers' compensation insurance, recruitment, and housing, to which H-2A employers must adhere. 8 U.S.C. 1188(c).

*B. Current Regulatory Framework*

The Department operated the H-2A program for more than two decades under regulations promulgated in the wake of IRCA or earlier. For the most part, the regulations at title 20 of the Code of Federal Regulations (CFR) part 655 were published at 52 FR 20507, Jun. 1, 1987 (the 1987 Rule). On December 18, 2008, the Department published final regulations revising these regulations and also revising the companion regulations at 29 CFR part 501 governing the enforcement responsibilities of the Department's Wage and Hour Division (WHD) under the H-2A program (the 2008 Final Rule). Included in that rulemaking were revisions to Fair Labor Standards Act (FLSA) regulations at 29 CFR parts 780 and 788. 73 FR 77110, Dec. 18, 2008.

The 2008 Final Rule made several significant changes in the processing of H-2A *Application for Temporary Labor Certification (Application)*. The 2008 Final Rule uses an attestation-based model, unlike the previous rule, which mandated a fully-supervised labor market test. Under the 2008 Final Rule, employers conduct the required recruitment and, based upon the results of that effort, apply for a number of needed foreign workers. Thereafter, employers attest that they have undertaken the necessary activities and made the required assurances to workers, rather than have such actual

efforts reviewed by a Federal or State official, as was the process in the 1987 Rule. The 2008 Final Rule relies largely on post-adjudication integrity measures to review selected documentation from a percentage of employers to compensate for a lack of hands-on review. It also reflects several significant policy shifts; chief among these was the decision to base the Adverse Effect Wage Rate (AEWR), which is the wage determined by the Department to be the minimum below which adverse impact to domestic workers would accrue, on the Occupational Employment Statistics (OES) Wage Survey collected by the Department's Bureau of Labor Statistics (BLS), rather than data compiled by the U.S. Department of Agriculture (USDA), National Agriculture Statistics Service (NASS) in its quarterly Farm Labor Survey Reports, which was what was relied upon in the 1987 Rule.

Following the issuance of the 2008 Final Rule, a lawsuit was filed in the U.S. District Court for the District of Columbia challenging the H-2A Final Rule. *United Farm Workers, et al. v. Chao, et al.*, Civil No. 09-00062 RMU (D.D.C.). The plaintiffs asserted that in promulgating the 2008 Final Rule, the Department violated 8 U.S.C. 1188 and the Administrative Procedures Act (APA). The plaintiffs requested a temporary restraining order and preliminary injunction, along with a permanent injunction that would prohibit DOL from implementing the 2008 Final Rule. The plaintiffs' requests for a temporary restraining order and preliminary injunction were denied and the 2008 Final Rule went into effect as scheduled on January 17, 2009.

The Administration, however, desired to review the policy decisions emanating from the 2008 Final Rule, made by a prior Administration, particularly on the role of the H-2A program in supplying foreign workers in agricultural activities, and with specific review of the protections afforded under that rule to all agricultural workers in general and the domestic workforce in particular. This review was believed to be particularly timely in light of the rising unemployment among U.S. workers and their apparent increasing availability for these jobs. Regardless, the Department upon review has determined the current level of worker protections and incentives for U.S. workers to accept employment in agriculture require expansion and are accordingly addressed in this NPRM. The Department's concern is that our agricultural economy should to the fullest extent feasible employ U.S. workers and they be granted a level of worker safety and protection

characterized in other occupations and that the need for foreign labor be when only there are demonstrably no available domestic workers for these jobs.

Accordingly, the Department extended the transition period contained in the 2008 Final Rule. In addition, the Department proposed to suspend the 2008 Final Rule in a Notice of Proposed Suspension at 74 FR 11408, Mar. 17, 2009. After considering the comments submitted in connection with the Notice of Proposed Suspension, the Department suspended the 2008 Final Rule and reinstated the regulations in effect prior to the 2008 Final Rule in order to effectuate a thorough review of the regulatory activity undertaken and to determine whether a new rulemaking effort was appropriate. 74 FR 25972, May 29, 2009. The Department stated in the Final Suspension that it intended to reinstate the former regulations for a 9-month period, after which time it would revert to the suspended regulations, unless a new rulemaking was in place. On June 29, 2009, the United States District Court for the Middle District of North Carolina issued a preliminary injunction enjoining the implementation of the Final Suspension. *North Carolina Growers' Association v. Solis*, 1:09-cv-00411 (June 29, 2009). As a result of that order, as of the date of publication of this Proposed Rule, the 2008 Final Rule remains in effect.

#### C. Need for New Rulemaking

The Department has determined for a variety of reasons that a new rulemaking effort is necessary for the H-2A program. The Department, upon due consideration, believes that the policy underpinnings of the 2008 Final Rule, e.g. streamlining the H-2A regulatory process to defer many determinations of program compliance until after an Application has been fully adjudicated, do not provide an adequate level of protection for either U.S. or foreign workers.

In addition, the usage of the program since January 2009 has demonstrated that the policy goals of the 2008 Final Rule have not been met. One of the clear goals of the 2008 Final Rule was to increase usage of the H-2A program, to make usage easier for the average employer, and more affordable. However, applications have actually decreased since the implementation of the new program. Employers filed 3,176 applications in the first three and one half months of Fiscal Year (FY) 2009, prior to the implementation of the 2008 Final Rule (October 1, 2008–January 16, 2009). In the six and one half months

from January 17, 2009, to July 31, 2009, 4,214 applications were filed. When compared to the previous year (FY 2008), in which 8,360 applications were filed, employers are not increasing their usage of the program. See Chart of Average Monthly H-2A Applications Received by OFLC, *infra*. Not only has usage not increased under the program revisions, there has actually been a reversal of an existing multi-year trend toward increased program utilization. While factors other than the regulatory changes may play a role in this decrease, without accomplishing the prior rules' goal of increasing program usage, the Department can no longer justify the significant decrease in worker protections.

The Department also feels that there are insufficient worker protections in the attestation-based model in which employers merely confirm, and do not actually demonstrate to the satisfaction of an objective government observer, that they have performed an adequate test of the U.S. labor market. Even in the first year of the attestation model it has come to the Department's attention that employers, either from a lack of understanding or otherwise, are attesting to compliance with program obligations with which they have not complied. Specific situations have been reported to the Department of employers who have imposed obstacles in the way of U.S. workers seeking employment. Examples of this have included the requirement of interviewing in-person at remote interview sites that require payment to access; multiple interview processes for job opportunities requiring no skills or experience; test requirements that are not disclosed to the applicants; contact information that is disconnected, is located outside the U.S., or proves incorrect; farm labor contractors who attest to a valid license who in fact have none; and contractors who have not obtained surety bonds. This anecdotal evidence from different geographical sectors, representative of both new filers and experienced program users, has been obtained by the Department in the course of its activities in processing cases (in responses to requests for modifications), auditing certified cases, and in complaints from U.S. workers since the effective date of the 2008 Final Rule. Such non-compliance appears to be sufficiently substantial and widespread for the Department to revisit the use of attestations, even with the use of back-end integrity measures for demonstrated non-compliance.

The Department has also determined that the area in which agricultural workers are most vulnerable—wages—

has been adversely impacted to a far more significant extent than anticipated by the 2008 Final Rule. As discussed further below, the shift from the AEWL as calculated under the 1987 Rule to the recalibration of the prevailing wage as the AEWL of the 2008 Final Rule resulted in a substantial reduction of farmworker wages in a number of labor categories, and the obvious effects of that reduction on the workers' and their families' ability to meet necessary costs is an important concern to the current Administration.

In order to adequately protect U.S. and H-2A workers, the Department is proposing the changes further discussed in the subsections below. The Department is engaging in new rulemaking to provide the affected public with notice and opportunity to engage in dialogue with the Department on the H-2A program. The Department took into account both the regulations promulgated in 1987, as well as the significant reworking of the regulations in the 2008 Final Rule, in order to arrive at a Proposed Rule that balances the worker protections of the 1987 Rule and the program integrity measures of the 2008 Final Rule. Much of the 2008 Final Rule has been retained in format, as it presents a more understandable regulatory roadmap; it has been used when its provisions do not conflict with the policies proposed in this NPRM. To the extent the 2008 Final Rule presents a conflict with the policies underpinning this Proposed Rule, it has been rewritten or the provisions of the 1987 Rule have been adopted. To the extent the 1987 Rule furthers the policies that underlie this rule, those provisions have been retained. These changes are pointed out below.

#### D. Overview of Proposed Process

In the proposed model, an employer must initiate the request for H-2A certification 60 to 75 days prior to the date of need by submitting an Agricultural and Food Processing Clearance Order, Form ETA-790, to the State Workforce Agency (SWA) in the area of intended employment to be placed as an intrastate job order. Concurrent with submitting the job order, the employer must request a housing inspection. The SWA will review the proposed terms and conditions, ensure that the wage offered meets the required wage, and commence required recruitment by placing the job order into intrastate clearance. The housing inspection must be completed prior to the issuance of the certification, since this is a requirement to access to the interstate clearance system (see 20 CFR 653.501(d)(2)(xv) and 654.403(e)).

The SWA must keep the job order posted and continue to refer employment applicants until 50 percent of the employer's contract period is complete. See § 655.135(d).

The employer must consider all U.S. worker applicants referred throughout the recruitment period. The employer may reject candidates only for lawful, job-related reasons. If the employer hires sufficient able, willing, and qualified U.S. workers during this pre-filing recruitment period to meet its needs, then the employer does not need to file a labor certification application for foreign workers with the Department's National Processing Center (NPC).

If the employer finds an insufficient number of U.S. workers available to meet its needs, then it may seek H-2A workers by filing with the NPC an Application, ETA Form 9142, along with a copy of the ETA-790 form at least 45 days prior to the date of need and an initial recruitment report. See § 655.130(b). Associations, labor contractors (known as H-2ALCs in this program), and agents have specific additional requirements, outlined below. Upon review by the NPC, the employer will either receive a Notice of Acceptance or a Notice of Deficiency. If the employer receives the latter, it will have no more than 12 days to modify the Application and return it to the NPC.

Once the NPC accepts the Application, the employer will be required to begin positive recruitment as specified in the Notice of Acceptance. The employer will also be required to accept referrals not only from the local SWA, but also SWAs that the NPC has designated as traditional supply States and to which the local SWA has sent an interstate job order. As part of this positive recruitment, the employer will be required to place newspaper advertisements, which must comply with § 655.152.

By the deadline set by the NPC in the Letter of Acceptance, the employer must complete a recruitment report and submit it to the NPC. The employer continues positive recruitment until the H-2A workers leave for the employer's place of business or the first date of need, whichever is earlier. 8 U.S.C. 1188(b)(4).

During the first 50 percent of the contract period the employer must accept any referral of U.S. workers from the SWA and continue to update the recruitment report. At the end of the 50 percent period, the employer finalizes the recruitment report and retains it along with copies of the advertisements placed throughout the recruitment

period in case of an audit. The NPC issues either a Certification in accordance with § 655.161 or a Denial Letter in accordance with § 655.164. Extensions can be granted only in accordance with § 655.170. Should the NPC deny the Application, the employer has the right to appeal the decision to the Office of Administrative Law Judges (ALJs). See § 655.171.

Should any integrity measures, by which the Department means the measures it uses to determine which employers have complied with their worker protection obligations and what actions it takes against employers who have failed to do so, such as audits, debarment, or revocation, be instituted against the employer by the Department (either by OFLC or by the WHD), the employer will have an opportunity to respond. Once a decision has been rendered, the employer has the right to appeal a negative decision to the Department's ALJ as described in § 655.171.

The following time sequence occurs generally in the proposed H-2A program:

*60-75 days from date of need:* Employer commences process by submitting job order for clearance.

*60-75 days from date of need:* SWA clears job order, employer begins accepting referrals from SWA.

*45-75 days from date of need:* Employer accepts referrals, conducts interviews, and begins to compile recruitment report.

*45 days from date of need:* Employer files Application.

*38-44 days from date of need:* Employer receives instructions from CO, SWA commences interstate recruitment, employer conducts positive recruitment, continues to compile recruitment report. Employer continues positive recruitment until the H-2A workers leave for the employer's place of business or the first date of need.

*30-38 days from date of need:* CO certifies or denies.

*50 percent of contract period (past date of need):* Employer continues to accept referrals of U.S. worker applicants.

## II. Discussion of 20 CFR 655 Subpart B

### A. Introductory Sections

#### 1. § 655.100 Scope and Purpose of Subpart B

This provision informs the users of the regulatory part of the authority of the H-2A labor certification process, drawn directly from statute. It provides the statutory basis for the regulatory process for receiving, reviewing and

adjudicating an Application for H-2A job opportunities.

#### 2. § 655.101 Authority of the Office of Foreign Labor Certification (OFLC) Administrator

The OFLC is the office within ETA that exercises the Secretary's authority for determining the availability of U.S. workers and where there are not sufficient U.S. workers available, certifying that the employment of H-2A nonimmigrant workers will not adversely effect the wages and working conditions of similarly employed workers. Such determinations are arrived at by the OFLC acting through its Administrator. The Administrator, in turn, delegates to staff the responsibility to make these determinations. Certifying Officers (COs) in the Chicago National Processing Center (CNPC) are primarily responsible for the activities of reviewing Applications and making adjudicatory decisions.

#### 3. § 655.102 Special Procedures

Section 655.102 proposes the establishment, continuation, revision, or revocation of special procedures. The H-2A regulations have, since their creation, included a provision for special procedures for variances from the process outlined in the regulation. These are situations where the Department recognizes that variations from the normal H-2A labor certification processes are appropriate to permit access to the program for specific industries or occupations. These include, for example, shepherding, and occupations in range production of livestock, as well as custom combine occupations. Accordingly, the Department has always reserved the right to, in its discretion, develop and implement special procedures for H-2A Applications relating to specific occupations. Such special procedures supplement the procedures described in subpart B for all H-2A Applications.

Historically, these special procedures have encompassed the authority to establish monthly, weekly, or semi-monthly AEWR for particular occupations. That process will continue under this proposal.

#### 4. § 655.103 Overview of This Subpart and Definition of Terms

Although the Department is proposing a number of changes to the definitions section, most of the changes are to improve clarity and do not substantively change the meaning of the term. Substantive changes to definitions are discussed below.

The Department has retained the definition of "employee" from the 2008

Final Rule. This definition is based on the common law definition, as set forth in the Supreme Court's holding in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318, 322–324 (1992), which is more consistent with the statute than the definition contained in the 1987 Rule. The Department is proposing to modify the definition of “employer” from that set forth in the 2008 rulemaking, in order to conform the definition to that used in most other Department-administered programs. The definition of “successor in interest” has been modified from that in the 2008 Final Rule to make it clearer.

Under 8 U.S.C. 1101(a)(15)(h)(ii)(A) the H–2A program encompasses agricultural services or labor defined by the Secretary to at least include agricultural labor or services as defined in the Internal Revenue Code (IRC) and the FLSA, and the pressing of apples for cider on a farm. Before the 2008 Final Rule, the Department never exercised its authority to expand the scope of the H–2A program beyond agricultural employment as defined in IRC or FLSA.

In the 2008 Final Rule, the Department changed the regulatory definition of “agricultural labor or services” to include work activities of the type typically performed on a farm and incidental to the agricultural labor or services for which an H–2A labor certification was approved. Because the FLSA definition of agriculture already encompasses incidental work (“and any practices \* \* \* performed by a farmer or on a farm as an incident to or in conjunction with such farming operations”), the Department believes that inclusion of a definition of incidental activities is duplicative. The Department also views as duplicative the clarification, included in the 2008 Final Rule that an activity that meets either the IRC or the FLSA definitions of agriculture is considered agricultural labor or services for H–2A program purposes. Therefore, the Department proposes to eliminate the separate definition of incidental work and the duplicative clarification.

The Department, however, is proposing to continue to include “logging activities” in the definition of “agricultural labor or services” for the same reasons discussed in the 2008 Final Rule. Prior to 1986, the Department had applied the same standards to logging employment as it applied to traditional agricultural employment. In 1986, IRCA separated the H–2 visa category into agricultural work under the H–2A visa and nonagricultural work under the H–2B visa. As discussed above, the H–2A program was intended to cover

agricultural labor or services as defined by the Secretary, including but not limited to agricultural labor or services as defined in the IRC and the FLSA. The Department chose at that time not to expand the definition of agriculture beyond the statutory minimum. Nevertheless, the Department simultaneously continued the existing regulatory H–2A-like standards for logging workers who were admitted under the H–2B program. Logging employers, therefore, have been subject to a substantially similar set of obligations and processes as H–2A employers, but their nonimmigrant employees must enter on H–2B, rather than H–2A, visas.

In the 2008 Final Rule the Department determined that there was no longer any reason to maintain two substantially similar yet slightly divergent processes for agriculture and logging, and returned to our 1965–1986 practice of treating both activities alike. The types of activities in which the employers in both fields engage—*i.e.*, harvesting of agricultural and horticultural products—and the labor certification requirements to which they are subject, are essentially the same. This proposal contains the identical provision as the 2008 Final Rule. The Department has also added a definition of “logging operations” consistent with that used by the Occupational Safety and Health Administration (OSHA).

In addition, the Department is now proposing to also include reforestation activities within the definition of “agricultural labor or services.” For purposes of the H–2A program, “reforestation activities” will be defined as predominately manual forestry work that includes, but is not limited to, tree planting, brush clearing, pre-commercial tree thinning, and forest fire fighting. Temporary foreign workers engaged in reforestation activities are currently admitted under the H–2B program.

Reforestation work is commonly performed by migrant crews and overseen by labor contractors. The Department's experience has been that contractor work performed by migrant crews, which carries these similar characteristics to reforestation, is subject to a higher rate of violations than that performed by work performed for fixed-site workers. For this and other reasons, the Department has imposed additional requirements and obligations on labor contractors, H–2ALCs, under the H–2A program. These reforestation crews share the same characteristics as traditional agricultural crews, and the characteristics of most reforestation contractors are nearly identical to the

characteristics of farm labor contractors found in traditional agriculture, and dissimilar than other occupations found in the H–2B program. It is common for their work to be paid on a piece rate basis; they work in locations typically with no access to public transportation, and are often left to their own devices to secure housing and food. These workers generally reside in remote locations for short periods of time with little or no access to community or government resources to assist them with work-related problems. The 2008 Final Rule included logging, a sub-industry of forestry, within the scope of H–2A agricultural labor. Reforestation workers, another sub-industry of forestry, who perform work in such remote locations and for such short periods of time should have the benefit of the same terms and conditions of employment as loggers as well as other traditional migrant crews with whom they share characteristics of employment. Being dependent on the crew leader combined with being in remote locations, with little or no access to community or government resources, increases the potential to be exploited by crew leaders. Due to the isolated and often harsh nature of reforestation activities and reforestation working conditions, and the similarities in the workforce between reforestation and traditional agricultural activities, as well as the potential for exploitation of such transient crews, the Department is proposing to include reforestation activities in the definition of “agricultural labor or services.”

For like reasons, the Department is also proposing to include “pine straw activities” in its definitions. Crews engaged in the raking, gathering, baling, and loading of pine straw, activities typically performed manually with hand tools, share these same characteristics of traditional agriculture crews. This is employment typically controlled by labor contractors, and as discussed above, the Department's experience has found a higher violation rate with labor contractors as opposed to fixed-site employers. These crews work in remote locations, often for short periods of time. These crews are highly transient and are typically dependent on the crew leader for all transportation, and typically in remote locations, are often left to their own devices to secure housing. They are also typically paid on a piece rate basis. Being so dependent on the crew leader combined with being in such remote locations, with little or no access to community or government resources, increases the potential to be exploited by crew leaders. Due to the

nature and working conditions of these pine straw activities, and the similarities in the workforce between pine straw and traditional agricultural activities, as well as the heightened potential for exploitation by crew leaders, the Department is proposing to include pine straw activities in the definition of agricultural labor or services.

The Department is proposing a simplified definition of a “temporary or seasonal nature”, to track the definition found in the DHS regulations at 8 CFR 214.2(h)(5)(iv)(A). Both the 1987 Rule and 2008 Final Rule used a definition derived from the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Upon further consideration, the Department has concluded that the MSPA definition, which is driven by the circumstances of individual workers, is not compatible with the needs of the H-2A program, which relates to the temporary/seasonal needs of employers. This has led to confusion under the previous rules, which the Department now seeks to rectify.

Also in the definitional provisions of the proposed regulations, the Department proposes to define “corresponding employment” to more accurately reflect the statutory requirement that, as a condition for approval of H-2A petitions the Secretary certify that the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. To ensure that similarly employed workers are not adversely affected by the employment of H-2A workers, the Department makes certain that workers engaged in corresponding employment are provided no less than the same protections and benefits provided to H-2A workers.

“Corresponding employment” is defined as the employment of workers who are not H-2A workers by an employer whose H-2A Application was approved by OFLC in any work included in the job order, or any agricultural work performed by the H-2A workers. “Corresponding employment” would include non-H-2A workers employed by an employer whose Application was approved by ETA who are performing work included in the job order or any other agricultural work performed by the employer’s H-2A workers as long as such work is performed during the validity period of the job order. The definition includes both non-H-2A workers hired during the recruitment period required under these regulations and non-H-2A workers already working for the

employer when recruitment begins. In the 2008 Final Rule, only workers newly hired by the H-2A employer were considered as engaged in corresponding employment. However, in this NPRM the Department is proposing to define corresponding employment more in keeping with the statutory language mandating that the importation of H-2A workers not adversely impact the wages and working conditions of workers similarly employed in the U.S. Such adverse impact could include providing housing at no cost to H-2A workers while housing domestic workers performing the same work in the same housing with a housing charge or reducing wages of domestic workers in order to have more available resources in order to import H-2A workers. Some might argue that precluding domestic workers from being paid the higher rate offered to H-2A workers is an adverse impact.

#### B. Prefiling Requirements

##### 1. § 655.120 Offered Wage Rate

###### a. The Need for an Adverse Effect Wage Rate (AEWR)

The AEWR is the minimum wage rate that agricultural employers seeking nonimmigrant alien workers must offer to and pay their U.S. and alien workers, if prevailing wages and any Federal or State minimum wage rates are below the AEWR. The AEWR is a wage floor, and the existence of the AEWR does not prevent the worker from seeking a higher wage or the employer from paying a higher wage.

The Department continues to believe that the justification for the establishment of an AEWR cited in the final rule published in 1989 specifically on the AEWR methodology, remains valid:

Even though the evidence is not conclusive on the existence of past adverse effect, DOL still believes that its statutory responsibility to U.S. workers will be discharged best by the adoption of an AEWR set at the USDA average agricultural wage in order to protect against the possibility that the anticipated expansion of the H-2A program will itself create wage depression or stagnation.

(54 FR 28037, Jul. 5, 1989.)

The AEWR not only addresses the potential adverse effect that the use of low-skilled foreign labor may have on the wages paid to native-born agricultural workers, but also protects U.S. workers whose low skills make them particularly vulnerable to wage deflation resulting from the hiring of immigrant labor. This is true even in the event of relatively mild, and thus very difficult to measure, wage deflation. Additionally, an adverse effect wage

rate will potentially result in greater employment opportunities for U.S. workers, furthering statutory intent.

The statute recognizes that U.S. agricultural workers need protection from potential adverse effects of the use of foreign temporary labor, because they generally comprise an especially vulnerable population whose low educational attainment, low skills, low rates of unionization and high rates of unemployment leave them with few alternatives in the non-farm labor market. Consequently, their ability to negotiate wages and working conditions with farm operators or agriculture services employers is quite limited. The Department therefore believes that its statutory mandate justifies returning to the previous methodology as it better ensures U.S. workers are not adversely affected. Additionally, it creates a floor below which wages cannot be negotiated, thereby strengthening the ability of this particularly vulnerable labor force to negotiate over wages with growers who are in a stronger economic and financial position in contractual negotiations for employment.

The Department has determined that the area in which agricultural workers are most vulnerable—wages—has been adversely impacted to a far more significant extent than anticipated by the 2008 Final Rule. Experience with the 2008 Final Rule to date demonstrates, that on average, required wages under the program have declined by approximately \$1.44 per hour.<sup>1</sup> The 2008 Final Rule did not anticipate such a precipitous drop in workers’ wages and as a result, the Department seeks to rectify this adverse effect on agricultural workers.

Furthermore, exclusive reliance on the traditional notion of the prevailing wage (*i.e.*, the wage paid for that occupation in area of intended employment) is inappropriate to the unique circumstances of the H-2A program. The other temporary foreign labor programs administered by the Department are subject to statutory visa caps. Historically, those programs have not involved the influx of large numbers of foreign workers into a particular labor market. In these other programs, it is realistic to conclude that payment of a prevailing wage to the foreign workers will have no adverse effect on U.S. workers. This assumption is not valid in the H-2A context. The program is uncapped and experience indicates that it can involve large numbers of foreign workers entering a specific labor market. Under these circumstances employment

<sup>1</sup> See Preamble section IV A. Administrative Information, Executive Order 12866.

of foreign workers may produce wage stagnation in the local labor market. Access to an unlimited number of foreign workers in a particular labor market at the current prevailing wage would inevitably keep the prevailing wage improperly low. The most effective way to address this problem is to superimpose a wage floor based on a survey that encompasses a wide enough geographic area so that the wage depressing effect of the use of H-2A workers will be ameliorated if not completely avoided.

#### b. Determining the Adverse Effect Wage Rate

In the 2008 Final Rule, the Department changed the data on which the AEWR is based from the USDA Farm Labor Survey (FLS) to data from the BLS OES. Additionally, the Department added a four-tiered set of skill levels to permit wages to be set based on the relative complexity of the job activities. As recognized in the 2008 rulemaking, the FLS and the OES survey are the leading candidates among agricultural wage surveys potentially available to the Department to set AEWRs. Although the Department solicited comment on the potential for alternative wage surveys in 2008, it received no ideas for useable alternative wage surveys. However, the Department again seeks comment on whether there are other approaches to calculating the AEWR that should be considered, as well as on its decision to revert to what it considers to be, on balance, a survey that provides more accurate and targeted data.

The OES wage survey is among the largest ongoing statistical survey programs of the Federal Government. The OES program surveys approximately 200,000 establishments every 6 months, and over 3 years collects the full sample of 1.2 million establishments. The OES program collects occupational employment and wage data in every State in the U.S. and the data are published annually. The Department already uses OES wage data to determine prevailing wages in other temporary worker programs.

The OES agricultural wage data, however, has a number of significant defects. Perhaps most significantly, BLS OES data do not include wages paid by farm employers. Rather, the OES focuses on establishments that support farm production, rather than engage in farm production. Given that the employees of non-farm establishments constitute a minority of the overall agricultural labor force, it can be argued that these data are therefore not representative of the farm labor supply, does not provide an

appropriately representative sample for the labor engaged by H-2A employers.

In contrast, the USDA FLS surveys between 11,000 and 13,000 farms and ranches each quarter on multiple subjects, including the number of hired farm workers, the gross wages paid to workers, and their total hours worked. Only farms and ranches with value of sales of \$1,000 or more are included in the scope of the survey. Hired farm workers are defined as "anyone, other than an agricultural service worker, who was paid for at least 1 hour of agricultural work on a farm or ranch." The survey seeks data on four types of hired workers: field workers, livestock workers, supervisors, and other workers.

USDA, through the National Association of State Departments of Agriculture, uses four collection methods for the FLS: mail, CATI (computer-assisted telephone interviews), personal visits (for larger operations), and online (only about 2 percent of respondents). The FLS sample is distributed across the entire country, with the geographic detail covering 15 multistate regions and 3 stand-alone States. This broader geographic scope makes the FLS more consistent with both the nature of agricultural employment and the statutory intent of the H-2A program. Because of the seasonal nature of agricultural work, much of the labor force continues to follow a migratory pattern of employment that often encompasses large regions of the country. Congress recognized this unique characteristic of the agricultural labor market with its statutory requirement that employers recruit for labor in multistate regions as part of their labor market, prior to receiving a labor certification for employing H-2A workers. The 2008 Final Rule did not sufficiently account for this labor market attribute and the Department believes that by returning to the FLS' regionally-based methodology that inconsistency will be remedied.

USDA calculates and publishes average wage rates for four categories of workers each quarter. Wage rates are not calculated and published for supervisors or other workers, but are for field workers, livestock workers, field and livestock workers combined, and total hired workers. Within the FLS, the wage rates, or average hourly wage, by category are defined as the ratio of gross wages to total hours worked. To the extent workers receive incentive pay, the average wage rate would exceed the workers actual wage rate. Because the ratio of gross pay to hours worked may be greater than a workers' actual wage rate, some statistics agencies refer to the

ratio as average hourly earnings, and not as hourly wages or wage rate.

The FLS-derived wage rate estimate for the four categories of workers is published quarterly, and annual averages are published as well. The Department has in the past used these annual averages to arrive at the annual AEWR. Before the implementation of the 2008 Final Rule, the Department used the regional annual average for the category field and livestock workers combined as the annual AEWR for each State within a given geographic region.

The FLS survey and publication schedule provides timely data for purposes of calculating the relevant State AEWRs. The FLS is the only source of data on farm worker earnings that is routinely available and published within 1 month of the survey date. The quarterly gathering of data ensures that the annual averages are more accurately reflective of the fluctuations of farm labor patterns, which are by definition seasonal and thus more subject to fluctuation than other occupations. This is in contrast to the OES data which can lag in wage rate reporting by up to 3 years and may be collected from surveys during times of the year when agricultural workers are not present in a specific geographic area, thus providing less precise calculations.

The FLS is the only annually available data source that actually uses information sourced directly from farmers. The majority of farm workers are hired directly by farm operators. The FLS reports for 2008, for example, showed that 73.4 percent (730,800 per quarter on average) of all hired workers on farms had been directly hired by farm operators. The FLS also collects data on the number of workers and wages of workers performing agricultural services on farms (*i.e.*, workers supplied by services contractors) in California and Florida. California and Florida account for the preponderance of agricultural service contract labor provided to farms. In 2008, on average, California accounted for 42.6 percent (112,750) of the estimated national total 264,700 farm workers supplied under agricultural services contracts.

The FLS is a scientifically-conducted quarterly survey of the wages of farm and livestock workers and includes small farms not covered in other surveys. The scope and frequency of the survey means that all crops and activities covered by the H-2A program are included in the survey data and that peak work periods are also covered. The Department believes that the average hourly wage, based on the FLS data, compensates for any wage depression or

stagnation resulting from the large numbers of undocumented workers in the agricultural labor market. Using this methodology, regional AEWRs will be calculated based on the previous year's annual combined average hourly wage rate for field and livestock workers in each of 15 multistate regions and 3 stand-alone States, as compiled by the USDA quarterly FLS Reports. In contrast, while the OES is an appropriate wage survey for other industries, it was not designed for the purpose of calculating an hourly wage for agricultural labor, does not survey farms and therefore does not provide data in the agricultural sector appropriate to what is needed to make the adverse effect wage determinations as required under the H-2A program. Therefore, the Department believes that the USDA FLS survey of farm and livestock workers presents the most appropriate data for determining the adverse effect wage in the agricultural sector for use in the H-2A program.

For these reasons, the Department proposes to return to its 1989 methodology for the formulation of the AEWR. The Department proposes to annually publish for each State the AEWR based on the average combined hourly wage for field and livestock workers for the four quarters of the prior calendar year from the USDA's NASS FLS. The Department seeks comments on this methodology.

The Department is also proposing to discontinue the process in the 2008 Final Rule of including within the AEWR four wage levels reflecting differences based on required skill levels and levels of responsibility. It is our experience that the majority of hired farm labor, and the vast majority of labor for which H-2A certification is sought, is in low-skilled positions where wage differences are not driven by the level of skill required and responsibility required. Such skill differences are difficult to discern and create opportunities for error, either intentional or inadvertent. In addition, and perhaps most important, to whatever extent such differences may exist, no wage data is collected that could reasonably be used to identify them.

The Department is also proposing a new provision in this NPRM: if a prevailing hourly wage or piece rate is announced by the Department as increasing during the work contract to such an extent as it becomes higher than the AEWR or the legal Federal or State minimum wage, the employer must pay the new amount for the remaining duration of the contract. This change in policy is intended to ensure workers are

paid throughout the life of their contracts at an appropriate wage commensurate with the baseline of the market value of their services. The Department expects that in these rare instances it will notify employers of the new wage and allow a period of time to ensure compliance.

## 2. § 655.121 Job Orders

The INA requires employers to engage in recruitment through the Employment Service job clearance system, administered by the SWAs. *See* 8 U.S.C. 1188(b)(4); *see also* 29 U.S.C. 49 *et seq.*, and 20 CFR part 653, subpart F. This proposal requires the employer to place a job order with the SWA serving the area of intended employment for intrastate clearance in order to test the local labor market to confirm the lack of U.S. workers prior to filing an Application. This process is consistent with the 2008 Final Rule. This eliminates the needless expenditure of limited government resources processing Applications when U.S. workers are actually available. If the job opportunity is located in more than one State within the same area of intended employment, the employer may submit a job order to any one of the SWAs having jurisdiction over the anticipated worksites to place the job order, but that SWA must forward the job order to the companion SWAs to have it placed in all locations simultaneously.

The employer must submit the job order to the SWA no more than 75 calendar days and no fewer than 60 calendar days before the date of need. Upon clearance and placement of the job order in intrastate clearance, the SWA must keep the job order on its active file until 50 percent of the H-2A contract period is reached, and must refer each U.S. worker who applies (or on whose behalf an Application is made) for the job opportunity during that time period. Any issue with respect to whether a job order may be properly placed in the intrastate clearance system that cannot be resolved with the applicable SWA must be first brought to the attention of the CO in the NPC.

The placement of the job order in the intrastate clearance system is typically a conditional access to the employment service system, given the requirement that the employer provide housing that meets applicable standards. 20 CFR 654.403(a). When the job order is placed in intrastate clearance, the SWA must inspect the housing that is to be provided to H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day. 20 CFR 654.403(e).

The Department has eliminated the requirement in the 2008 Final Rule that SWAs must complete the employment eligibility verification process (Form I-9 or Form I-9 plus E-Verify) for all workers referred to the job order by the SWA. This is a reversion to the 1987 Rule, under which workers in most States self-attested that they were eligible to take up the employment, in other words that they met the definition of a U.S. worker or were authorized to be employed in the U.S. The Department has done so for several reasons. The Department, upon reconsideration of the rationale for this practice after decades of not requiring States to verify employment eligibility of referrals, has decided to again place the responsibility for H-2A employment eligibility verification back on the employer, where the statute places it as a primacy. A referral is not an offer of employment—the individual may not apply for and may reject the position, they may not even be offered the position; regardless there are legal distinctions between refer and hire which are again being separated with this decision. While the Department does not desire that SWAs should refer any undocumented workers to any H-2A job opportunities they assist, it is also a resource (both financial and human) issue for States to complete, update and maintain Forms I-9 for referrals. Most States rely on an attestation for ensuring the eligibility of applicants who utilize SWA resources other than H-2A job referrals (such as job skills training), and by returning to this practice States will ensure that no worker seeking services in the public workforce system is treated disparately.

The operational benefits address two general categories of difficulty with I-9 verification by SWAs: SWAs have been at best inconsistent in operationalizing the requirement and have reported back significant difficulties in doing so. SWAs offer decentralized services but the H-2A job orders are often handled in a central (single) location. Due to the necessity of physical inspection, more staff—some of whom are not State merit staff—must be trained to perform document inspection, especially in geographically large States. In addition, States forwarding workforce referrals to other States (*e.g.*, traditional labor supply States) carry a disproportionate share of verification because of the higher number of referrals they are charged with sending on; the receiving States cannot assist as the worker is not physically present to present the documentation. Employment verification is moreover seen as



discriminatory in that SWAs must verify eligibility of only those referrals to H-2A job orders and are not required to verify referrals for non-H-2A job orders; this is particularly an issue given the typical ethnic makeup of migrant agricultural referrals. Further, referrals are disparately impacted; individuals that show up (or are sent) to the farm as so-called gate potential hires do not get the benefit of employment verification by the SWA but must be verified by the employer. Accordingly, workers will be handled by two processes—the employer and the State referring the worker.

The 2008 Final Rule recommended use of E-Verify but did not (indeed could not) require its use by States. States have been extremely slow to use E-Verify, despite the efforts on the part of United States Citizenship and Immigration Services (USCIS) to implement access to E-Verify for SWAs and the training efforts of the Department to ensure States are comfortable in using it. This is in part because USCIS requires a State to apply equal use of E-Verify to all workers who are referred, which given the mandate for H-2A job orders only, is difficult to apply unless the State is required to (or agrees to) verify all referrals to all job orders and not only those it is required to do. In addition, the use of E-Verify requires the completion of the Form I-9, and is an extra step requiring already stretched resources.

The Department has accordingly determined that SWAs may choose to complete employment eligibility verification on those individuals it refers in accordance with USCIS regulatory procedures, but are not required to do so. The Department believes that the administrative burdens of this activity do not outweigh its benefits. The savings to SWAs in time and human capital are more effectively directed at the core functions of the nation's public workforce system, the effective placement of U.S. workers in appropriate job opportunities.

### 3. § 655.122 Contents of Job Offers

The job offer sets out the terms and conditions of employment contained within the job order. The employer can give this information to the workers by providing a copy of the job order or a separate work contract. A written job offer is critical to inform potential workers of the terms and conditions of employment and to demonstrate compliance with all of the obligations of the H-2A program. For H-2A program purposes, the job offer must contain, at a minimum, all of the worker protections that apply to both domestic

and foreign workers pursuant to these regulations. The Department considers the job offer essential for providing the workers sufficient information to make informed employment decisions. The job order, which is the document representing the terms and conditions of the job offer, must be provided with its pertinent terms in a language the worker understands.

The Department is proposing to retain most of the 2008 Final Rule requirements concerning job offers. As these requirements are familiar to the regulated community, the Department's discussion below focuses solely on the main differences between this section and the corresponding section in the 2008 Final Rule as well as minor nuances and clarifications.

#### *a. Prohibition against preferential treatment (§ 655.122(a)).*

The Department's statutory obligation in administering the H-2A program dictates that the employer be required to extend a job offer containing the same benefits, wages and working conditions for both U.S. and foreign workers. An employer may not impose any additional restrictions or obligations on U.S. workers. Under the proposed regulations, the employer is also responsible for providing to the H-2A workers at least the same minimum level of benefits, wages, and working conditions that are being offered to U.S. workers. This additional requirement levels the playing field so that employers offer H-2A and U.S. workers the same minimum levels of benefits, wages, and working conditions. It is consistent with the approach taken by the Department in the 1987 Rule and is intended to provide parallel protections from exploitation for H-2A workers.

#### *b. Job qualifications and requirements (§ 655.122(b)).*

The Department proposes to retain the same requirements as in the 2008 Final Rule that the job requirements be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers for the same or comparable occupations and crops. In addition, the Department has made explicit that the CO or the SWA has the discretion to require that the employer submit documentation to justify the qualifications specified in the job order.

#### *c. Minimum benefits, wages, working conditions (§ 655.122(c)).*

The Department proposes to retain the identical provision from the 2008 Final Rule.

#### *d. Housing (§ 655.122(d)).*

The proposed regulation clarifies the employer's obligation to provide

housing both to H-2A workers and to workers in corresponding employment who are not reasonably able to return to their residence within the same day, for the entire duration of the contract period. The employer's obligation to provide housing ends when the worker departs, voluntarily abandons employment, or is terminated for cause. The employer's obligations with respect to housing standards, rental or public accommodations, open range housing, deposit charges, charges for public housing, and family housing under the proposed regulations have remained the same as under the 2008 Final Rule. With respect to certified housing that becomes unavailable, the Department is retaining most of the requirements of the 2008 Final Rule but is also proposing to require the SWA to promptly notify the employer of its obligation to cure deficiencies in the substituted housing, if the housing is found to be or becomes out of compliance with applicable housing standards after an inspection. To clarify the Department's available remedies, the NPRM provides that the Department can deny a pending Application as well as revoke an existing certification.

#### *e. Workers' compensation (§ 655.122(e)).*

The Department is proposing to retain the 2008 Final Rule requirements regarding an employer's obligation to provide workers' compensation insurance coverage in compliance with State law. To reflect a policy change to a full adjudication model, the Department is additionally requiring employers to provide the CO with proof of workers' compensation insurance coverage, including the name of the insurance carrier, the insurance policy number, and proof that the coverage is in effect during the dates of need. This requirement is a return to the requirements of the 1987 Rule.

#### *f. Employer provided items (§ 655.122(f)).*

It is proposed that this section on employer-provided items be amended from the 2008 Final Rule to require employers to provide to the worker, without charge, all tools, supplies and equipment necessary to complete the job offered to them.

#### *g. Meals (§ 655.122(g)).*

The Department is proposing to retain identical requirements with regard to an employer's obligation to provide meals to workers as those outlined in the 2008 Final Rule.

#### *h. Transportation; daily subsistence (§ 655.122(h)).*

The Proposed Rule retains the 2008 Final Rule requirement for transportation and daily subsistence

costs incurred by the worker when traveling to the employer's place of employment. In addition, language has been added to place employers on notice that they may be subject to the FLSA that operates independently of the H-2A program and imposes requirements relating to deductions from wages. In providing notice to employers of companion FLSA requirements, the Department hopes to assure better protection of U.S. and foreign workers. When it is the prevailing practice among non-H-2A employers in the area of intended employment, or the employer offers the benefit to foreign workers, the employer must advance the transportation and subsistence costs to U.S. workers in corresponding employment as well. At the end of the work contract or if the employee is terminated without cause, the employer must also provide or pay for transportation costs and daily subsistence from the place of employment to the place from which the worker departed for work. In addition, the Department proposes to eliminate the limitation in the 2008 Final Rule on the employer's obligation to provide for travel expenses and subsistence for foreign workers only to and from the place of recruitment, *i.e.* the appropriate U.S. consulate or port of entry; this Proposed Rule requires the employer to pay the costs of transportation and subsistence from the worker's home to and from the place of employment, as was required under the 1987 Rule.

(i) *Transportation from place of employment.* As noted above, the Department is proposing to keep the 2008 Final Rule requirement for employers to provide transportation from the place of employment for workers who complete their work contract period. In addition, the Department proposes to include a requirement from the 1987 Rule which obligates either the initial or subsequent employer to cover the transportation and subsistence fees for the travel between the initial and subsequent worksite. The obligation to pay remains with the first H-2A employer if the subsequent H-2A employer has not contractually agreed to pay the travel expenses. In addition, this proposed paragraph incorporates a 2008 Final Rule requirement concerning displaced H-2A workers and places employers on notice that they are not relieved of their obligation to provide or pay for return transportation and subsistence if an H-2A worker is displaced as a result of an employer's compliance with the 50 percent rule.

(ii) *Employer-provided transportation.* The 2008 Final Rule imposed mandatory compliance with applicable Federal, State or local laws and regulations regarding vehicle safety, driver licensure and vehicle insurance on the transportation between the living quarters and the worksite. The Department is now proposing to ensure this provision reflects similar existing compliance requirements for all employer-provided transportation. It is less an expansion however, of the requirement as much as an acknowledgment that such compliance requirements exist elsewhere, as these already exist in Federal, State or local transportation laws and regulations. The Department is ensuring that the requirement of compliance with these transportation and safety laws is reflected in the affirmative obligations to the workers. The Department anticipates that this will further ensure worker safety.

i. *Three-fourths guarantee* (§ 655.122(i)).

The Department is proposing to retain the three-fourths guarantee from the 2008 Final Rule clarifying that the guarantee is to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the contract period, beginning with the first workday after the arrival of the worker at the place of employment. The Department proposes to retain the provision addressing displaced H-2A workers from the 2008 Final Rule, except that the provision now refers to the reinstated 50 percent rule rather than the 30 day rule contained in the 2008 Final Rule.

j. *Earnings records* (§ 655.122(j)).

This proposed section mirrors the earning records requirements in the 2008 Final Rule with one exception. Under the Proposed Rule, the employer must keep the earning records for 5 instead of 3 years.

k. *Hours and earnings statements* (§ 655.122(k)).

Under the Proposed Rule, the employer would be required to provide to each worker hours and earnings statements that consist of all elements contained in the 2008 Final Rule plus two additional pieces of information: the beginning and ending dates of the pay period, and the employer's name, address and Federal Employment Identification Number.

l. *Rate of pay* (§ 655.122(l)).

The Department is proposing to keep the 2008 Final Rule requirements regarding the rate of pay and is introducing an additional requirement to the job offer (already contained in the assurances and obligations of the 2008

Final Rule) that provides that the offered wage may not be based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, semi-monthly or monthly basis that equals or exceeds the AEWR, prevailing hourly wage or piece rate, or the legal Federal or State minimum wage, whichever is highest. The term semi-monthly replaces the term biweekly from the 2008 Final Rule's obligation.

Additionally, the Department proposes to retain the requirement of the 2008 Final Rule that if the employer has a productivity standard associated with a piece rate payment, the productivity standard must be disclosed in the job offer. The Department also proposes to revive the requirement of the 1987 Rule that the productivity standard must also be no more than that required by the employer in 1977, or, if the employer first filed an Application after 1977, the employer's productivity standard when it first filed an Application. If the productivity standard is higher than required by the employer in 1977 or when the employer first filed an Application, the productivity standard must be approved by the OFLC Administrator.

m. *Frequency of pay* (§ 655.122(m)).

The Department is proposing to retain most of the 2008 Final Rule requirements on pay frequency, requiring employers to pay wages at least twice a month (semi-monthly) and state the pay frequency in the job offer. However, the Department is proposing to add an option from the 1987 Rule, whereby employers may set pay frequency according to the prevailing practice in the area of intended employment, and proposes to add a new requirement that they employers must pay wages when due.

n. *Abandonment of employment or termination for cause* (§ 655.122(n)).

The Department's proposal retains the requirements of the 2008 Final Rule on the abandonment of employment or termination for cause. However, one key difference from the 2008 Final Rule is that the Department has not included the express exception to abandonment or abscondment of a short-term unexcused absence; the Department is using a purely temporal (5 day) calculation to provide clarity.

o. *Contract impossibility* (§ 655.122(o)).

The Department proposes to retain the 2008 Final Rule requirements regarding contract impossibility with one additional obligation, taken from the 1987 Rule, under which an employer is required to make efforts to transfer the worker to other comparable

employment acceptable to the worker in the event the employer is prevented from fulfilling the requirements of the work contract.

p. *Deductions (§ 655.122(p)).*

Under the Proposed Rule, the employer must make all deductions required by law and must specify all other reasonable deductions in its job offer, just as under the 2008 Final Rule. In addition, subject to an employer's compliance with applicable FLSA requirements, the Department proposes to once again permit an employer to deduct the cost of worker's inbound transportation and daily subsistence expenses to the place of employment which were paid directly by the employer, but only if the worker is reimbursed the full amount of such deduction when he or she completes 50 percent of the work contract period. This reimbursement must be inserted in the job order.

q. *Disclosure of work contract (§ 655.122(q)).*

Under this proposal, as under the 2008 Final Rule, the employer must provide a copy of the work contract (or the job order in the absence of the separate, written contract) to the worker no later than on the day that work commences. As a new requirement under this NPRM, this disclosure, as necessary and reasonable, must be written in a language the worker understands. It is appropriate in a program administered by the Department that we obligate an employer to provide the terms and conditions of employment to a prospective worker in a manner permitting the worker to understand the nature of the employment being offered and the worker's commitment under that employment.

C. *Application Filing Procedures*

1. § 655.130 Application Filing Requirements

This provision sets out the basic requirements with which employers need to comply in order to file an Application. As discussed above, the proposed process begins with the filing of an Agricultural and Food Processing Clearance Order (Form ETA 790) with the SWA 60 to 75 days before the date of need. As discussed above, this required preliminary period permits the SWA, with its substantial knowledge of the local labor market and farming activities, to evaluate the job's requirements. As was the case in the 2008 Final Rule, a single Application is filed with only the NPC. This eliminates the duplication of effort that occurred under the 1987 regulations, in which

OFLC and the SWA both received an Application and both spent time reviewing it. By requiring a submission of only one Application form with the NPC, the proposed regulation segregates the process into those activities best handled by each entity.

The proposed provision also establishes filing deadlines consistent with the 2008 Final Rule. The Department is constrained by statute from requiring employers to file an Application more than 45 days prior to the date of need. 8 U.S.C. 1188(c)(1). The Department anticipates, based on decades of program experience, that it will continue to receive requests 45 days prior to the date of need, although Applications may be voluntarily filed in advance of that date.

The Department proposes to continue to receive Applications filed in the same paper format as currently filed until such time as an electronic system can be fully implemented. The Department proposes to use the *Application for Temporary Employment Certification*, Form ETA 9142, to collect the necessary information; the form's appendices will be modified slightly to reflect changes from the 2008 Final Rule (such as a change of tense to note the pre-recruitment filing of the Application). The Department has begun efforts to establish an online format for the submission of information, but as such a system depends upon the resolution of issues in rulemaking, its implementation necessitates a period during which paper Applications will continue to be accepted. The Department contemplated in its 2008 rulemaking an electronic submission process; until such is developed, it will continue to accept paper Applications. This will assist employers familiar with the program, who are currently filing paper Applications and will thus have a less onerous transition.

The proposed provision also sets out the requirement for obtaining signatures. As in the 2008 Final Rule, the Department is proposing to require original forms and signatures. One departure from the 2008 Final Rule is the requirement that an association, filing not as an association but as an agent for its members, obtain the signatures of all its employer-members before submitting the Application to the Department, to ensure that all members are fully aware of the obligations of the Application to which each member must adhere.

The rule proposes that the employer will file the Application with an initial recruitment report, outlining the results of its initial recruitment attempts, including the results of referrals from its

intrastate job order placed with the SWA, and any other efforts in which it has engaged. The employer will also file with the *Application* a copy of its ETA 790 clearance order, so that the NPC may verify the order placed with the SWA against the terms and conditions provided on the Application.

2. § 655.131 Association Filing Requirements

a. *Associations (§ 655.131(a))*

The Department has previously permitted associations to file on behalf of their members. The proposed provision clarifies the role of associations as filers, in order to assist both the employer-members and the Department in assessing the obligations of each party. As in the past, an association will identify in what capacity it is filing, so there is no doubt as to whether the association is subject to the obligations of an agent or an employer (whether individual or joint). Both the 1987 and 2008 regulations required an association of agricultural producers filing an Application to identify whether the association is the sole employer, a joint employer with its employer-members, or the agent of its employer-members.

b. *Master Applications (§ 655.131(b))*

Although the 1987 Rule did not specifically describe a master application that can be filed by associations, they are clearly contemplated by 8 U.S.C. 1188(d), and the Department has permitted master applications to be filed as a matter of practice. *See* 52 FR 20496, 20498, Jun. 1, 1987 (cited in ETA Handbook No. 398). The 2008 Final Rule explicitly permitted their use. This Proposed Rule continues to permit their use but narrows the scope of what constitutes an acceptable master application. The Proposed Rule continues to require a single date of need as a basic element for a master application. The Department proposes to retain the long-standing requirement that a master application may be filed only by an association acting as a joint employer with its members; the Proposed Rule reiterates this joint responsibility by requiring that the association identify all employer-members that will employ H-2A workers. The Application must demonstrate that each employer has agreed to the conditions of H-2A eligibility.

The Department also proposes to revert to the long-established practice of permitting a master application only for the same occupation and comparable work within that occupation. However,

the Department proposes to modify that practice to limit such Applications to a single State. Requiring comparable work on a master application also reduces overstatement of need by employers and the potential for idling of workers, both domestic and H-2A. Workers applying to a job opportunity that is the subject of a master application are thus provided a more accurate start date and can gauge their own availability accordingly. The Department notes that similar crop activities are far more likely to link to the single date of need that is required.

### 3. § 655.132 H-2A Labor Contractor (H-2ALC) Filing Requirements

The proposed regulation sets out additional filing requirements for H-2A Labor Contractors (H-2ALCs), building upon those outlined as attestations for H-2ALCs in the 2008 Final Rule. We are proposing that H-2ALCs be required to provide certain basic information, such as the names and locations of each fixed-site farm or agricultural operation to which the H-2ALC has contracted to send the workers, as well as information regarding crop activities the workers will be performing at each site. The Department also proposes to require H-2ALCs to submit copies of all contracts with each fixed-site entity identified in its Application. In addition, the Department proposes to continue to require the submission of the Farm Labor Contractor Certificate of Registration, if MSPA requires the H-2ALC to have one.

The Department is proposing to continue its requirement that an H-2ALC post a bond to demonstrate its ability to meet its financial obligations to its employees. This permits the Department to ensure labor contractors can meet their payroll and other obligations contained in the terms of the job order and the H-2A program obligations. Additionally, we are proposing that the H-2ALC be required to submit documentation of its surety bond.

Finally, the Department is proposing to require that in situations where the fixed-site farm with which the H-2ALC has a contractual relationship is the entity that will be providing housing and/or transportation, the H-2ALC must provide proof that the housing complies with the applicable standards, and has been approved by the SWA, and that transportation provided complies with all applicable laws and regulations.

### 4. § 655.133 Requirements for Agents

The Department has long accepted Applications in many of its programs from agents. The Proposed Rule

continues the long-standing practice of allowing employers to utilize agents to file the Application. However, in recognition of the unique relationship an agent has with an employer it represents before the Department, the proposed rule requires an agent to provide, as a part of the Application, a copy of the agreement by which it undertakes the representation—contract, agency agreement, or other proof of the relationship and the authority of the agent to represent the employer. In addition, the Department is requiring, for those agents who are required under MSPA to register as a farm labor contractor, proof of such registration.

### 5. § 655.134 Emergency Situations

The Department proposes to retain from both the 2008 Final Rule and its predecessor Rule the criteria for accepting and processing Applications filed less than 45 days before date of need on an emergency basis. The Department is proposing that emergency Applications continue to be accepted for employers who did not use the H-2A program in the previous year, or for any employer that has good and substantial cause. The predicate for accepting an Application on an emergency basis continues to be sufficient time for the employer to undertake an expedited test of the labor market. To meet the good and substantial cause test, the employer must provide to the CO detailed information describing the reason(s) which led to the request. Such cause is outlined in the regulation in a non-inclusive fashion, including factors such as loss of U.S. workers from weather-related conditions and unforeseen events affecting the work activities. The discretion to determine good and substantial cause rests entirely with the CO.

### 6. § 655.135 Assurances and Obligations of H-2A Employers

In addition to commitments made to workers through the job order, employers seeking H-2A workers must provide additional assurances designed to ensure that the granting of the certification will not adversely affect the wages and working conditions of workers similarly employed in the U.S.

Under this Proposed Rule, the employer must assure that the job opportunity is available to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap or citizenship. Domestic applicants may only be rejected for lawful, job related reasons. Additionally, the employer must assure that there is no work stoppage or lockout at the worksite.

As under the 1987 Rule, we propose that employers continue to work with the SWA(s) and accept referrals of all eligible U.S. workers who apply for the job until the completion of 50 percent of the contract period. In addition, the employers will have to conduct positive recruitment until the actual date on which the H-2A workers depart for the place of work, or 3 calendar days before the first date the employer requires the services of workers.

In this NPRM the Department is proposing to reinstate the 50 percent rule, outlined in 8 U.S.C. 1188(c)(3)(B)(i). The 50 percent rule is a creation of statute; it was added in IRCA to enhance domestic worker access to job opportunities for which H-2A workers were recruited. In short, the rule provided that the Department was to require that an employer seeking H-2A certifications agree to accept referrals through 50 percent of the contract period outlined on the job order. The Department seeks to enhance protections for U.S. workers, to the maximum extent possible, while balancing the potential costs to employers. The Department acknowledges that such increased referral activity imposes an additional cost on both employers and on SWAs. The burden on SWAs, however, is already a core labor market exchange function which they already provide to the nation's workforce pursuant to the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*). The cost on employers is lessened, to large extent, by the ability to discharge the H-2A worker upon the referral of a U.S. worker. In addition, the Department proposes retaining from the 1987 Rule (and U.S.C. 1188(c)(3)(B)(ii)) the small farm exemption to the 50 percent rule to minimize the adverse effect on those operations least able to absorb additional workers.

The proposed regulation at § 655.135(e) requires employers to assure that they will comply with all applicable Federal, State and local laws and regulations, including health and safety laws, during the period of employment that is the subject of the labor certification. Among other obligations employers may be subject to the provisions of the FLSA. This proposed requirement is intended to emphasize the important policy objective of protecting both U.S. and foreign workers and ensuring that both groups are afforded the protections to which they are entitled.

Among other requirements, the Department is proposing to require employers to offer only full-time temporary employment of at least 35 hours per work week, an increase from

the 30 hours per week in the 2008 Final Rule. The Department believes that a 35-hour work week more accurately reflects the work patterns of farm entities and strikes an appropriate balance between the employer's needs and the employment and income needs of both U.S. and foreign workers.

As in the 2008 Final Rule, an employer must guarantee that it has not laid off and will not lay off any similarly employed U.S. worker in the occupation in which the employer is seeking to hire H-2A workers within 60 days of the date of need. If the employer has laid off U.S. workers, the Department will require the employer to demonstrate that it has offered the job opportunities created by the lay offs to those laid-off U.S. workers(s) and the U.S. worker(s) either refused the job opportunity or was rejected for lawful, job-related reasons. This proposed requirement is intended to prevent the few unscrupulous employers from firing U.S. workers, then hiring H-2A workers to perform the same services under less advantageous working conditions, including lower wages and benefits, resulting in savings for the employers.

Proposed § 655.135(h) would prohibit employers from intimidating, threatening, coercing, blacklisting, discharging or in any manner discriminating against complaining workers or former workers who file a complaint against the employer for violating 8 U.S.C. 1188 or who institute any proceeding against the employer or testify in any proceeding against the employer, or consult with an employee of a legal assistance program or an attorney on matters related to a proceeding against the employer, or exercise or assert any right or protection under the same section or under the Department's H-2A regulations.

The NPRM proposes to continue to require an employer to inform H-2A workers that they are required to depart the U.S. at the end of the certified work period, or if they become separated from the employer before the end of that period. The requirement that the workers depart applies to all H-2A workers who do not have a subsequent offer of employment from another H-2A employer. This continues a standing requirement in the program which parallels DHS regulations. Requiring employers to notify H-2A workers of their obligation to depart will help to ensure that the workers timely depart the U.S. without risking negative immigration consequences for overstays of their temporary work visas. This will enable workers to remain eligible to return the following season and assist the same or different employers if there

are not sufficient qualified, able and willing U.S. workers. In addition, the proposed requirement ensures that the employers are aware that they may not offer employment to foreign workers which exceeds the period certified by the Department (and that approved by DHS) without violating their obligations under the program.

As in the 2008 Final Rule and in conjunction with similar DHS regulations, the Department proposes to prohibit employers from passing on fees associated with the recruitment of workers recruited under 8 U.S.C. 1188 to those workers, such as referral fees, retention fees, transfer fees, or similar charges. The Department proposes to define payment as monetary payments, wage concessions (including deductions from wages, salary or benefits), kickbacks, bribes, tributes, in-kind payments, and free labor. The Department believes that requiring employers to bear costs associated with the recruitment of foreign and domestic workers will incentivize employers to offer the terms and conditions that would most likely attract U.S. workers who are qualified, willing and able to perform the work. In addition, this prohibition protects the workers from becoming heavily indebted when applying for the job opportunities and vulnerable to exploitation by unscrupulous employers. As before, this provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility of the worker, such as government required passport fees. The Department has also removed visa fees, border inspection, and other government-mandated or authorized fees from consideration as an acceptable fee attributable to the worker. A visa fee for an H-2A visa is one directly attributable to the employer's need for the worker to enter the U.S. to work for the employer; as such it is not reimbursable from the employee to the employer.

In addition to prohibiting employers and their agents from collecting or soliciting fees from H-2A workers for the cost of recruitment, the proposed regulations require those employers to contractually forbid any foreign labor contractor or recruiter, or agent of such foreign labor contractor or recruiter, engaged in the international recruitment of H-2A workers from seeking or receiving payments, whether directly or indirectly, from prospective employees. This provision is also intended to ensure that the employer's contractual obligations do not permit the passing of recruitment fees to foreign employees.

As an additional element of worker protection, the Department proposes to require that employers post and maintain in conspicuous locations at the worksite a poster provided by the Department in English, and, to the extent necessary, language common to a significant portion of the workers if they are not fluent in English, which describes the rights and protections for workers employed pursuant to 8 U.S.C. 1188. Providing such notification to workers through a poster at the worksite of their rights is consistent with other programs administered and enforced by the Department. Such a posting requirement is even more meaningful at remote worksites where agricultural workers are often employed. The posting requirement ensures that both H-2A and corresponding workers are aware of their rights and are provided with resources (in the form of phone numbers or contact information) which they may use to notify the Department of any issues at the worksite or report employers who fail to meet their obligations under the program.

#### *D. Processing of Applications*

##### *1. § 655.140 Review of Applications*

Under the Department's proposed regulations, upon receipt of each Application, job order, and other required documentation, the CO at the NPC will promptly conduct a comprehensive review of all documentation provided by the employer to ensure that the employer has complied with all applicable requirements and obligations. The timing of the review process is defined primarily in the INA, and therefore the Department's procedures remain largely unchanged. The Proposed Rule, however, now requires that the Application be accompanied by required documentation supporting employer assurances. Additionally, the CO will have a greater role in substantively reviewing the Application for compliance with the requirements.

##### *2. § 655.141 Notice of Acceptance*

The Proposed Rule partially incorporates the requirements of the 1987 Rule with respect to the process of accepting an Application. Under the proposal, the Notice of Acceptance from the CO grants conditional access to the interstate clearance system and directs the SWA to circulate a copy of the job order to the States the CO determines to be potential sources of U.S. workers. The Notice of Acceptance also directs the employer to engage in positive recruitment of U.S. workers during the same time period. Finally, each Notice

of Acceptance informs the employer that the Department will adjudicate the certification request no later than 30 calendar days before the date of need, except in the case of modified Applications.

Under the proposed regulations, the CO will review each employer's Application to determine whether the employer has established the need for agricultural services or labor to be performed on a temporary or seasonal basis by temporary H-2A workers and met all the requirements and obligations required by these regulations. The CO will ensure that the employer has submitted the Application no less than 45 days from the date of need and that it has previously submitted a copy of the job order to the SWA serving the area of intended employment for intrastate clearance. Further, the CO will look for a complete and appropriate job description, a full number of job openings and the appropriate dates of need. Most significantly, the CO will ensure that the employer is offering prospective workers an adequate offered wage rate. While conducting its review of the employer's Application, the CO will also determine whether the employer has included complete housing information, proof of workers' compensation coverage, the guarantee to provide to the workers travel reimbursement and meals/cooking facilities, and a promise to provide tools or items required for the position, as appropriate. The CO will ensure that the employer has agreed to offer to workers a total number of work hours equal to at least three-fourths of the workdays of the total contract period.

### 3. § 655.142 Electronic Job Registry

The Department proposes to post employers' H-2A job orders, including modifications approved by the CO, into a national and publicly accessible electronic job registry. The job registry will be created and maintained by the Department and will serve as a public repository of H-2A job orders for the duration of 50 percent of the work contract. The job orders will be posted in the registry by a CO upon the acceptance of each submission. The posting of the job orders will not require any additional effort on the part of the SWAs or H-2A employers.

The Department intends that this new national job registry will serve as an effective, user-friendly tool for informing and attracting U.S. workers to agricultural jobs for which H-2A workers are being recruited. In addition, the Department anticipates that the job registry will contribute to increased transparency in the H-2A labor

certification approval process. The Department will inform all stakeholders of the creation of the job registry through a notice in the **Federal Register** and provide access through the Department's resources, including its One-Stop Career Centers, as well as through a link to the job registry on the OFLC's Web site <http://www.foreignlaborcert.doleta.gov/>.

### 4. §§ 655.143 and 655.144 Notice of Deficiency and Submission of Modified Applications

As in the 2008 Final Rule, the Department proposes that if the CO determines that the Application or job order is incomplete, contains errors or inaccuracies, or fails to meet necessary regulatory requirements, the CO must notify each employer within 7 days that the Application does not meet standards for approval. This Notice of Deficiency will include the reason(s) why the Application is deficient and provide the employer with an opportunity to resubmit a modified Application. It will also identify the type of modification that is necessary in order for the CO to issue a Notice of Acceptance. In addition, the Notice of Deficiency must inform the employer that the CO will grant or deny the certification within 30 days of the date of need as long as the employer submits a modified application within 5 business days.

The Notice of Deficiency will also give an employer the opportunity to request expedited administrative review or a de novo administrative hearing before an ALJ and provide instructions on filing a written request for a hearing with the ALJ. Finally, the Notice of Deficiency will inform the employer that failing to act within 5 business days to either modify the Application or request an administrative hearing or review will result in the denial of that employer's Application.

The employer may submit a modified application within 5 business days of receiving a Notice of Deficiency. If an employer timely submits a modified application that meets conditions for acceptance, the CO will issue a Notice of Acceptance. For each day over the 5-day window, the CO may take up to one additional day to issue a Final Determination on the Application, up to a maximum of an additional 5 days. The Application will be considered to be abandoned if the employer does not submit a modified Application within 12 calendar days (allowing for two periods of 5 business days each) after the Notice of Deficiency was issued. The 12 days, which is more time than was allotted under the 2008 Final Rule, is a reasonable maximum period, given the

statute's concern for prompt processing of Applications and the time needed to obtain visas and bring in the workers by the date of need.

### 5. § 655.145 Amendments to Applications for Temporary Employment Certification

As in the 2008 Final Rule, the Department proposes that amendments to a request for labor certification for H-2A workers are permitted in two limited instances—where an employer desires to increase the number of workers requested, and where the employer makes minor changes to the period of employment. DHS regulations at 8 CFR 214.2(h)(5)(x) provide for a limited maximum of 2-week extension in emergent circumstances (the temporary labor cert will be deemed to be approved for up to 2 weeks under such emergent circumstances (upon DHS approval of the 2-week extension request)). As proposed, an employer will be able to amend its Application with the Department at any time before the final determination without an obligation to submit a new Application (and conduct additional recruitment), to increase the number of workers requested by not more than 20 percent (50 percent for employers requesting 10 workers or less). Requests for increases above these percentages will be approved by the CO only in limited circumstances when the employer can satisfy DOL that the need could not have been foreseen and the crops or commodities would be in jeopardy before the expiration of any additional recruitment period.

For amendments to the period of employment, the Department proposes that the employer seek written approval in advance from the CO. The employer's request must be justified, taking into account the effect of the change of the period of employment on the adequacy of the labor market test. An employer must demonstrate that the change to the period of employment could not have been foreseen, and the crops or commodities will be in jeopardy prior to the commencement of an additional recruitment period. In addition, if the change involves a delay in the date of need, the employer must offer assurances that workers who have already departed for the employer's job site will be provided with housing and subsistence without cost to the workers until they begin working.

### E. Positive Recruitment and Post-Acceptance Requirements

The Department proposes, under new §§ 655.150–655.159, that employers be required to conduct the majority of their

recruitment after filing their Application at the direction of the NPC. The proposed post-acceptance recruitment is similar to the process used in the 1987 Rule. The Department has determined that this oversight of recruitment is preferable to ensure the validity and adequacy of the labor market test in which the employer will engage. However, because the proposal retains the audit system introduced in the 2008 Final Rule, employers must maintain all resumes and applications filed by the U.S. workers. U.S. worker recruitment will continue to use the steps that program experience has shown are the most appropriate for agricultural employment. These include the involvement of the SWAs, placement of two newspaper advertisements, contact with former U.S. employees, advertising in traditional or expected labor supply States, and as appropriate, contacting local unions.

#### 1. § 655.150 Interstate Clearance of Job Order

The Department proposes to require the employer to test the labor market before filing the Application by submitting a job order to the SWA in the area of intended employment. As discussed previously, the SWA will place this order only in the intrastate job clearance system. If enough U.S. workers apply for the positions available and are qualified, able, and willing to perform the duties, then the employer cannot file with the Department for a labor certification. However, if the employer still has a need for foreign workers, then the employer files an Application with the NPC. Once the CO issues the Notice of Acceptance, the NPC will instruct the SWA to post the Job Clearance Order on its interstate job clearance system. Likewise, the NPC will inform the SWA of the traditional or expected labor supply States and the SWA will send the SWAs in those States the Job Clearance Order.

#### 2. § 655.151 Newspaper Advertisements

Newspapers remain a potential recruitment source for U.S. workers likely to be affected by the introduction of H-2A labor. As in the 2008 Final Rule, the Department proposes to require two print advertisements in the State of intended employment. The newspaper advertisements can be on two consecutive days, but one of which must be on a Sunday or the day of the week with the largest circulation if there is no 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 recruitment report is submitted. However, the employer will be required to maintain documentation of the actual advertisement(s) published in the event of an audit or other review. The Department is not requiring advertising in ethnic newspapers, but allows for this option if, in the discretion of the CO, it is normal and customary in the area of intended employment.

#### 3. § 655.152 Advertising Requirements

Proposed § 655.152 retains the requirements of the 2008 Final Rule for the information that must be contained in the advertisements. However, the Proposed Rule requires the advertisements to be placed at the direction of the CO after the Application has been accepted. It also proposes to require employers with remote worksites to provide physical space or other assistance for the interviewing of U.S. workers in a place other than the worksite that is readily accessible to the population that is most likely to apply to the job opportunity.

#### 4. § 655.153 Contact with Former U.S. Employees

The NPRM proposes to continue to require employers to contact former U.S. employees as included in the 2008 Final Rule. These contacts must occur during the pre-filing recruitment period. Contact with previous employees will be documented by maintaining copies of correspondence with such employees (or records of attempts to contact former employees). The recruitment report must contain a description of the outcome of those contacts, including the lawful, job-related reasons for not rehiring a former employee. This will increase the likelihood that former U.S. workers of the employer will receive advance notice of available job opportunities, as well as provide them with additional information on available positions.

#### 5. § 655.154 Additional Positive Recruitment

The statute requires the Secretary to deny a petition if the employer has not made positive recruitment efforts within a multistate region of traditional or expected labor supply States and the Secretary finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment is in addition to and occurs within the same time period as the circulation of the job order

through the interstate employment service system. The NPRM proposes that the Notice of Acceptance will instruct the employer how to conduct positive recruitment. If such traditional or expected labor supply States exist for an area of intended employment, the Notice of Acceptance will designate such States and the employer will be required to perform additional positive recruitment in those States. The type of recruitment that will be required of the employer is left to the discretion of the CO, but will be no less than the normal recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of intended employment. Such recruitment may include radio advertising, additional newspaper advertisements, and other targeted efforts.

#### 6. § 655.155 Referrals of U.S. Workers

The NPRM proposes to return to the 1987 Rule standard which required the SWAs to refer only those individuals who have been apprised of all the material terms and conditions of employment. Under those provisions, only those individuals who had indicated that they were able and willing to perform such duties, qualified and eligible to take such a job and available at the time and place required in the job order were referred.

#### 7. § 655.156 Recruitment Report

The reporting of recruitment results has always been an element of the H-2 program. Under the 1987 Rule, if the employer did not hire a referred worker, the employer was required to inform the SWA of the lawful employment-related reason(s) for not hiring the worker. The 2008 Final Rule formalized this process and required the preparation of a recruitment report, but the report was not sent to either the SWA or the NPC; instead the employer maintained the recruitment report in its records. The NPRM proposes to require that employers begin the recruitment report before they file their Application and continue to supplement it as referrals and applicants come in. The employer will be required to submit the initial recruitment report at the time of filing the Application with the NPC and to file an updated report by a date certain specified in the Notice of Acceptance. Finally, the employer will be required to continue to update the recruitment report until 50 percent of the contract period has expired at which time the SWA will cease referring U.S. workers. The complete recruitment report and all supporting documentation must be maintained by the employer for 5 years.

### 8. § 655.157 Withholding of U.S. Workers Prohibited

The statute prohibits willfully and knowingly withholding domestic workers until the arrival of H-2A workers in order to force the hiring of domestic workers under the 50 percent rule. Both previous rules implemented the statutory prohibition by describing the procedure for filing complaints in such instances. Because the Department has now centralized many of the functions formerly performed by the SWAs, the NPRM proposes to have such complaints filed directly with the CO rather than first going through the SWA and having the SWA refer complaints to the CO.

#### F. Labor Certification Determinations

##### 1. § 655.160 Determinations

This NPRM proposes to continue to implement the Secretary's statutory mandate to make determinations on Applications no later than 30 days prior to the date of need.

##### 2. § 655.161 Criteria for Certification

The NPRM sets out the criteria by which the CO will determine the availability of U.S. workers. As in the 2008 Final Rule, the CO will count as available those individuals who are rejected by the employer for any reason other than a lawful, job-related reason, or who are rejected and are not provided by the employer with a lawful, job-related reason for the rejection.

##### 3. § 655.162 Approved Certification

The Department is proposing to continue the requirement from the 2008 Final Rule that the CO will send the certified Application to the employer by means assuring next-day delivery. This is to ensure employers receive expeditious handling of their certifications.

##### 4. § 655.163 Certification Fee

The Proposed Rule continues to require, as outlined in the statute, that each employer of H-2A workers under the Application (except joint employer associations, which may not be assessed a fee in addition to the fees assessed to the members of the association) must pay to the Department the appropriate certification fee. These processing fees are authorized by statute and set by regulations originally published at 52 FR 20507, Jun. 1, 1987. The Department is updating the fees to an amount that more nearly approaches the reasonable costs of administering the H-2A program.

The fee for each employer receiving a temporary agricultural labor

certification will continue to be \$100 plus \$10 for each H-2A worker certified under the Application. The fee to an employer for an individual Application will be continue to be capped at \$1000, regardless of the number of H-2A workers that are certified. Non-payment or untimely payment of fees may be considered a violation subject to the procedures under § 655.182.

##### 5. § 655.164 Denied Certification

The Proposed Rule retains the general provisions for denying certifications from the 2008 Final Rule. The final determination letter will state the reasons that the certification was denied and cite the relevant regulatory provisions and/or special procedures that govern. The Department will continue to provide the applicant an opportunity to appeal the determination.

##### 6. § 655.165 Partial Certification

The Proposed Rule retains in large part the 2008 Final Rule provision explicitly providing that the CO may issue a partial certification, reducing either the period of need or the number of H-2A workers requested or both. The ability to issue a partial certification is necessary where the Department receives an Application with respect to which eligible and qualified U.S. workers have been successfully recruited prior to certification. A partial certification is issued by subtracting the number of available U.S. workers from the total number of workers requested. In addition an employer will have the ability to request administrative review.

##### 7. § 655.167 Document Retention Requirements

The Proposed Rule retains a provision from the 2008 Final Rule requiring the retention of certain documentation demonstrating compliance with the program's requirements, but increases the period of retention. Documents must be retained in hard copy for a period of 5 years from the date of adjudication of the Application, up from the 2008 Final Rule's 3-year requirement. Document retention is a necessary component of the H-2A certification process to respond to an audit or other investigation.

#### G. Post-Certification Activities

Proposed §§ 655.170 through 655.173 concern various actions an employer may take after its H-2A Application has been adjudicated, including making a request for extension of certification, appealing a decision of the CO, withdrawing an Application, and petitioning for higher meal charges.

Section 655.174 proposes a new publicly-accessible electronic database of employers who have applied for H-2A certification that the Department will maintain.

##### 1. § 655.170 Extensions

Proposed § 655.170 contains the provisions governing an employer's request for an extension of the time period for which an Application has been certified. Aside from two substantive changes, the provisions of this proposed section are the same as the provisions under the 2008 Final Rule, which were themselves similar to the provisions of the 1987 Rule.

The substantive changes in the proposed section would permit the CO to notify an employer through means other than writing if time does not permit, or in writing if time permits, of the CO's decision to grant or deny an extension of certification. This would enable COs to provide a decision in the fastest manner possible, when a delay for a formal writing would otherwise hamper the ability of the employer to act on the decision. The proposed regulation also would not allow an employer to appeal a denial of an extension. Under this Proposed Rule, there is no right to appeal a denied extension request. While the Department, in its discretion, allowed for appeals of denied extensions in the 2008 Final Rule, the Department does not see sufficient justification to continue this practice.

##### 2. § 655.171 Appeals

This section sets out the procedures for ALJ review of a decision of a CO. The substance of this section has remained the same since 1987, except that this proposed section allows an ALJ to remand a case to the CO, in addition to the ALJ's existing ability to affirm, reverse, or modify a CO's decision.

The proposed section reorganizes the text in the corresponding sections of previous rules to enhance clarity and readability. The proposed section does not list the various CO decisions that may be appealed, such as a denial of certification, a decision to decline to accept an Application for consideration, or a denial of an amendment of an Application. Rather, the Proposed Rule is structured so that the right to appeal a particular decision of the CO is discussed in the sections of the rule that discuss the CO's authority and procedure for making that particular decision.



### 3. § 655.172 Withdrawal of Job Order and Application for Temporary Employment Certification

Proposed § 655.172 discusses the withdrawal of Applications. An employer may withdraw a job order from intrastate posting if the employer no longer plans to file an H-2A Application. However, withdrawal of a job order does not nullify the obligations the employer has to any workers recruited in connection with the placement of the job order before it was withdrawn.

An employer may also seek to withdraw an Application after it has been accepted by the NPC. However, the employer is still obligated to comply with the terms and conditions of employment contained in the Application for workers recruited in connection with that Application.

### 4. § 655.173 Setting Meal Charges; Petition for Higher Meal Charges

The text of proposed § 655.173 is substantively the same as the text of the section governing meal charges in the 2008 Final Rule. The proposed section contains some minor changes to the description of an employer's right to appeal a denial of a petition for higher meal charges, primarily to refer to current appeal procedures.

### 5. § 655.174 Public Disclosure

This proposed section describes a new initiative of the Department: DOL will maintain an electronic database accessible to the public containing information on all employers who apply for H-2A labor certifications. The database will include information such as the number of workers the employer requests on an Application, the date an Application is filed, and the final disposition of an Application.

### H. Integrity Measures

Proposed §§ 655.180 through 655.185 have been grouped together under the heading Integrity Measures, describing those actions the Department may take to ensure that Applications filed with the Department are in fact compliant with the requirements of this subpart.

#### 1. § 655.180 Audit

This section proposes how the Department will conduct audits of applications for which certifications have been granted. The regulatory text is substantively the same as the text of the audit section of the 2008 Final Rule, with minor changes to improve organization and readability. Like the 2008 Final Rule, the proposed section states that the Department has the discretion to choose which labor

certification requests will be audited. When an Application is selected for audit, the CO will send a letter to the employer (and its attorney or agent) listing the documentation the employer must submit and the date by which the documentation must be received by the CO.

An employer's failure to comply with the audit process may result in the revocation of certification or debarment, under proposed §§ 655.181 and 655.182. A CO may provide any findings made or documents received in the course of the audit to the WHD, DHS or other enforcement agency. The CO will refer any findings that an employer discriminated against an eligible U.S. worker to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

#### 2. § 655.181 Revocation

This proposed section describes the Department's power to revoke an H-2A labor certification. The proposed section expands the grounds upon which the Department may revoke from those specified in the revocation (§ 655.117) in the 2008 Final Rule. Under the proposed section, the CO may revoke certification if the CO finds that it was not justified based on the requirements of the INA. This will allow the CO to correct situations where she finds that the labor certification should never have been granted. The CO may also revoke if the CO finds that the employer substantially violated a material term or condition of the approved labor certification. The definition of substantial violation is in the debarment section of these proposed regulations, at proposed § 655.182(d). Finally, the CO may revoke if she finds that the employer failed to cooperate with a DOL investigation, inspection, audit, or law enforcement function, or if she finds that the employer failed to comply with any sanction(s), remedy(ies), or order(s) of the Department.

The proposed procedures for revocation are largely the same as the revocation procedures in the 2008 Final Rule. They have been revised for clarity and to provide that in the event of a revocation, the employer may either take advantage of the opportunity to submit rebuttal evidence to the CO, or the employer may file an administrative appeal under proposed § 655.171.

The revocation procedure begins with the CO sending the employer a Notice of Revocation if the CO determines that certification should be revoked. Upon receiving the Notice of Revocation, the employer has two options: It may submit rebuttal evidence to the CO or

the employer may appeal the revocation under the procedures in proposed § 655.171. The employer must submit rebuttal evidence or appeal within 14 days of the Notice of Revocation, or the Notice will be deemed the final decision of the Secretary, and the revocation will take effect immediately at the end of the 14-day period.

If the employer chooses to file rebuttal evidence, and the employer timely files that evidence, the CO will review it and inform the employer of her final determination on revocation within 14 calendar days of receiving the rebuttal evidence. If the CO determines that the certification should be revoked, the CO will inform the employer of its right to appeal under proposed § 655.171. The employer must file the appeal of the CO's final determination within 10 calendar days, or the CO's determination becomes the final decision of the Secretary and takes effect immediately after the 10-day period.

If the employer chooses to appeal either in lieu of submitting rebuttal evidence, or after the CO makes a determination on the rebuttal evidence, the appeal will be conducted under the procedures contained in proposed § 655.171. The timely filing of either rebuttal evidence or an administrative appeal stays the revocation pending the outcome of those proceedings. If labor certification is ultimately revoked, the CO will notify DHS and the Department of State.

Proposed § 655.181(c) lists an employer's continuing obligations if the employer's H-2A certification is revoked. These obligations are the same as those listed in § 655.117(d) of the 2008 Final Rule.

#### 3. § 655.182 Debarment

Proposed § 655.182 describes the Department's debarment authority and procedures, pursuant to 8 U.S.C. 1188(b)(2). Sections 655.182(a-c) are substantively the same as § 655.118(a)-(c) of the Debarment section of the 2008 Final Rule; they have been revised to provide clarity. Section 655.182(a) states that the OFLC Administrator may debar an employer if the Administrator finds that the employer has committed a substantial violation. Section 655.182(b) states that the OFLC Administrator may debar an agent or attorney if the Administrator finds that the agent or attorney participated in, had knowledge of, or reason to know of an employer's substantial violation. The OFLC Administrator will not issue a future labor certification to any employer represented by a debarred agent or attorney. Under paragraph (b),

the agent or attorney is the subject of the debarment; the OFLC Administrator may issue labor certifications to the same employer(s) if they are not represented by the debarred agent or attorney (unless of course the employer itself is also debarred). The Administrator may not commence debarment proceedings against an employer, attorney, or agent any later than 2 years after the substantial violation occurred. The Administrator may not debar an employer, attorney, or agent for longer than 3 years from the date of the Department's final debarment decision.

The statute at 8 U.S.C. 1188(b)(2) directs the Secretary to debar any employer who the Secretary determines has committed a substantial violation. Proposed §§ 655.182(d) and 655.182(e) work together to describe the violations that the CO may determine are so substantial as to merit debarment. Proposed § 655.182(d) defines a violation for purposes of debarment. The text of this section is similar to the text of § 655.118(d) of the 2008 Final Rule, with the following changes:

- The proposed text of paragraph (d)(1) makes clear that there need only be one act of commission or omission that fits the criteria listed in paragraphs (d)(1)(i) through (x) to constitute a substantial violation; this replaces the 2008 Final Rule's requirement of a pattern or practice of acts.
- Proposed paragraph (d)(1)(iii) is changed to say failure to comply with recruitment obligations rather than willful failure.
- A new proposed paragraph (d)(iv) was added. Under the Proposed Rule, an employer's improper layoff or displacement of U.S. workers or workers in corresponding employment may be a debarable violation.
- A new proposed paragraph (d)(vii) is added. Under the Proposed Rule, employing an H-2A worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension of the job order may be a debarable violation.
- A new proposed paragraph (d)(viii) is added. This will permit debarments based on violations of § 655.135(j) & (k) which address employer fee shifting and related matters.
- A new proposed paragraph (d)(ix) is added. Under the Proposed Rule, a violation of any of the anti-discrimination provisions listed in 29 CFR 501.4(a) may be a debarable violation.

Proposed § 655.182(e) adds a description of the factors a CO may

consider when determining when a violation is substantial for purposes of determining whether the violation merits debarment. This list of factors is not exclusive, but it offers some guidance to employers, attorneys, and agents as to what a CO commonly considers when determining whether a substantial violation has occurred. The factors are the same as those factors used by the WHD to determine whether to assess civil money penalties under 29 CFR 501.19 or whether to debar under 29 CFR 501.20.

The independent debarment authority of the WHD is a new feature of the Proposed Rule. See proposed language at 29 CFR 501.20 and the corresponding preamble. Because both OFLC and the WHD have concurrent debarment jurisdiction, some changes have been added to the OFLC debarment procedures in the Proposed Rule to ensure that the procedures are consistent with the WHD debarment procedures.

Proposed § 655.182(f) describes the procedures that will be followed in the event of an OFLC debarment. These procedures are the same as the debarment procedures contained in the 2008 Final Rule, but these procedures would eliminate the Notice of Intent to Debar and the employer's option to submit rebuttal evidence. Instead, the debarment procedures will begin with the OFLC Administrator sending a Notice of Debarment, and the same appeal opportunities as in the 2008 Final Rule will follow.

The Department believes that the provision for the employer to submit rebuttal evidence in response to an OFLC Notice of Debarment is unnecessary because of the reality of debarment under these proposed regulations: Most often, debarment will actually be done by the WHD. Because the WHD has more extensive investigation authority than the OFLC, any WHD debarment will come only after the WHD has conducted an extensive investigation in which the employer has many opportunities to submit evidence and otherwise communicate with the WHD official. Further, it is highly unlikely that any OFLC debarment would occur without the OFLC Administrator conducting an audit of the employer under proposed § 655.180, so the employer will have had opportunity to submit evidence before the Notice of Debarment occurs. Because of this, the Department does not believe that the employer would need an additional opportunity to submit further evidence. Also, because the employer will have already had opportunities to submit evidence to the

Department, and debarment will only be conducted if the OFLC Administrator believes that the employer has committed a serious, substantial violation, the Department believes that giving the employer an additional option to submit rebuttal evidence would cause inappropriate delay in the debarment proceedings.

Another minor change was made in proposed § 655.182(f)(3), describing the ALJ's decision after a debarment hearing; it adds that the ALJ will prepare the decision within 60 days after completion of the hearing and closing of the record. This time constraint is consistent with the newly-proposed debarment hearing procedures of the WHD.

Proposed § 655.182(g) clarifies that while the WHD and OFLC will now have concurrent debarment jurisdiction, the two agencies may coordinate their activities so that a specific violation for which debarment is imposed will be cited in a single debarment proceeding.

Proposed § 655.182(h-j) state the impact a determination to debar a member of an agricultural association has on the rest of the association or its individual members, the impact that a debarment of an agricultural association acting as a joint employer has on the association's individual members, or the impact a debarment of an agricultural association acting as a sole employer has on the association. The text of these provisions is substantively the same as the text of § 655.118(f-h) of the 2008 Final Rule. The one substantive change is in proposed paragraph (i), which states that a debarment of an agricultural association acting as a joint employer with its members will apply only to that association and not to any individual employer-member of the association, unless the OFLC Administrator determines that an employer-member participated in, had knowledge of, or had reason to know of the violation. Unlike the 2008 Final Rule, an employer-member's knowledge of or reason to know of the association's debarable violation may give rise to debarment of that member, in addition to the member's participation in the violation.

#### 4. § 655.183 Less Than Substantial Violations

Proposed § 655.183 describes the CO's actions if she determines that a less than substantial violation has occurred. The text of this section is the same as the text of the 1987 Rule, with a few non-substantive editorial changes. If the OFLC Administrator believes that a less than substantial violation may have had or will continue to have a chilling or

otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the OFLC Administrator may require the employer to follow special procedures before and after the temporary labor certification determination.

The OFLC Administrator will notify the employer (or agent or attorney) in writing of the special procedures which will be required in the coming year. The employer may request review of these special procedures according to the procedures of proposed § 655.171. If the OFLC Administrator determines that the employer has failed to comply with the special procedures, the Administrator will send a written notice to the employer, stating that the employer's otherwise affirmative H-2A certification determination will be reduced by 25 percent of the total number of H-2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year. Notice of such a reduction in the number of workers requested will be conveyed to the employer by the OFLC Administrator in the written certification determination. We have and will continue to provide for prompt notification to DHS and the Department of State (DOS) of any such determination. The employer may appeal the reduction in the number of workers according to the procedures in § 655.171. If the ALJ affirms the OFLC Administrator's determination that the employer has failed to comply with the required special procedures, the number of workers requested will be reduced.

#### 5. § 655.184 Applications Involving Fraud or Willful Misrepresentation

Proposed § 655.184(a) is the same as § 655.113(a) in the 2008 Final Rule, discussing investigation of fraud and willful misrepresentation. The section states that if a CO discovers possible fraud or willful misrepresentation concerning an Application, the CO may refer the matter for investigation to the WHD, DHS, or to the Department's Office of Inspector General.

Proposed § 655.184(b) revises § 655.113(b) of the 2008 Final Rule to more accurately describe the ramifications of a determination of fraud or willful misrepresentation concerning an Application. If the WHD, a court, or the DHS determines that there was fraud or willful misrepresentation involving an Application, and the CO had granted certification of the fraudulent Application, the finding of fraud or misrepresentation will be grounds for the CO to revoke that certification. The finding may also merit debarment according to proposed § 655.182.

#### 6. § 655.185 Job Service Complaint System; Enforcement of Work Contracts

Proposed § 655.185(a) contains the same provisions about complaints filed through the Job Service Complaint System as were in the 1987 Rule and the 2008 Final Rule, with one addition. Proposed § 655.185(b) states that complaints alleging that an employer discriminated against eligible U.S. workers may be referred to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices and was also included in the 2008 Final Rule.

The Department has added a provision permitting allegations of fraud that are part of a complaint through the Job Service Complaint System to be brought to the CO. This will permit the CO to take any such actions as necessary to determine whether such allegations have any validity, such as an audit, and if such further inquiry has yielded information so as to call a certification into question, to determine whether there are any actions (revocation and/or debarment) that can be taken as a result.

### III. Revisions to 29 CFR Part 501

Section 218(g)(2) of the INA authorizes the Secretary to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to ensure compliance with terms and conditions of employment under this section of the statute. The Secretary determined that enforcement of the contractual obligations of employers under the H-2A program is the responsibility of the WHD. Regulations at 29 CFR part 501 were issued to implement the WHD's responsibilities under the H-2A program; amendment of these regulations is part of this proposed rulemaking.

Concurrent with the Department's proposed regulations in 20 CFR part 655, subpart B amending the certification of temporary employment of nonimmigrant H-2A workers, the Department proposes to amend its regulations at 29 CFR part 501 on enforcement under the H-2A program.

Changes are proposed for enhanced enforcement to complement the certification process so that workers are appropriately protected when employers fail to meet the requirements of the H-2A program. Since this NPRM would make changes to the existing regulations in 29 CFR part 501, we have included the entire text of the regulation

and not just the sections with proposed changes.

#### A. General Provisions and Definitions

Proposed § 501.2 has been broadened to allow broader information sharing and coordination between agencies both within and outside of DOL. Both WHD and OFLC will now have the express authority to share information for enforcement purposes, both with each other and with other agencies such as DHS and DOS which play a role in immigration enforcement. In addition, because ETA and WHD will have concurrent debarment authority under the proposal, the new regulation provides that a specific violation for which debarment is imposed will be cited in a single debarment proceeding, and that OFLC and the WHD may coordinate their activities to accomplish this result. It also provides that copies of final debarment decisions will be forwarded to DHS so that it can take appropriate action.

Section 501.3 of the proposed regulations sets forth the definitions used in part 501, most of which are carried forward from § 501.10 of the 2008 Final Rule. As in the 2008 Final Rule, proposed § 501.3 sets forth the same definitions in 20 CFR part 655, subpart B that pertain to 29 CFR part 501. The discussion of definitions that are common to both 20 CFR 655.103 and 501.3 can be found in the preamble for 20 CFR part 655, subpart B above.

The Department is proposing to modify language used in the 2008 Final Rule that defined "corresponding employment" as including only U.S. workers who are newly hired by the employer in the occupations and during the period of time set forth in the Application and thereby excluding U.S. workers who were already employed by the H-2A employer at the time the Application was filed. The Department is proposing to define "corresponding employment" more in keeping with the statutory language mandating that the importation of H-2A workers not adversely impact the wages and working conditions of workers similarly employed in the U.S. Corresponding employment would include non-H-2A workers employed by an employer whose Application was approved by ETA who are performing work included in the job order or any other agricultural work performed by the employer's H-2A workers as long as such work is performed during the validity period of the job order. The definition includes both non-H-2A workers hired during the recruitment period required under these regulations and non-H-2A

workers already working for the employer when recruitment begins.

In defining an H-2A worker, the INA gives the Secretary the authority to define in regulations the term "agricultural labor or services," with the requirement that the definition include agricultural labor or services as defined in the IRC, the FLSA, and the pressing of apples for cider on a farm. The work must also be of a temporary or seasonal nature. See 8 U.S.C.

1101(a)(15)(h)(ii)(A). The activity of "pressing apples for cider on a farm" was added to the statute by Public Law 109-90, (October 18, 2005). As in the 2008 Final Rule, the Department again proposes that the regulatory definition reflect the 2005 amendment, and the proposal adds an explanation of the term.

The Department is also proposing to expand the regulatory definition of "agricultural labor or services" to include certain reforestation activities and also pine straw activities. In addition, the Department proposes to retain the addition of logging employment that was included in the 2008 Final Rule and seeks to clarify which logging employment activities qualify for H-2A status. Finally, the proposal deletes the 2008 Final Rule's inclusion of minor and incidental work not listed on the Application and the handling, packing, processing, *etc.* of any agricultural or horticultural commodity. These changes are more fully discussed in the preamble for 20 CFR part 655, subpart B above. Section 501.6 (formerly § 501.5) has been substantially shortened and revised for clarity and to eliminate duplication. Section 501.7 (former § 501.6) is proposed to be broadened to require cooperation with any Federal official investigating, inspecting, or enforcing compliance with the statute or regulations. Section 501.8 has been renumbered from § 501.7 but is otherwise unchanged.

#### B. Surety Bonds for H-2ALCs

The number of Farm Labor Contractors (FLCs) applying for labor certifications enabling them to hire and employ H-2A workers has risen in recent years and is expected to continue to increase. The WHD's enforcement experience demonstrates that FLCs are generally more likely to violate applicable requirements than fixed-site agricultural employers. To address this higher violation rate of FLCs and given the transient nature of FLCs, as well as to ensure compliance with H-2A obligations and to protect the safety and security of workers, WHD proposes to continue the 2008 Final Rule's

requirement that FLCs (called H-2ALCs in this Proposed Rule) must obtain and maintain a surety bond, based on the number of workers employed as listed on the Application, throughout the period the temporary labor certification is in effect, including any extensions thereof. WHD will have authority to make a claim against the surety bond to secure unpaid wages or other benefits due to workers employed under the labor certification.

The proposed text of this section is similar to the text of the 2008 Final Rule discussing the bonding requirement; however, in addition to the surety bond amounts specified in the 2008 Final Rule, the Department proposes to add larger bonding requirements applicable to H-2ALCs with larger crews. Under this proposal, H-2ALCs seeking to employ 75 to 99 workers will be required to obtain a surety bond in the amount of \$50,000, and H-2ALCs seeking to employ 100 or more workers will be required to obtain a surety bond in the amount of \$75,000. Hypothetically, the proposed increased amount would address 2 weeks where no wages have been paid for crews of 100 (40 hours  $\times$  2)  $\times$  9.25 (assumed AEW)  $\times$  100 workers = \$74,000. The Department specifically requests comments addressing the implications for H-2ALCs who may be subject to this requirement.

The Department also proposes to change the requirement that H-2ALCs provide written notice to the WHD Administrator of cancellation or termination of the surety bonds from a 30-day to a 45-day notice period. Finally, the proposal clarifies that the bond must remain in effect for at least 2 years. However, if WHD has commenced any enforcement proceedings by that date, the bond must remain in effect until the conclusion of those proceedings and any appeals.

The Department has not created a form specific to this bonding requirement, but instead proposes that documentation from the bond issuer be provided with the Application, identifying the name, address, phone number, and contact person for the surety, as well as providing the amount of the bond, date of its issuance and expiration and any identifying designation utilized by the surety for the bond. This requirement can be met by the applicant attaching a copy of the signed and dated document issued from the surety that shows the information required. This request for information is in keeping with the information that was required in the appendix for the ETA 9142 in the 2008 Final Rule.

#### C. Enforcement Provisions

In order to deter significant violations of the H-2A worker protection provisions, a number of changes and clarifications are proposed in the sanctions and remedies available under part 501 as discussed below. Most of these changes are consistent with those in the 2008 Final Rule.

Proposed § 501.16 has been amended to provide WHD with express authority to pursue reinstatement and make-whole relief in cases of discrimination, or in cases in which U.S. workers have been improperly rejected, laid off, or displaced. In addition, the proposal would allow WHD to pursue recovery of recruiter fees or other costs improperly deducted or paid in violation of regulations forbidding such payments, including where the employer has not properly contractually prohibited its recruiter and agents from seeking or receiving such payments, directly or indirectly, as set forth in proposed 20 CFR 655.135(j) and (k). Proposed § 501.17 has been changed to clarify the differing roles and responsibilities of OFLC and WHD, and to note that both agencies have concurrent jurisdiction to impose debarment. However, as explained above, § 501.2 is designed to protect an employer from being debarred twice for a single violation.

Proposed § 501.18 has been changed to conform to the statute, which provides for administrative appeals, but does not grant the Secretary independent litigating authority in civil litigation.

Proposed § 501.19 is amended to increase the maximum civil money penalty (CMP) amount from \$1,000 to \$1,500 for each violation, in most cases. This amount has not been adjusted since 1987. The CMP of up to \$5,000 for failure to meet a condition of the work contract, or for discrimination against a U.S. or H-2A worker who, in connection with the INA or these regulations has filed a complaint, has testified or is about to testify, has exercised or asserted a protected right, has been retained from the 2008 Final Rule. The Proposed Rule increases the penalty amount to no more than \$15,000 for a failure to meet a condition of the work contract that results in displacing a U.S. worker employed by the employer during the period of employment on the employer's Application, or during the period of 60 days preceding such period of employment. The Proposed Rule adds a penalty of an amount up to \$15,000 for improperly rejecting a U.S. worker who has made application for employment.

These proposed penalties for violators who disregard their obligations would provide the Department with an effective tool to discourage potential abuse of the program. Such penalties will deter violations, discrimination and interference with investigations, and strengthen necessary enforcement of laws that protect workers who may be unlikely to approach government agencies to intercede on their behalf. The increase in certain penalties demonstrates the Department's commitment to protecting workers.

Further, if a violation of an applicable housing or transportation safety and health provision of the work contract causes the death or serious injury of any worker, the Department proposes a penalty of up to \$50,000 per worker. Where the violation of safety and health provision involving death or serious injury is repeated or willful, the Department proposes to increase the maximum penalty to up to \$100,000 per worker.

The proposed penalties for such violations of applicable safety and health provisions would provide a meaningful assurance that participants meet their obligation to see that housing and/or transportation provided to the workers meets all applicable safety and health requirements and that housing and/or vehicles used in connection with employment do not endanger workers.

The assessment of the maximum penalties available under proposed § 501.19 would not be mandatory, but rather would be based on regulatory guidelines found in paragraph (b) of this section and the facts of each individual case.

#### *D. Debarment by the WHD*

The current regulations provide OFLC the authority to deny access to future certifications (*i.e.*, debarment) and require the WHD to report findings in order to make a recommendation to OFLC to deny future certifications. Under proposed § 501.20, OFLC and WHD would have concurrent debarment authority, with WHD primarily concerned with issues arising from WHD investigations, while OFLC would focus on issues arising out of the application process. Both agencies may coordinate their activities whenever debarment is considered. The proposed standards for debarment within the WHD's purview are identical to those proposed by OFLC for debarment actions under 20 CFR part 655, thus ensuring consistency in Application. This change will allow administrative hearings and appeals relating to back wages or other relief to employees or CMP's assessed by the WHD to be

consolidated with the debarment actions that arise from the same facts. This will not affect OFLC's ability to institute its own debarment proceedings on issues that arise from the Application or OFLC's proposed audits. Conforming changes are proposed to other sections in part 501 to reflect the proposed WHD debarment authority.

The Department proposes to modify the criteria for debarment to eliminate the multiple thresholds in the 2008 Final Rule, which required a pattern and practice of a violation that also must be significant. The proposed criteria require a substantial violation that includes a significant failure to comply with one or more of the provisions of the H-2A program. The criteria found in § 501.19(b) will be used in determining if a violation is substantial.

Section 501.20 (j) and (k) are proposed to conform to the proposed changes in 20 CFR part 655, which provide OFLC the authority to revoke an existing certification, by allowing the WHD to recommend revocation to OFLC based upon the WHD's investigative determinations.

#### *E. Administrative Proceedings*

The NPRM proposes few changes to the administrative proceedings set forth in §§ 501.30–501.47 of the 2008 Final Rule. Because the NPRM proposes to authorize the WHD to pursue debarment proceedings, rather than simply recommending debarment to OFLC, the NPRM adds references to debarment in §§ 501.30, 501.31, 501.32(a), and 501.41(d). Those sections of the proposal also specify that these procedures will govern any hearing on an increase in the amount of a surety bond pursuant to proposed § 501.9(c). Finally, those sections of the proposal replace the term unpaid wages with the term monetary relief to reflect the fact that WHD may seek to recover other types of relief, such as if an employer fails to provide housing or meet the three-fourths guarantee.

Proposed § 501.33 would permit hearing requests to be filed by overnight delivery, as well as by certified mail, and would reiterate that surety bonds must remain in force throughout any stay pending appeal. Section 501.34(b) provides discretion to the ALJ to ensure the production of relevant and probative evidence while excluding evidence that is immaterial, irrelevant or unduly repetitive without resort to the formal strictures of the Federal Rules of Evidence. This section conforms H-2A procedures to those used in the H-1B program.

Other than very minor editorial changes or corrections of typographical errors, the NPRM proposes no other changes to §§ 501.30–501.47.

## **IV. Administrative Information**

### *A. Executive Order 12866*

Under Executive Order (E.O.) 12866, the Department must determine whether a regulatory action is significant and therefore, subject to the requirements of the E.O. and subject to review by the Office of Management and Budget (OMB). Section 3(f) of the E.O. defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of \$100 million or more or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities (also referred to as "economically significant"); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Department has determined that this NPRM is not an economically significant regulatory action under sec. 3(f)(1) of E.O. 12866. The time frames and procedures for fixed-site agricultural employers, H-2ALCs, or an association of agricultural producer-members to file a job offer and Application, prepare supporting documentation, and satisfy the required assurances and obligations under the H-2A visa category, proposed under this regulation, are substantially similar to those under the 2008 Final Rule and would not have an annual economic impact of \$100 million or more. The proposed regulation would not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, nor public health or safety in a material way. In fact, this NPRM is intended to provide to agricultural employers clear and consistent guidance on the requirements for participation in the H-2A temporary agricultural worker program. The Department, however, has determined that this NPRM is a significant regulatory action under sec. 3(f)(4) of the E.O. and accordingly OMB has reviewed this NPRM.

The Department anticipates that the changes in this NPRM would have

limited net direct impact on employers, above and beyond the baseline of the current costs required by the program as it is currently implemented. Further, the Department does not anticipate that this NPRM would result in significant processing delays on its part or the SWAs, as the Department continues to operate under the statutory mandate to make a determination of whether or not the Application meets the threshold requirements for certification within 7 days of filing. The Department is requesting comment on the benefits and costs of these policies, with the goal of ensuring a thorough consideration and discussion at the Final Rule stage.

1. Need for Regulation

The Department has determined that there are significant defects in the 2008 Final Rule that necessitate new rulemaking. First, the Department has determined that there are insufficient worker protections in the attestation-based model in which employers do not actually demonstrate that they have performed an adequate test of the U.S.

labor market. Even in the first year of the attestation model it has come to the Department's attention that employers, either from a lack of understanding or otherwise, are attesting to compliance with program obligations with which they have not complied. This anecdotal evidence appears to be sufficiently substantial and widespread for the Department to revisit the use of attestations, even with the use of back-end integrity measures for demonstrated non-compliance.

The Department has also determined that the area in which agricultural workers are most vulnerable—wages—has been adversely impacted to a far more significant extent than anticipated by the 2008 Final Rule. As discussed further below, the shift from the AEWR as calculated under the 1987 Rule to the recalibration of the prevailing wage as the AEWR of the 2008 Final Rule resulted in a reduction of farmworker wages in a number of labor categories, and an increase in a few others.

The 2008 Final H-2A Rule based the estimation of the AEWR on the OES

Wage Survey collected by BLS. This NPRM changes the methodology for estimating the AEWR to the USDA survey.

Using data from the OES Wage Survey for the States with the top-ten largest numbers of H-2A workers in the job classification of farmworkers and crop laborers (SOC-OES Code 45-2092.02), the Department estimates a weighted average hourly wage rate of \$7.92. Using data from the USDA's NASS FLS for the same States, the Department estimates a weighted average hourly wage rate of \$9.36. Thus, the 2008 Final Rule is associated with a lower average hourly wages of approximately \$1.44, equivalent to an 18 percent decrease.

The table below displays the hourly wage rates under the two wage methodologies for the top 10 agricultural states based on the total workers certified. The estimated wage rates for each of the top ten States would be higher under the NPRM where the Department proposes to base the methodology for calculating the AEWR on the USDA's NASS FL survey.

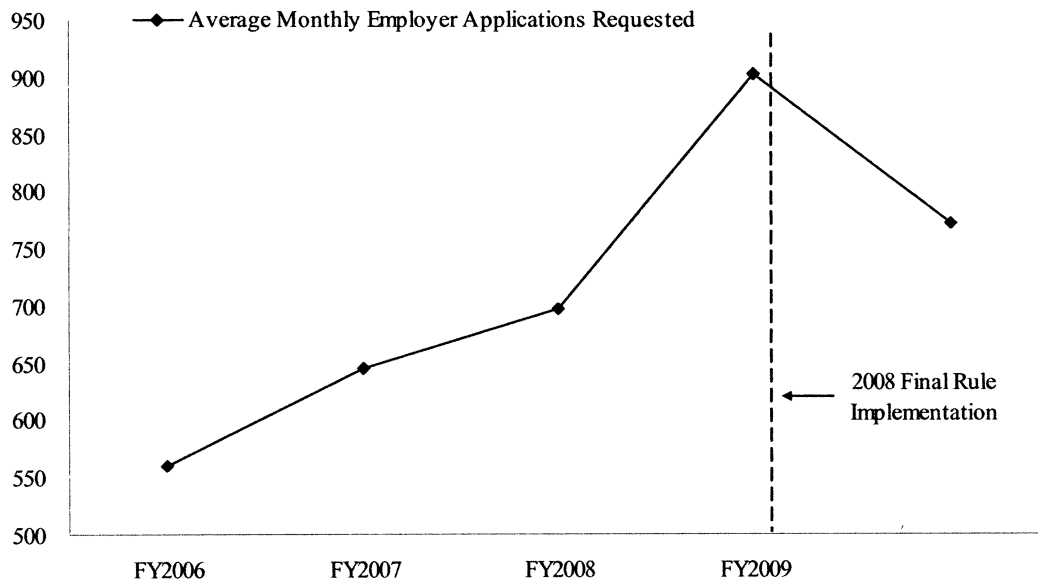
	2008 Final rule Average hourly wage from OES survey	Proposed NPRM average hourly wage from 2009 AEWR USDA survey	Differential wage decrease for workers under 2008 final rule
North Carolina .....	\$7.57	\$9.34	-\$1.77
Kentucky .....	7.39	9.41	-2.02
Georgia .....	7.44	8.77	-1.33
Louisiana .....	8.07	8.92	-0.85
Tennessee .....	7.54	9.41	-1.87
Virginia .....	7.46	9.34	-1.88
South Carolina .....	7.33	8.77	-1.44
New York .....	9.37	10.20	-0.83
California .....	9.37	10.16	-0.79
Colorado .....	8.72	9.88	-1.16

The graph below displays program participation in the H-2A program for FY 2006, 2007, and 2008, as well as FY 2009 before and after implementation of the 2008 Final Rule (through the end of June 2009). As shown in the graph, the H-2A program experienced increased participation from approximately 560 Applications per month on average in FY 2006 to 903 Applications per month immediately prior to the

implementation of the 2008 Final Rule. After the implementation of the 2008 Final Rule, agricultural employer participation in the H-2A program decreased to approximately 773 Applications per month.<sup>2</sup> The Department is not certain of the source of this decrease, noting it has multiple origins, including economic weaknesses, including the relatively high rate of unemployment at that time;

the presence of enhanced worker protections in the 2008 Final Rule that may have disincentivized employers from participation, the litigation to which the 2008 Final Rule was subject since prior to its implementation; and simple confusion on the part of potential program participants stemming from the new requirements.

<sup>2</sup> Source: H-2A Case Management System. Data extracted on July 10, 2009.



To adequately protect U.S. and H-2A workers, the Department is proposing the changes discussed in the subsections below. The Department is engaging in new rulemaking to provide the affected public with notice and opportunity to engage in dialogue with the Department on the H-2A program. The Department took into account both the regulations promulgated in 1987, as well as the substantive reworking of the regulations in the 2008 Final Rule, in order to arrive at an NPRM that balances the worker protections of the 1987 Rule and the program integrity measures of the 2008 Final Rule.

Much of the 2008 Final Rule has been retained in format, as it presents a more understandable regulatory roadmap; it has been used when its provisions do not conflict with the policies proposed in this NPRM. To the extent the 2008 Final Rule presents a conflict with the policies underpinning this NPRM, it has been rewritten or the provisions of the 1987 Rule have been adopted. To the extent the 1987 Rule furthers the policies that underlie this rule, those provisions have been retained. These changes are pointed out below.

## 2. Alternatives

The Department has considered three alternatives: (1) To make the policy changes contained in this NPRM; (2) to take no action, that is, to leave the 2008 Final Rule intact; and (3) to revert to the 1987 Rule. The Department believes that the first alternative—the policies contained in this NPRM—represents retention of the best features of both the 1987 Rule and 2008 Final Rule. The Department has, for the reasons enunciated above, chosen not to retain the 2008 Final Rule. It has also rejected

the reversion to the 1987 Rule as inefficient and ineffective given societal and economic changes that have occurred since its promulgation.

The Department is requesting comment on other possible alternatives to consider, including alternatives on the specific provisions contained in this NPRM with the goal of ensuring a thorough consideration and discussion at the Final Rule stage.

## 3. Analysis Considerations

The economic analysis presented below covers the following economic sectors: crop production; animal production; activities for agriculture and forestry; logging; reforestation; and fishing, hunting, and trapping. In 2007, there were over 2.2 million farms of which 78 percent had annual sales of less than \$50,000, 17 percent had annual sales of \$50,000 to \$499,999, and the remaining 5 percent had annual sales in excess of \$500,000.<sup>3</sup>

The Department derives its estimates by comparing the baseline, that is, the program benefits and costs under the 2008 Final Rule, against the benefits and costs associated with implementation of provisions contained in this NPRM. For a proper evaluation of the benefits and costs of the NPRM, we explain how the required actions of workers, employers, government agencies, and other related entities under the NPRM are linked to the expected benefits and costs. We also consider, where appropriate, the unintended consequences of the provisions introduced by the NPRM.

The Department makes every effort, where feasible, to quantify and monetize the benefits and costs of the NPRM.

<sup>3</sup> Source: 2007 Census of Agriculture, United States Department of Agriculture.

Where we are unable to quantify them—for example, due to data limitations—we describe the benefits and costs qualitatively. Following OMB Circular A-4 and consistent with the Department's practice in previous labor certification rulemaking, this analysis focuses on benefits and costs that accrue to citizens and residents of the U.S. The analysis covers 10 years to ensure it captures all major benefits and costs.<sup>4</sup> In addition, the Department provides a qualitative assessment of transfer payments associated with the increased wages and protections of U.S. workers. Transfer payments are payments from one group to another that do not affect total resources available to society. When summarizing the benefits or costs of specific provisions of the NPRM, we present the 10-year averages to represent the typical annual effect or 10-year discounted totals to represent the overall effects.

## 4. Subject-by-Subject Analysis

The Department's analysis below covers expected impacts of the following proposed provisions of the NPRM against the baseline: New methodology for estimating the AEWR, an enhanced U.S. worker referral period for employers after certification, increased costs to the Department for developing and maintaining an Electronic Job Registry, changes in administrative burdens placed on SWAs by increased time frames for recruitment and benefits from eliminating employment verification requirements, enhanced worker protections through compliance certification, enhanced

<sup>4</sup> For the purposes of the cost-benefit analysis, the 10-year period starts in the next fiscal year on October 1, 2009.

coverage of transportation expenses to and from the worker's place of residence, and changes in the requirement for housing inspections.

#### a. New Methodology for Estimating the AEW

The 2008 Final Rule based the estimation of the AEW on the OES Wage Survey collected by BLS, rather than data compiled by the USDA, NASS, which was what was relied upon in the 1987 Rule. This NPRM changes the methodology for estimating the AEW to the USDA survey. As explained above, the wage survey methodology proposed in this NPRM is associated with an hourly wage that is \$1.44 higher than that under the 2008 Final Rule.

#### 1. Benefits to U.S. Workers

The higher wages for workers associated with the new methodology for estimating the AEW represents a direct benefit to workers improving their ability to meet costs of living and spend money in local communities in which they are employed, and important concern to the current Administration and a key aspect of the Department's mandate to ensure the wages and working conditions of similarly employed U.S. workers are not adversely affected.

Labor market research indicates that as agricultural wages for U.S. workers increase, a larger number of U.S. workers decide it is economically feasible or desirable to participate in the agricultural labor force. Some of these workers would otherwise remain unemployed or out of the labor force entirely, earning no salary. This effect is captured by the so-called wage elasticity of the U.S. agricultural labor supply. A recent study finds that this elasticity is 0.43, that is, for each 1 percent increase in wages, there is a 0.43 percent increase in labor supply by U.S. agricultural workers.<sup>5</sup> Another study finds that the elasticity is 0.36.<sup>6</sup> Although the increase in wages for documented workers in agriculture will lead to complex, hard-to-quantify labor market dynamics involving both labor supply and demand, the Department believes that the net effect may be increased employment opportunities for U.S. workers, which represent a U.S.

<sup>5</sup> See Julie L. Hotchkiss and Myriam Quispe-Agnoli, "Employer Monopsony Power in the Labor Market for Undocumented Workers," Federal Reserve Bank of Atlanta, Working Paper 2009-14a, June 2009.

<sup>6</sup> See Source: Duffield, J.A. and R. Coltrane, 1992, "Testing for Disequilibrium in the Hired Farm Labor Market," *American Journal of Agricultural Economics*, 74: 412-20.

societal benefit by engaging U.S. human resources in productive activity that may not otherwise occur. This impact is also a transfer in the sense the U.S. workers may displace temporary foreign workers in providing agricultural services or labor to employers.

#### 2. Transfers

Transfer payments are payments from one group to another that do not affect total resources available to society. The increase in the wage rates for some workers also represents an important transfer from agricultural employers to H-2A and corresponding U.S. workers. As noted previously, the higher wages for workers associated with the new methodology for estimating the AEW represents an improved ability on the part of workers and their families to meet costs of living and spend money in local communities. On the other hand, higher wages represent an increase in costs of production from the perspective of employers which on the margin creates a disincentive to hire H-2A and corresponding U.S. workers. There may also be a transfer resulting from a reduction in unemployment expenditures. Some previously unemployed individuals who were not willing to accept a job at the lower wage may now be willing to accept the job and would not need to seek new or continued unemployment insurance benefits. The Department, however, is not able to quantify these transfer payments with a high degree of precision. The factors that make the calculation uncertain include the actual entries of H-2A workers, the unknown quantity of corresponding U.S. workers, the types of occupations to be included in future filings; the ranges of wages in the areas of actual employment; and the point at which any occupation in any given area is subject to the prevailing wage (hourly or piece rate) or Federal or State minimum wage rather than the application of the OES or FLS survey to the calculation of the AEW. The Department cannot assume the number of workers will remain constant for any given entity for its wage transfer.

#### 3. Costs

In standard models of supply and demand an increase in the wage rate will lead to a reduction in the demand for agricultural labor. This is a loss in profits for agricultural employers that is not gained by anyone and is known as a deadweight loss. The deadweight loss is essentially the profits that employers were getting from being able to hire more workers at a lower wage. When the wage is reduced they will hire fewer workers overall and the benefit that

those workers had produced will be lost to society. In order to estimate that lost benefit we would have to calculate the estimated reduction in employment assuming an elasticity of labor demand—the extent to which employers respond to an increase in wages by lowering employment. Using standard estimates of this elasticity the deadweight loss is not projected to be large.<sup>7</sup>

#### b. Enhanced U.S. Worker Referral Period

Although the recruitment requirements of employers will not change substantively, this NPRM requires employers to accept referrals of qualified U.S. workers for temporary agricultural opportunities for a longer period of time after the job begins than the current regulation. Specifically, during the same time period as the employer places the advertisements, the NPRM requires SWAs to extend their job advertising efforts, on behalf of employers, to keep the job order on active status through 50 percent of the period of employment, as opposed to 30 calendar days after the date of need under the current regulation.

#### 1. Benefits to U.S. Workers

The enhanced referral period for employers after certification represents a benefit to society by expanding the period in which agricultural jobs are available to U.S. workers and, therefore, improving their employment opportunities. Here again, this is a U.S. societal benefit because it represents engaging U.S. human resources in productive activity that may not otherwise occur.

#### 2. Costs

The extension of the referral period imposed by the NPRM will result in increased SWA staff time to maintain job orders for the new U.S. worker referrals. SWAs will need to maintain additional job orders for the new applicants to the H-2A program in the

<sup>7</sup> A recent study finds that the wage elasticity of labor demand in U.S. agriculture is -0.42. This indicates that for each 1 percent increase in wages for U.S. workers, the demand for their labor decreases by 0.42 percent. See Orachos Napisintuwong and Robert D. Emerson, "Induced Innovations and Foreign Workers in U.S.," Institute of Food and Agricultural Sciences, University of Florida, Working Paper 05-03, March 2005. It is possible that this elasticity over-estimates the potential reduction in demand for U.S. workers as a result of the new methodology for estimating the AEW because, in the context of the H-2A program, there are legal constraints (and associated potential penalties) for agricultural employers who would turn to undocumented workers as a result of the wage increase. The Department estimates that average wages will increase by 18.2 percent for U.S. workers.



States in which temporary workers are expected to perform work and for all applicants to the H-2A program in the States designated as States of traditional or expected labor supply. The Department estimates the average annual cost associated with this activity to be \$0.4 million.<sup>8</sup>

The Department recognizes a cost to employers is the requirement that they accept more referrals through a longer time period of the contract. The Department does not, however, have sufficient data on the number of average additional referrals (and the ensuing additional cost in terms of contractual obligations to a greater number of workers) to accurately monetize such a cost to employers, and invites comment from employers who may have such data. The Department recognizes however that the cost to employers of additional work-related expenses may be offset to a certain extent by increased productivity.

The expansion of DOL oversight of the H-2A program will result in increased time for the Department to review Applications. We estimate this cost by multiplying the total number of new Applications by the time required for Department staff to review each Application, and then by the average hourly compensation of this staff. The Department estimates the average annual cost associated with this activity to be \$0.6 million.<sup>9</sup>

The NPRM proposes to require that employers maintain a complete recruitment report and all supporting documentation for 5 years (rather than 3 years under the 2008 Final Rule. The Department assumes that this will require all H-2A employers to purchase additional file storage in the first year of the Proposed Rule.<sup>10</sup> After the first year, the Department assumes that only new applicants to the H-2A program will be required to purchase additional storage. The Department estimates average

<sup>8</sup> The Department assumes that it takes SWA staff 30 additional minutes per application to maintain a job order. We assume that a State employee with a job title of "Compensation, Benefits, and Job Analysis Specialists" conducts this activity. Their median hourly wage is \$21.69, which we increased by 1.53 to account for employee benefits (source: Bureau of Labor Statistics).

<sup>9</sup> The Department assumes that Department staff (GS-12, step 5) spend one additional hour to review each application. The hourly salary for a GS-12, step 5 staff was multiplied by an index of 1.69 to account for employee benefits and proportional operating costs, resulting in an hourly rate of \$52.96. The 1.69 index is derived by using the Bureau of Labor Statistics' index for salary and benefits plus the Department's analysis of overhead costs averaged over all employees of the Department's Office of Foreign Labor Certification.

<sup>10</sup> The Department assumes that one additional file drawer will be required per employer.

annual costs of increased storage to be approximately \$0.06 million.

### 3. Transfers

In addition, U.S. workers hired who were previously unemployed will no longer need to seek new or continued unemployment insurance benefits.<sup>11</sup> Other things constant, we expect the States to experience a reduction in unemployment insurance expenditures as a consequence of U.S. workers being hired. The Department, however, is not able to quantify these transfer payments due to a lack of adequate data.

### c. New Electronic Job Registry

Under the NPRM, the Department will create and maintain an electronic job registry. The Department will post and maintain employers' H-2A job orders, including modifications approved by the CO, in a national and publicly accessible electronic job registry. The job registry will serve as a public repository of H-2A job orders for the duration of the enhanced U.S. worker referral period: 50 percent of the certified period of employment. The job orders will be posted in the registry by a CO upon the acceptance of each submission. The posting of the job orders will not require any additional effort on the part of the SWAs or H-2A employers.

### 1. Benefits

The job registry will improve the visibility of agricultural jobs to U.S. workers. Thus, the job registry represents a benefit to U.S. society by expanding the period in which agricultural jobs are available to U.S. workers and, therefore, improving their employment opportunities. In addition, the establishment of a job registry will provide greater transparency with respect to the Department's administration of the H-2A program to the public, members of Congress, and other related stakeholders. Transferring these agricultural job orders (Form ETA 790 and attachments) into electronic records for the job registry will eliminate unnecessary paper records currently being maintained by the CO and result in a better and more complete record of jobs petitioned for H-2A labor certification. Finally, since the Form ETA 790 and attachments are some of the most commonly requested documents by members of the public, Congress, and other stakeholders, the Department anticipates some reduction in FOIA requests for these agricultural

<sup>11</sup> A benefit to U.S. workers could still exist even if these workers were employed elsewhere: Their departure from their old jobs will open up new employment opportunities for other U.S. workers.

job orders thereby saving staff time and resources.

### 2. Costs

The establishment of an electronic job registry in the NPRM imposes several costs directly on the Department: The increased costs for developing business requirements and design documentation outlining the functional components of the job registry; increased costs for application programming, testing, and implementation of the Electronic Job Registry into a production environment; increased costs to maintain and continuously improve the Electronic Job Registry; and additional staff time to maintain job orders placed on the registry. The Department expects that the majority of costs to develop and implement the new Electronic Job Registry will occur within the first 12 months of implementing the regulation. Out-year costs will include maintenance and additional staff time to maintain job orders on the registry. The Department estimates average annual costs of maintaining an electronic job registry to be approximately \$0.5 million.<sup>12</sup>

### d. Reduced SWA Administrative Burden by Eliminating Employment Verification

Under this NPRM, SWA's will no longer be responsible for conducting employment eligibility verification activities. These activities include the completion of the Form I-9 and the vetting of Application documents by SWA personnel. There will, however, be additional costs to employers as they resume the function of their own employment eligibility verification for all employees, not only those for whom a certification is received from the SWA.

<sup>12</sup> The Department assumes the following first-year development, testing, and implementation staff time for the following labor categories: Project Manager II—1,253 hours, Computer Systems Analyst II—1,253 hours, Computer Systems Analyst III—2,037 hours, Computer Programmer III—3,995 hours, Computer Programmer IV—3,995 hours. For out-year maintenance costs, the Department assumes that 376 hours will be required for the following labor categories: Program Manager, Computer Systems Analyst II & III, Computer Programmer III & IV, Computer Programmer Manager, Data Architect, Web Designer, Database Analyst, Technical Writer II, Help Desk Support Analyst, and Production Support Manager. Finally, the Department uses the following loaded rates based on an Independent Government Cost Estimate (ICGE) produced by OFLC and inclusive of direct labor and overhead costs for each labor category: Program Manager—\$138.34, Project Manager II—\$106.90, Computer Systems Analyst II—\$92.14, Computer Systems Analyst III—\$109.84, Computer Programmer III—\$89.63, Computer Programmer IV—\$107.72, Computer Programmer Manager—\$123.88, Data Architect—\$104.99, Web Designer—\$124.76, Database Analyst—\$77.80, Technical Writer II—\$84.81, Help Desk Support Analyst—\$55.28, Production Support Manager—\$125.76.

## 1. Benefits

Under the 2008 Final Rule, SWAs are required to complete Form I-9 for agricultural job orders and inspect and verify the employment eligibility documents furnished by the applicants.<sup>13</sup> Under the NPRM, SWAs will no longer be required to complete this process, resulting in cost savings. To estimate the avoided costs of employment eligibility verification activities, the Department multiplies the estimated number of U.S. farm workers that are referred to H-2A jobs through One-Stop Career Centers by the cost per Application.<sup>14</sup> The Department estimates average annual avoided costs of employment eligibility verification activities to be \$ 0.03 million.

After the adjudication of employment eligibility, SWAs issue certifications for eligible workers. Under the NPRM, SWAs will no longer be required to issue such certifications. The avoided costs include the staff time to prepare and print the certification form as well as the costs of paper, envelopes, and postage. The Department estimates average annual avoided costs of certification issuance to be \$0.02 million.<sup>15</sup>

SWAs are also required to retain records for the employment eligibility decisions. Under the NPRM, SWAs will no longer be required to retain the records. The avoided costs include the staff time to copy, organize, and store all relevant documents as well as the material costs of paper and photocopy machine use. The Department estimates average annual avoided costs equal to approximately \$0.02 million.<sup>16</sup>

<sup>13</sup> The cost estimate assumes the use of the Form I-9 rather than the E-Verify system. The most recent count indicates that only four SWAs are using E-Verify.

<sup>14</sup> To estimate the cost per application, the Department sums the time for the SWA staff to complete the Form I-9, the time required to review employment eligibility documents, and the time to file the completed form in a systematic manner. The Department then divides this result by 60 to approximate the fraction of an hour required to process each application and multiplies this fraction by the hourly compensation of an SWA Compensation, Benefits, and Job Analysis Specialist scaled by 1.52 to account for employee benefits.

<sup>15</sup> The Department estimates the cost of staff time by multiplying the number of U.S. farm workers who are referred to H-2A jobs through One-Stop Career Centers by the time required to print the form (5 minutes) and the hourly labor compensation of an SWA Compensation, Benefits, and Job Analysis Specialist scaled by 1.52 to account for employee benefits. The Department then adds the cost per application by the number of U.S. farm workers who are referred to H-2A jobs through One-Stop Career Centers by the cost per application, assuming that the cost of a sheet of paper, cost of an envelope, and cost of postage per envelope are \$0.02, \$0.04, and \$0.42, respectively.

<sup>16</sup> The Department estimates the cost of staff time by multiplying the total number of H-2A workers

The employment eligibility verification activities currently in place require the training of SWA to properly complete the process. Under the NPRM, SWAs will no longer incur the costs of this training. These costs include the staff time to attend training courses, the staff time to teach training courses, and the material costs of producing training manuals. The Department estimates average annual avoided costs of SWA staff training equal to approximately \$0.4 million.<sup>17</sup>

## 2. Costs

The Department acknowledges the increase in cost faced by employers to perform employment eligibility verification on referred employees who will, under this NPRM, no longer be verified by SWAs. The cost to employers is, however, not a corresponding number to the number representing the benefit to SWAs, as employers are not required to also complete the certification required of SWAs.

### e. Enhancing Worker Protections through Compliance Certification

The 2008 Final Rule uses an attestation-based model, unlike the 1987 Rule, which mandated a fully-supervised labor market test and required the submission of important documentation, such as workers' compensation, housing certification issued by the SWA, and proof of registration and surety bond for H-2ALCs. Employers conduct the required recruitment in advance of Application filing and, based upon the results of that effort, apply for certification from the Department for a number of needed

requested by the time required to copy, organize, and store all relevant documents (5 minutes) and the hourly labor compensation of an SWA Compensation, Benefits, and Job Analysis Specialist scaled by 1.52 to account for employee benefits. The Department then adds the cost per record by multiplying the total number of H-2A workers by the cost per record, assuming the number of sheets photocopied is 5 and cost per photocopy is \$0.12.

<sup>17</sup> The Department estimates the avoided costs of attending training courses by multiplying the number of One-Stop Career Centers (1,794) by the number of workers trained per center (2), the length of training (3 hours), and the hourly labor compensation of an SWA Compensation, Benefits, and Job Analysis Specialist scaled by 1.52 to account for employee benefits. The Department estimates the avoided costs of trainer workload by multiplying the number of trainers (1 per 5 One-Stop Career Centers, or 359 trainers) by the length of training (3 hours) and the hourly labor compensation of an SWA Compensation, Benefits, and Job Analysis Specialist scaled by 1.52 to account for employee benefits. The Department estimates the avoided cost of producing training manuals by multiplying the number of One-Stop Career Centers (1,794) by the number of workers trained per center (2), the pages per training manual (30) and the cost per photocopy (\$0.12).

foreign workers. That is, under the 2008 Final Rule, employers attest that they have undertaken the necessary activities and made the required assurances to workers rather than have such actual efforts or documentation reviewed by a Federal or State official to ensure compliance. The Department has determined that there are insufficient worker protections in the attestation-based model in which employers merely confirm, and do not actually demonstrate, that they have performed an adequate test of the U.S. labor market.

## 1. Costs

The certification of compliance will represent some costs to employers because they will need to submit copies of recruitment activities, details of job offers, workers' compensation documentation, and for H-2ALCs, registration, surety bond, and work contracts, rather than attesting that they have complied with the required elements of the H-2A program. Under the 2008 Final Rule, employers are already required to obtain and retain these documents and the NPRM simply requires the submission of those documents, particularly workers' compensation and housing inspections, to the Department in order to satisfy the underlying statutory assurances. The Department estimates the cost by multiplying the total number of Applications by the difference in time to prepare the new H-2A Application as compared to that under the 2008 Final Rule. We then multiply this product by the average compensation of a human resources manager at an agricultural business. Because the H-2A Application in the Proposed Rule requires more to be submitted than the application under the 2008 Final Rule, we add the incremental costs of photocopying the additional pages and the postage required to ship them to the DOL.<sup>18</sup> This calculation yields an average annual cost to employers of \$0.7 million.<sup>19</sup>

<sup>18</sup> The Department estimates that 150 additional pages will need to be photocopied at a cost of \$0.12 per photocopy. The additional pages weigh approximately 17.6 ounces and require \$0.80 in postage per application. This cost estimate is based on mailing the additional 150 pages via Priority Mail (2-day delivery) from Topeka, Kansas to the NPC in Chicago (source: <http://postcalc.usps.gov>).

<sup>19</sup> The Department projects the annual number of applications to be approximately 9,785 in 2009 and increase to 26,427 by 2018, of which approximately 3,262 and 2,787 of the applications submitted in 2009 and 2018, respectively, would not have been previously submitted. For applications that would not have been previously submitted, the Department assumes that preparing an application using the certification application process, as compared to the attestation process, will result in

#### f. Changes in the Requirement for Housing Inspections

The NPRM retains most of the 2008 Final Rule provisions governing housing inspections. The employer's obligations with respect to housing standards, rental or public accommodations, open range housing, deposit charges, charges for public housing, and family housing under the proposed regulations have remained the same as under the 2008 Final Rule. One notable difference, however, is the timeframe in which an inspection of the employer's housing must occur.

In the NPRM, when an employer places an Agricultural and Food Processing Clearance Order (Form ETA 790) with the SWA serving the area of intended employment 60 to 75 days before the date of need, the employer is required to disclose the location and type of housing to be provided to domestic and H-2A workers. Upon receipt of the Form ETA 790, the SWA will schedule and conduct an inspection of the employer's housing. Unlike the 2008 Final Rule, this NPRM requires that the pre-occupancy inspection of the employer's housing be completed prior to the issuance of a temporary labor certification, which is 30 days before the date of need.<sup>20</sup>

The Department expects that this change in timing will have a minimal economic impact on employers. Because employers are required to place the job order with the SWA between 60 and 75 days prior to the date of need, the SWA will have between 30 and 55 days to schedule and conduct a timely inspection of the housing. The Department believes that this enhanced recruitment time frame will also provide a sufficient amount of time for SWAs to conduct the required pre-occupancy housing inspection. Prior to the 2008 Final Rule, the Department's experience is that most employers who routinely utilize the H-2A program prepare their housing in advance of inspection and/

increased agricultural employer staff time of 30 minutes per application. For applications that would have been previously submitted under the H-2A program, the Department assumes there will be a 20-minute increase in staff time using the certification application process. The Department estimates that the median hourly wage for a human resources manager is \$42.15 (as published by the Department's OES survey, O\*Net Online), which we increased by 1.43 to account for employee benefits (source: Bureau of Labor Statistics).

<sup>20</sup> The Department also notes that such inspection is mandated by other regulations governing the H-2A program. Pursuant to 20 CFR 654.400, SWAs must deny intrastate and interstate recruitment services unless, among other things, a pre-occupancy inspection has been conducted (with conditional access permitted for H-2A employers for a limited time period). These regulations govern all migrant seasonal worker housing inspections.

or communicate with SWA staff with respect to changes in the location(s) or type(s) of housing before Application filing occurred at 45 days prior to the date of need. This past practice was necessary, particularly among large grower associations, in allowing SWAs to schedule and conduct pre-occupancy housing inspections in a timely manner, thereby minimizing any negative impacts on employers' ability to obtain labor certification, petition for workers at USCIS, obtain visas through the U.S. consulate, and bring foreign workers to the worksite by the certified date of need.

The Department examined program activity data for FY 2007 and 2008 to determine if the NPRM's change requiring completion of a pre-occupancy housing inspection prior to the issuance of a temporary labor certification would have a significant negative impact on employers. For employer Applications certified in FY 2007 and 2008, the Department issued determinations, on average, approximately 27 calendar days before the employer's certified start date of need; the median in both years was 29 calendar days before the employer's certified start date of need. This processing timeframe provided employers with sufficient time to petition USCIS and obtain visas from the U.S. consulate in order to bring foreign workers from their place of residence to the worksite by the certified start date of need. Any downstream delays in processing at either the USCIS or U.S. consulate, such as scheduling and conducting interviews for foreign workers, cannot be attributed to the Department's processing of the temporary labor certification.

The Department also examined the percentage of H-2A labor certifications that were issued during FY 2007 and 2008 beyond the statutory 30 days timeframe such that the issuance of the determination would have negatively impacted the employer's ability to obtain foreign workers by the certified start date of need. To do this, the Department assumed that employers, following issuance of the temporary labor certification, would receive the labor certification within 2 days, file an I-129 petition for non-premium processing and receive approval from the USCIS within 5 days, file appropriate Applications with DOS and obtain visas within 5 days, and transport foreign workers from the place of residence to the worksite in the U.S. over the course of 3 days. Using these assumptions, the Department determined that any labor certification

issued later than 15 days before the employer's certified start date of need would have negatively impacted the employer's ability to obtain foreign workers.

For FY 2007, approximately 6 percent of the H-2A labor certification Applications approved between October 1, 2006 and September 30, 2007 (273 out of 4,526 certifications), for employers and associations of employer producers were issued by the Department later than 15 days before the certified start date of need. For FY 2008, approximately 5.4 percent of the H-2A labor certification Applications approved between October 1, 2007 and September 30, 2008 (271 out of 5,014 certifications), for employers and associations of employer producers were issued by the Department later than 15 days before the certified start date of need, thus having a potential adverse impact. Some percentage of this number was as a result of delays in the housing inspection; the Department cannot quantify how many were delayed for this reason alone, as other reasons exist independent of housing inspections (for example, a failure of the employer to provide the Department with evidence of the coverage of workers by workers' compensation). Even if the entire group of such Applications were delayed solely for the lack of a valid housing certificate, the Department's program experience has demonstrated that the change contemplated in the NPRM requiring a pre-occupancy housing inspection prior to issuance of a temporary labor certification has not and will not have a significant impact on employers' ability to obtain foreign workers by the certified start date of need.

Because of data limitations, we were not able to monetize the costs and benefits associated with this provision. While the Department believes such costs will be minimal, it invited interested parties to comment on the costs associated with this change.

#### g. Enhanced Coverage of Transportation Expenses

Under the 2008 Final Rule, the employer provides for travel expenses and subsistence for foreign workers only to and from the place of recruitment, *i.e.* the appropriate U.S. consulate or port of entry. Under the NPRM, the employer is required to pay the costs of transportation from the worker's home to and from the place of employment. The Department examined the increase in the costs to employers from the current costs of travel from the appropriate U.S. consulate to the place of employment, adding to that cost the

cost of travel from the home to the consulate city. The Department estimates average annual costs of these additional transportation expenditures to be approximately \$10.8 million.<sup>21</sup>

**h. Other**

During the first year that this NPRM would be in effect, all employers would need to learn about the new application process and how compliance will be judged. We estimate this cost by multiplying the number of applications submitted by employers by the time required to read the new rule and any educational and outreach materials that explain the H-2A application process under this NPRM by the average compensation of a human resources manager at an agricultural business. The Department estimates this one-time cost to employers at \$0.5 million.<sup>22</sup>

This NPRM requires that contracts be translated into the languages of employees who do not speak English. Employers are already required to provide contract translation for Spanish workers. The Department multiplies the percent of H-2A workers who do not speak English or Spanish by the total number of H-2A Applications to estimate the number of contract translations required.<sup>23</sup> The Department then multiplies the resulting value by

the average number of pages per contract and the cost per page for translation.<sup>24</sup> The Department estimates average annual costs of contract translation at \$0.1 million.

This NPRM also requires that H-2ALCs submit photocopies of contracts with fixed agricultural sites as well as documentation of surety bonds. To estimate the number of H-2ALCs that will be subject to this requirement, the Department multiplies the total number of H-2A Applications by the percent of H-2A employers who are foreign labor contractors.<sup>25</sup> To estimate the cost of submitting photocopies of contracts, the Department multiplies the resulting value by the average number of pages per employer contract and the cost per photocopy, resulting in average annual costs of contract submission of \$0.02 million. To estimate the cost of documenting the surety bond, the Department multiplies the number of H-2ALCs that will be subject to this requirement by the average number of pages per surety bond and the cost per photocopy, resulting in average annual costs of surety bond documentation of \$0.002 million.<sup>26</sup>

To inform the public about this NPRM, the Department will produce and deliver outreach and education materials to employers in order to

explain the new application process and how compliance will be judged. We estimate this cost by multiplying the hours required to develop, maintain, and distribute such materials by the average compensation of Department staff and find average annual cost to the Department equal to \$0.06 million.<sup>27</sup>

**5. Summary of Cost-Benefit Analysis**

Exhibit 1 presents a summary of the cost-benefit analysis of this NPRM. The monetized costs and benefits displayed are the yearly summations of the calculations described above. In some cases, the totals for 1 year are less than the totals of the annual averages described above. For example, the annual average cost of enhanced transportation expenses—the largest cost component of this NPRM—is \$10.8 million across the 10-year time horizon, but the individual yearly values range from \$7.6 million in 2009 to \$14.6 million in 2018. This is due to increased program participation across the time horizon of the cost-benefit analysis. The monetized costs exceed the monetized benefits both at a 7 percent and a 3 percent discount rate. The size of the net benefits, the absolute difference between the projected benefits and costs, is negative.

**EXHIBIT 1—SUMMARY OF MONETIZED BENEFITS AND COSTS**

Year	Monetized benefits (\$millions/year)	Monetized costs (\$millions/year)
1. 2009 .....	0.47	10.56
2. 2010 .....	0.47	9.75
3. 2011 .....	0.47	10.52
4. 2012 .....	0.47	11.35
5. 2013 .....	0.47	12.25
6. 2014 .....	0.47	13.23
7. 2015 .....	0.47	14.30
8. 2016 .....	0.47	15.45
9. 2017 .....	0.47	16.70
10. 2018 .....	0.47	18.07
Undiscounted total .....	4.68	132.17
Total with 7% discounting .....	3.29	89.34
Total with 3% discounting .....	3.99	110.86

Totals may not add because of rounding.

<sup>21</sup> The Department estimates these costs by multiplying the total number of H-2A workers certified by the cost of bus fare from the worker's home to the consulate and back. The Department assumes one-way cost of bus fare of \$31.50 based on the cost of a bus trip from Oaxaca to Mexico City. Source: <http://www.ticketbus.com.mx>.

<sup>22</sup> The Department estimates that employers will spend 1 hour to read the new rule and outreach and educational materials explaining the program. In addition, the Department estimates that the median hourly wage for a human resources manager is \$42.15 (as published by the Department's OES survey, O\*Net Online), which we increased by 1.43

to account for employee benefits (source: Bureau of Labor Statistics).

<sup>23</sup> Approximately 0.6 percent of H-2A workers do not speak English or Spanish. Source: <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/table32d.xls>.

<sup>24</sup> The Department assumes that the average number of pages per contract is 50, and the cost per page for translation is \$19.50. Source: <http://www.languagescape.com>.

<sup>25</sup> The Department estimates that approximately 20 percent of H-2A employers are foreign labor contractors.

<sup>26</sup> The Department estimates that the average number of pages per employer contract is 50, the

average number of pages per surety bond is 5, and the cost per photocopy is \$0.12.

<sup>27</sup> The Department estimates that Department staff (GS-12 step 5) will spend 160 hours during the first year of the program to develop educational and outreach materials. For every subsequent year, the Department estimates that staff will spend 40 hours to review and update educational materials, as appropriate. The hourly salary for Department staff was multiplied by an index of 1.69 to account for employee benefits and proportional operating costs, resulting in an hourly rate of \$52.96 for a GS-12, step 5 and \$74.43 for GS-14, step 5.

Due to lack of adequate data, however, the Department is not able to provide monetary estimates of several important benefits to society, including the increased employment opportunities for U.S. workers and the enhancement of worker protections for U.S. and H-2A workers. In addition, this NPRM has distributional effects that improve the ability of the part of workers and their families to meet the basic costs of living.

The Department has concluded that after consideration of both the quantitative and qualitative impacts of this NPRM, the societal benefits of the NPRM justify the societal costs.

### B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. Further, under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C 801 (SBREFA), an agency is required to produce a compliance guidance for small entities if the rule has a significant economic impact. The Assistant Secretary of ETA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), under the RFA at 5 U.S.C. 605(b), and certified that this rule will not have a significant economic impact on a substantial number of small entities.

The Department is requesting comment on the costs of these proposed policies on small entities, with the goal of ensuring a thorough consideration and discussion at the Final Rule stage.

#### 1. Definition of a Small Business

A small entity is one that is "independently owned and operated and which is not dominant in its field of operation." The definition of small business varies from industry to industry to the extent necessary to properly reflect industry size differences. An agency must either use the SBA definition for a small entity, or, establish an alternative definition for the agricultural industry. The Department has adopted the SBA definition, which is an establishment with annual revenues of less than \$0.75 million. The SBA also defines a reforestation small business as one that has annual revenues of less than \$7.0 million. The Department has also adopted that definition for its

reforestation and pine straw activity establishments.

#### 2. Impact on Small Businesses

The Department has estimated the incremental costs for small businesses from the 2008 Final Rule (the baseline) to this NPRM. We have estimated the costs of reading and reviewing the new Application and compliance processes, the enhanced coverage of transportation expenses, the enhanced worker protections through compliance certification, the changes in the requirement for housing inspections, and the enhanced U.S. worker referral period.<sup>28</sup>

Approximately 98 percent of U.S. farms have revenues of less than \$0.75 million and, therefore, fall within the SBA's definition of small entity. The Department estimates that by 2018 there will be approximately 26,427 Applications (not necessarily applicants) to the H-2A program. Even if all 26,427 Applications are filed by unique small farms, the percentage of small farms applying for temporary agricultural worker certification will be only 1.4 percent of the total number of small U.S. farms.<sup>29</sup>

To examine the impact of the proposed rule on small entities, the Department evaluates the impact of the incremental costs on the average small entity, which is assumed to apply for 12 temporary workers. The Department estimates that these farms have annual revenues of about \$367,000.<sup>30</sup>

<sup>28</sup> The analysis in this section does not include the impact of the higher wages for U.S. workers because they represent a transfer rather than an economic cost from a societal perspective. Transfer payments are payments from one group to another that do not affect total resources available to society. The increase in the wage rates for U.S. workers represents an important transfer from agricultural employers to U.S. workers. The higher wages for U.S. workers associated with the new methodology for estimating the AEWR represent an improved ability on the part of workers and their families to meet the costs of living, an important concern to the current Administration and a key aspect of the Department's mandate to ensure the wages and working conditions of similarly employed U.S. workers are not adversely affected.

<sup>29</sup> Based on the number of farms in 2007 and assuming that the number of farms will decline at the same average annual rate as it has in the past 10 years, the Department estimates that in 2018 there will be approximately 1,917,300 farms.

<sup>30</sup> Based on the average duration of temporary agricultural workers' stay, the Department estimates that these workers work, on average, 198 days. As already discussed, temporary agricultural workers will be paid, on average, \$9.36 per hour. Given this hourly rate and 1,584 working hours per year, a small entity hiring 12 temporary workers incurs hired farm labor costs of \$130,395. Based on the 2002 Census of Agriculture, hired farm labor costs account, on average, for 41.2 percent of total farm costs while total costs represent, on average, 86.3 percent of total revenues. Applying these rates to the estimated hired labor costs, we estimate that a

The Department recognizes that transfers constitute an increase in wage costs in order to comply with this rule for small businesses choosing to participate in the H-2A program. While we lack the data to know how many H-2A participants are small entities, the Department does not believe, based on program experience, that it constitutes a significant number of small entities. The Department seeks comments on these costs, and the number of small entities involved, so it can gauge this cost and thus the effect on these businesses.

#### a. Reading and Reviewing the New Application and Compliance Processes

During the first year that this proposed rule would be in effect, employers would need to learn about the new application process and how compliance will be determined. We estimate this cost by multiplying the time required to read the new rule and any educational and outreach materials that explain the H-2A application process under this NPRM by the average compensation of a human resources manager at an agricultural business. In the first year of the proposed rule, the Department estimates that the average small farm will spend approximately 1 hour of staff time to read and review the new application and compliance processes, which amounts to approximately \$60.27 in labor costs.<sup>31</sup>

#### b. Enhanced Coverage of Transportation Expenses

Under the 2008 Final Rule, the employer provides for travel expenses and subsistence for foreign workers only to and from the place of recruitment, *i.e.* the appropriate U.S. consulate or port of entry. Under the proposed rule, the employer is required to pay the costs of transportation from the worker's home to and from the place of employment. The Department estimates that the average small farm would incur costs of \$63.00 per worker related the enhanced coverage of transportation expenses.<sup>32</sup>

small farm employing 12 temporary agricultural workers would have total production expenses of \$316,777, revenues of \$366,936, and net farm income (*i.e.*, revenues minus production expenses) of \$50,159 per year.

<sup>31</sup> The Department estimates that employers will spend 1 hour to read the new rule and outreach and educational materials explaining the program. In addition, the Department estimates that the median hourly wage for a human resources manager is \$42.15 (as published by the Department's OES survey, O\*Net Online), which we increased by 1.43 to account for private-sector employee benefits (source: Bureau of Labor Statistics).

<sup>32</sup> The Department estimates these costs by multiplying the total number of H-2A workers certified by the cost of bus fare from the worker's home to the consulate and back. The Department assumes one-way cost of bus fare of \$31.50.

### c. Enhancing Worker Protections Through Compliance Certification

The certification of compliance will represent minimal costs to employers because they will need to submit copies of recruitment activities, details of job offers, workers' compensation documentation, and for H-2ALCs, registration, surety bond, and work contracts, rather than attesting that they have complied with the required elements of the H-2A program. Under the 2008 Final Rule, employers are already required to obtain and retain these documents and the proposed rule simply requires the submission of those existing documents, particularly workers' compensation and housing inspections, to the Department in order to satisfy the program's underlying statutory assurances. The Department estimates this cost by multiplying the difference in time to prepare the new H-2A Application as compared to that under the 2008 Final Rule for both new H-2A applicants and previous applicants. We then multiply these products by the average compensation of a human resources manager at an agricultural business.

For small employers applying to the program for the first time, the Department estimates that the Application will take approximately one-half hour more to complete. This results in additional labor costs equal to \$30.14. For applicants familiar with the process, the Department estimates that the Application will require approximately 20 additional minutes to complete. The result is additional labor costs of \$20.09 for applicants familiar with the program. Because the Application will be longer, the Department adds the costs of photocopying additional pages and additional postage required to the labor costs above.<sup>33</sup> In total, the Department estimates that the average small farm that is a new H-2A applicant would incur costs of \$48.94, and the average small farm that is a previous H-2A applicant would incur costs of \$38.89.

This NPRM also requires that contracts be translated into the languages of employees who do not speak English. Employers are already required to provide contract translations for employees who speak Spanish. We multiply the percent of H-2A workers who do not speak English or Spanish by the average number of pages per contract and the cost per page for

<sup>33</sup> The Department estimates that an average of 150 additional pages will need to be photocopied at a cost of \$0.12 per photocopy. The additional pages weigh approximately 17.6 ounces and require \$0.80 in postage per application.

translation.<sup>34</sup> The Department estimates the average small farm would incur costs of contract translation of \$5.96.

### d. Changes in the Requirement for Housing Inspections

The proposed rule retains most of the 2008 Final Rule provisions governing housing inspections. The employer's obligations with respect to housing standards, rental or public accommodations, open range housing, deposit charges, charges for public housing, and family housing under the proposed regulations have remained the same as under the 2008 Final Rule.

One notable difference, however, is the timeframe in which an inspection of the employer's housing must occur. Unlike the 2008 Final Rule, this NPRM requires that the pre-occupancy inspection of the employer's housing be completed prior to the issuance of a temporary labor certification, which is 30 days before the date of need for the workers.

The Department expects that this change in timing will have a minimal economic impact on employers. Prior to the effective date of the 2008 Final Rule, the Department's experience was that the majority of employers who routinely utilized the H-2A program prepared their housing in advance of inspection and/or communicated with SWA staff with respect to changes in the location(s) or type(s) of housing before Application filing occurred at 45 days prior to the date of need. Because of data limitations, we were not able to monetize the costs and benefits associated with this provision.

### e. Enhanced U.S. Worker Referral Period

The NPRM proposes to require that employers maintain a complete recruitment report and all supporting documentation for 5 years (rather than 3 years as required by the 2008 Final Rule). The Department estimates that the additional record retention requirements will add costs equal to \$21.99 to the average small farm for the retention of the Application and supporting documents.<sup>35</sup>

### f. Additional Costs for Small Employers Who are H-2ALCs

Employers who are H-2ALCs will incur additional costs related to the

<sup>34</sup> Approximately 0.6 percent of H-2A workers do not speak English or Spanish. Source: <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/table32d.xls>. The Department assumes that the average number of pages per contract is 50, and the cost per page for translation is \$19.50. Source: <http://www.languagescape.com>

<sup>35</sup> We assume that the average small farm will purchase one additional file drawer for document storage.

submission of contracts and the documentation of the surety bond. For both categories, we estimate the cost by multiplying the additional photocopies required by the cost per photocopy. The Department estimates that the average small H-2ALC will incur costs of \$6.00 for the submission of contract photocopies and \$0.60 for the documentation of the surety bond.<sup>36</sup>

### g. Reforestation and Pine Straw Activity

The Department has proposed to include reforestation crews and pine straw gathering activities in the categories of agricultural activities for which H-2A visas would be appropriate.<sup>37</sup> The Department acknowledges that the transfer of reforestation and pine straw gathering industries from H-2B to H-2A will impose additional costs on such employers, such as housing, transportation, meals, and the three-fourths guarantee. The Department is, however, unable to quantify these costs as it is unknown how many of the employers who currently apply for H-2B visa status for their workers actually provide such benefits already as a condition of employment. As mentioned above, the Department believes that some percentage of employers in these industries already provide some, if not all, of these benefits, and thus is unable to estimate the cost to those employers who do not. The Department invites comment from reforestation and pine straw employers and others on the benefits currently provided in those industries, so it can gauge this cost and thus the effect on these businesses.

### h. Other Issues

The Department does not anticipate that the increased SWA activity under this Proposed Rule will result in significant processing delays, as the Department continues to operate under the statutory mandate to make a determination of whether or not the Application meets the threshold requirements for certification within 7 days of filing. The Department's analysis pursuant to E.O. 12866, *supra.*, contains an analysis of potential delays for all employers, including small employers, incurred for all reasons, not just for the reason of delays that may happen as a result of increased SWA activity. The conclusion that the Department has drawn from this

<sup>36</sup> We assume that the average number of pages per contract is 50, the number of pages per surety bond is 5, and the cost per photocopy is \$0.12.

<sup>37</sup> The Department received applications from 173 employers in reforestation activities, including pine straw gathering, in the Department's H-2B program in FY 2008.

analysis is that the increased SWA activity, which the department believes is required by statute, will not result in increased delays to employers. The Department invites comment on this issue.

### 3. Total Cost Burden for Small Entities

The Department's calculations indicate that the total average annual cost of this NPRM is \$911 for the average small entity applying to the program for the first time and \$901 for the average small entity that has previous program familiarity. Both of these costs represent less than 0.3 percent of annual revenues.

For small entities that apply for 1 worker instead of 12 (representing the smallest of the small farms that hire workers), the Department estimates that the total average annual cost of the rule ranges from \$143 (for those that have previous program familiarity) to \$153 (for small entities new to the program). These values represent approximately 0.5 percent of annual revenues for these very small farms.

Therefore, the Department believes that this NPRM is expected to have a limited net direct cost impact on small farm employers, above and beyond the baseline of the current costs required by the program as it is currently implemented under the 2008 Final Regulation.

### 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-2A worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

The SWAs are mandated to perform certain activities for the Federal Government under this program, and are compensated for the resources used in performing these activities. While the SWA role was altered under the 2008 Final Rule, before that time employers filed Applications for H-2A labor certifications concurrently with the Department and the SWA having

jurisdiction over the area of intended employment. The SWA and the Department through the NPCs both receive the Application and review the terms of the job offer. The SWA then placed the job order to initiate local recruitment. The SWA directly supervised and assisted employer recruitment, and the making of referrals of U.S. workers. The NPC directed the SWA to place job orders into intrastate/interstate clearance ensuring employers meet advertising and recruitment requirements. The SWA was responsible for processing the employer's certification request for H-2A labor certification, overseeing the recruitment and directing referrals to the employer. SWAs coordinated all activities regarding the processing of H-2A Applications directly with the appropriate NPC for their jurisdiction, including transmittal to the NPC of housing inspection results, prevailing wage surveys, prevailing practice surveys or any other material bearing on the Application. Once the Application was reviewed by the SWA and after the employer demonstrated that it conducted its required recruitment, the SWA then sent the complete Application to the appropriate NPC for final certification or denial.

This NPRM proposes to return to a more active SWA role in the application process as had been in place from 1987-2008. SWA activities under the H-2A program are currently funded by the Department through grants provided under the Wagner-Peyser Act. 29 U.S.C. 49 *et seq.* The Department anticipates continuing funding under the Wagner-Peyser Act. As a result of this NPRM and the publication of a final regulation, the Department will analyze the amounts of such grants made available to each State to fund the activities of the SWAs.

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

The Department has determined that this rulemaking did not impose a significant impact on a substantial number of small entities under the RFA; therefore, the Department is not required to produce any Compliance Guides for Small Entities as mandated by the SBREFA. The Department has similarly concluded that this Proposed Rule is not a major rule requiring review by the Congress under the 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

The Department has reviewed this Proposed Rule in accordance with E.O. 13132 regarding federalism and has determined that it does not have federalism implications. The Proposed Rule does not have substantial direct effects on States, on the relationship between the States, or on the distribution of power and responsibilities among the various levels of Government as described by E.O. 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. Executive Order 13175—Indian Tribal Governments

This rule was reviewed under the terms of E.O. 13175 and determined not to have Tribal implications. The rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. As a result, no Tribal summary impact statement has been prepared.

### G. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681) requires the Department to assess the impact of this Proposed Rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale.

The Department has assessed this Proposed Rule and determines that it will not have a negative effect on families.

### H. Executive Order 12630—Government Actions and Interference With Constitutionally Protected Property Rights

This Proposed Rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

**I. Executive Order 12988—Civil Justice**

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

**J. Plain Language**

The Department drafted this NPRM in plain language.

**K. Executive Order 13211—Energy Supply**

This rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

**L. Paperwork Reduction Act**

As part of its continuing effort to reduce paperwork and respondent burden, DOL conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The PRA requires all Federal agencies to analyze proposed regulations for potential time burdens on the regulated community created by provisions in the proposed regulations, which require the submission of information. The information collection requirements must be submitted to the OMB for approval. 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(l) or is exempt from the PRA.

The majority of the information collection (IC) requirements for the current H-2A program are approved under two OMB control numbers—OMB

Control Number 1205-0466 (which includes ETA Form 9142) and OMB Control Number 1205-0134 (which includes Form ETA 790). The IC for 1205-0466 will need to be modified to account for sections of the proposed regulation that are similar to the current regulation, but were not accounted for previously. The IC for 1205-0134 was recently modified as part of the regular extension process, which is still pending with OMB at the time of this publication. Many other provisions under this Proposed Rule are either exempt from a burden analysis or have been accounted for by other OMB control numbers. Below is a section by section analysis of the PRA burden. Any necessary adjustments to the burden calculations have been submitted to OMB for review under section 3507(d) of the PRA. For an additional explanation of how the Department calculated the burden hours and related costs, the PRA package for information collection 1205-0466 may be obtained by contacting the PRA addressee shown below or at <http://www.RegInfo.gov>.

**PRA Addressee:** Sherril Hurd, Office of Policy Development and Research, U.S. Department of Labor, Employment & Training Administration, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210. Telephone: 202-693-3700 (this is not a toll-free number).

Comments should be sent to (1) the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration; and a copy to (2) Office of Foreign Labor Certification, Room C-4312, 200 Constitution Ave., NW., Washington, DC 20210 or fax: 202-693-2768. Comments to OMB may be submitted by using the Federal e-Rulemaking portal at <http://www.regulations.gov> (follow instructions for submission of comments) or by fax: 202-395-5806. OMB requests that comments be received within 60 days of publication of the Proposed Rule to ensure their consideration. Please note that comments submitted to OMB are a matter of public record.

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

- 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.

**Summary**

The IC is required by secs. 214(c) and 218 of the INA (8 U.S.C. 1184(c), and 1188) and 8 CFR 214.2(h)(1), (2), and (5). The INA requires employers who wish to hire foreign labor to receive a certification from the Secretary that there are not sufficient U.S. workers for the job opportunity and that hiring the foreign worker will not adversely affect wages and working conditions of U.S. workers similarly employed. This Proposed Rule is designed to obtain the necessary information for the Secretary to make an informed decision in meeting her statutory obligation. The IC will be used, among other things, to inform U.S. workers of the job opportunity thereby testing the labor market, to determine whether or not the employer is offering the proper wage to all employees, to ensure that the employers, agents, or associations are qualified to receive foreign workers, to have written assurances from the employer of its intent to comply with program requirements, and to ensure program integrity.

**Hourly Burden**

NPRM Section	IC Action	Obligation to respond <sup>38</sup>	Covered under OMB No.	Total No. resp.	Hourly burden	Total hours
655.130, 131, & 132 .....	Fill out 9142 .....	M .....	1205-0466	8,356	1 hour .....	8,356
655.130, 131, & 132 .....	Send in 790 .....	M .....	1205-0134	8,356	1 hour .....	8,356
655.132(b)(1) .....	List of fixed site employers (FSE) .....	M .....	1205-0466	559	30 min .....	280
655.132(b)(2) .....	Submit FLC certificate .....	M .....	1205-0466	559	5 min .....	47
655.132(b)(3) .....	Submit proof of bond .....	M .....	1205-0466	559	5 min .....	47



NPRM Section	IC Action	Obligation to respond <sup>38</sup>	Covered under OMB No.	Total No. resp.	Hourly burden	Total hours
655.132(b)(4)	Submit contracts with FSE	M	1205-0466	559	30 min	280
655.132(b)(5)(i)	Submit housing approval	M	1205-0466	559	5 min	47
655.132(b)(5)(ii)	Drivers' licenses & Auto Insurance	M	1205-0466	559	5 min	47
655.133(a)	Letter of Representation	M	1205-0466	4,574	30 min	2,287
655.133(b)	Agent's FLC certificate	M	1205-0466	309	5 min	26
655.134(b)	Request waiver of 45-day filing	R	1205-0466	151	30 min	76
655.135(i)	Notify of duty to depart	M	1205-0466	8,356	2 min	278
655.135(j) & (k)	Inform of fee prohibition	M	1205-0466	8,356	5 min	696
655.135(l)	Workers' rights poster	M	<sup>39</sup> Exempt			
655.144	Modify application	R	1205-0466	1,151	30 min	576
655.145	Amend application	R	1205-0466	668	30 min	334
655.150	SWA posts & refers	M	1205-0134	8,356	25 min	3,482
655.151 & 152	Advertising	R	<sup>40</sup> Exempt			
655.153	Contact old employees	R	1205-0466	8,356	1 hour	8,356
655.154	Proof of recruitment	M	<sup>41</sup> Exempt			
655.156	Recruitment report	R	1205-0466	8,356	1 hour	8,356
655.157	Withholding workers complaints	V	1205-0466	0	30 min	0
655.167	Document retention	M	1205-0466	8,356	10 min	1,393
655.170	Extension application	R	1205-0466	418	30 min	209
655.171	Notice of Appeal	R	1205-0466	70	20 min	23
655.172	Request withdrawal	R	1205-0466	226	10 min	38
655.173	Petition to increase meal charges	R	1205-0466	84	1 hour	84
655.180, 181, & 182	Audit, revocation, debarment	R	<sup>42</sup> Exempt			
655.185 & 501.2	Job service complaint system	V	1205-0039			
655.185	DOJ complaints	V	<sup>(43)</sup>			
501.4(b) & 501.6(c)	Filing complaints	V	1215-0001			

Annual Hourly Burden

In order to estimate the potential hourly burden of the information required to apply for a labor certification as described in this Proposed Rule, the Department used program experience and program data from fiscal year 2008. Based on information on program usage from FY 2008 the Department received 8,356 Applications requesting more than 100,000 foreign workers. This is an increase over the 7,725 Applications received in previous years used to calculate the burden in 1205-0466 originally. This is also more than the 4,600 responses accounted for in the 1205-0134 IC approved in 2006. The current extension request has adjusted the burden calculation.

For the number of appeals, modifications, requests for waivers of the filing time, extensions, and other program components requiring information collection under the PRA, the Department also used program experience to determine annual hourly burdens described in the chart above.

The total annual hourly burdens for the two ICs requiring adjustments due to this NPRM have been calculated as follows:

	Hours
1205-0466	31,833
1205-0134	10,688

Monetized Hourly Burden

Employers filing Applications for temporary alien employment certification may be from a wide variety of industries. Salaries for employers and/or their employees who perform the reporting and recordkeeping functions required by this regulation may range from several hundred dollars to several hundred thousand dollars where the corporate executive office of a large company performs some or all of these

number or called in to the Office of Special Counsel.

functions themselves. However, the Department believes that in most companies a Human Resources Manager will perform these activities. In estimating employer staff time costs, the Department used the hourly wage rate for a Human Resources Manager (\$39.50), as published by the DOL's OES OnLine,<sup>44</sup> and increased by a factor of 1.43 to account for employee benefits and other compensation for a total hourly cost of \$56.50. The SWA employees required to help employers with reviewing and translating the Form ETA 790 and referring workers to the employer are based on a Labor Relations Specialists (\$23.70) as published by the DOL's OES OnLine and increased by a factor of 1.52 to account for employee benefits and other compensation for a total hourly cost of \$36.02. Total annual respondent hour costs for the two main information collections are estimated as follows:

1205-0466	33,256 hours × \$56.09 = \$1,865,329
1205-0134	8,356 hours × \$56.09 = \$468,688
	3,482 hours × \$36.02 = \$125,422

<sup>44</sup> Source: Bureau of Labor Statistics 2009 OES wage data.

<sup>38</sup> Obligation to respond to this information collection is mandatory (M), required for benefit (R), or voluntary (V).

<sup>39</sup> See 5 CFR 1320.3.

<sup>40</sup> See 5 CFR 1320.3(b).

<sup>41</sup> See 29 CFR 1602.14 (OMB 3046-0040); 29 CFR 1627.3(b)(3) (OMB 3046-0018); 29 CFR 1627.3(b)(3).

<sup>42</sup> See 5 CFR 1320.3(h)(6) & (9); 5 CFR 1320.4(a)(2).

<sup>43</sup> Complaints can be filed on DOJ's "Charge Complaint" form, which has no OMB control

**Cost Burden to Respondents**

The Proposed Rule stipulates that the applicant who receives an approved labor certification must pay \$150 plus \$15 for each foreign worker requested with an overall cap of \$2,000 per Application. Assuming a 95 percent approval rate and the same amount of approved foreign workers as in previous years at 94,445, the Department estimates the maximum cost to employers will be \$2,607,405 [(8,356 applicants × .95 × \$150) + (94,445 foreign workers × \$15)].

*Affected Public:* Farms, business or other for-profit; not-for-profit institutions, and State governments.

*Estimated Number of Respondents:* 8,408 (8,356 employers and 52 SWAs).

*Estimated Number of Responses:* 77,853.

*Frequency of Response:* Annually; occasionally.

*Estimated Annual Burden Hours:* 43,674.

*Estimated Annual Hourly Burden Cost:* \$2,459.

*Estimated Annual Cost Burden:* \$2,607,405.

**List of Subjects in 20 CFR Part 655**

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

**List of Subjects in 29 CFR Part 501**

Administrative practice and procedure, Agriculture, Aliens, Employment, Housing, Housing standards, Immigration, Labor, Migrant labor, Penalties, Transportation, Wages.

For the reasons stated in the preamble, the Department of Labor proposes that 20 CFR part 655 and 29 CFR part 501 be amended as follows:

**TITLE 20—EMPLOYEES' BENEFITS****PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES**

1. Revise the authority citation for part 655 to read as follows:

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec.

412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; 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).

Subparts A and C issued under 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).

Subparts D and E authority repealed. Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and sec. 323(c), Pub. L. 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); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K authority repealed. Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

2. Revise the heading of part 655 to read as set forth above.

3. Revise § 655.1 to read as follows:

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

This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the United States (U.S.) in occupations other than agriculture or registered nursing.

4. Revise subpart B to read as follows:

**Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)**

Sec.  
655.100 Scope and purpose of Subpart B.  
655.101 Authority of the Office of Foreign Labor Certification (OFLC) Administrator.  
655.102 Special procedures.  
655.103 Overview of this Subpart and definition of terms.

**Prefiling Procedures**

655.120 Offered wage rate.  
655.121 Job orders.  
655.122 Contents of job offers.

**Application for Temporary Employment Certification Filing Procedures**

655.130 Application filing requirements.  
655.131 Association filing requirements  
655.132 H–2A Labor contractor (H–2ALC) filing requirements.  
655.133 Requirements for agents.  
655.134 Emergency situations.  
655.135 Assurances and obligations of H–2A employers.

**Processing of Application for Temporary Employment Certification**

655.140 Review of applications.

655.141 Notice of acceptance.  
655.142 Electronic job registry.  
655.143 Notice of deficiency.  
655.144 Submission of modified application.  
655.145 Amendments to applications for temporary employment certification.

**Post-Acceptance Requirements**

655.150 Interstate clearance of job order.  
655.151 Newspaper advertisements.  
655.152 Advertising requirements.  
655.153 Contact with former U.S. employees.  
655.154 Additional positive recruitment.  
655.155 Referrals of U.S. workers.  
655.156 Recruitment report.  
655.157 Withholding of U.S. workers prohibited.  
655.158 Duration of positive recruitment.

**Labor Certification Determinations**

655.160 Determinations.  
655.161 Criteria for certification.  
655.162 Approved certification.  
655.163 Certification fee.  
655.164 Denied certification.  
655.165 Partial certification.  
655.166 Appeal procedures.  
655.167 Document retention requirements.

**Post Certification**

655.170 Extensions.  
655.171 Appeals.  
655.172 Withdrawal of job order and application for temporary employment certification.  
655.173 Setting meal charges; petition for higher meal charges.  
655.174 Public disclosure.

**Integrity Measures**

655.180 Audit.  
655.181 Revocation.  
655.182 Debarment.  
655.183 Less than substantial violations.  
655.184 Applications involving fraud or willful misrepresentation.  
655.185 Job service complaint system; enforcement of work contracts.

**§ 655.100 Scope and purpose of Subpart B.**

This subpart sets out the procedures established by the Secretary of the United States Department of Labor (the Secretary) under the authority given in 8 U.S.C. 1188 to acquire information sufficient to make factual determinations of:

(a) Whether there are sufficient able, willing, and qualified United States (U.S.) workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H–2A workers); and

(b) Whether the employment of H–2A workers will adversely affect the wages and working conditions of workers in the U.S. similarly employed.

**§ 655.101 Authority of the Office of Foreign Labor Certification (OFLC) Administrator.**

The Secretary has delegated her authority to make determinations under 8 U.S.C. 1188 to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). The determinations are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff members; e.g., a Certifying Officer (CO).

**§ 655.102 Special procedures.**

To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the Immigration and Nationality Act (INA), while not deviating from statutory requirements, the OFLC Administrator has the authority to establish, continue, revise, or revoke special procedures for processing certain H-2A *Application for Temporary Employment Certification*. Employers must demonstrate upon written application to the OFLC Administrator that special procedures are necessary. These include special procedures currently in effect for the handling of applications for sheepherders in the Western States (and adaptation of such procedures to occupations in the range production of other livestock), and for custom combine harvesting crews. Similarly, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the OFLC Administrator has the authority to establish monthly, weekly, or semi-monthly adverse effect wage rates (AEWR) for those occupations for a statewide or other geographical area. Prior to making determinations under this section, the OFLC Administrator may consult with affected employer and worker representatives.

**§ 655.103 Overview of this Subpart and definition of terms.**

(a) *Overview.* In order to bring nonimmigrant workers to the U.S. to perform agricultural work, an employer must first demonstrate to the Secretary that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed and that the employment of foreign workers will not adversely affect the wages and working condition of U.S. workers similarly employed. This rule describes a process by which the Department of Labor (Department or DOL) makes such a determination and certifies her

determination to the Department of Homeland Security (DHS).

(b) *Definitions.*

*Administrative Law Judge (ALJ).* A person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

*Adverse effect wage rate (AEWR).* The annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey.

*Agent.* A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(2) Is not itself an employer, or a joint employer, as defined in this subpart with respect to a specific application; and

(3) Is not under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review, or DHS under 8 CFR 292.3 or 1003.101.

*Agricultural association.* Any nonprofit or cooperative association of farmers, growers, or ranchers (including but not limited to processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses, or transports any worker that is subject to 8 U.S.C. 1188. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

*Area of intended employment.* The geographic area within normal commuting distance of the place of the job opportunity for which the certification is sought. There is no rigid measure of distance that 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 the regional transportation network). 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.* 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. Such a person is also permitted to act as an agent under this subpart. No attorney who is under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this subpart

*Certifying Officer (CO).* The person who makes determination on an *Application for Temporary Labor Certification* filed under the H-2A program. The OFLC Administrator is the national CO. Other COs may be designated by the OFLC Administrator to also make the determinations required under this subpart.

*Corresponding employment.* The employment of workers who are not H-2A workers by an employer who has an approved H-2A *Application for Temporary Labor Certification* in any work included in the job order, or in any agricultural work performed by the H-2A workers. To qualify as corresponding employment the work must be performed during the validity period of the job order, including any approved extension thereof.

*Date of need.* The first date the employer requires the services of H-2A workers as indicated in the *Application for Temporary Labor Certification*.

*Employee.* A person who is engaged to perform work for an employer, as defined under the general common law of agency. 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 to perform the work; 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 may be considered and no one factor is dispositive.

*Employer.* A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(1) Has a place of business (physical location) in the U.S. and a means by

which it may be contacted for employment;

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employee) with respect to an H-2A worker or a worker in corresponding employment; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).

*Federal holiday.* Legal public holiday as defined at 5 U.S.C. 6103.

*Fixed-site employer.* Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this subpart, who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart as incident to or in conjunction with the owner's or operator's own agricultural operation.

*H-2A Labor Contractor (H-2ALC).* Any person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

*H-2A worker.* Any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), as amended.

*Job offer.* The offer made by an employer or potential employer of H-2A workers to both U.S. and H-2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

*Job opportunity.* Full-time employment at a place in the U.S. to which U.S. workers can be referred.

*Job Order.* The document containing the terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its inter- and intra-State job clearance systems based on the employer's Form ETA-790, as submitted to the SWA.

*Joint employment.* Where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer

of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.

*Master application.* An *Application for Temporary Labor Certification* filed by an association of agricultural producers as a joint employer with its employer-members. A master application must cover the same occupations and comparable agricultural employment; the same start date of need for all employer-members listed on the *Application for Temporary Employment Certification*; and may cover multiple areas of intended employment within a single State.

*National Processing Center (NPC).* The office within OFLC in which the COs operate and which are charged with the adjudication of *Applications for Temporary Employment Certification*.

*Office of Foreign Labor Certification (OFLC).* OFLC means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA concerning the admission of foreign workers to the U.S. to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

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

*Positive recruitment.* The active participation of an employer or its authorized hiring agent, performed under the auspices and direction of the OFLC, in recruiting and interviewing individuals in the area where the employer's job opportunity is located and any other State designated by the Secretary as an area of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

*Prevailing practice.* A practice engaged in by employers, that:

(1) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; and

(2) This 50 percent or more of employers also employs 50 percent or more of U.S. workers in the occupation and area (including H-2A and non-H-2A employers) for purposes of determinations concerning the provision of family housing, and frequency of wage payments, but non-H-2A employers only for determinations concerning the provision of advance transportation and the utilization of labor contractors.

*Prevailing wage.* Wage established pursuant to 20 CFR 653.501(d)(4).

*State Workforce Agency (SWA).* State government agency that receives funds pursuant to the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

*Strike.* A concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement).

*Successor in interest.* Where an employer has violated 8 U.S.C. 1188, 29 CFR part 501, or these regulations, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(7) Similarity in machinery, equipment, and production methods;

(8) Similarity of products and services; and

(9) The ability of the predecessor to provide relief.

For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

*Temporary agricultural labor certification.* Certification made by the OFLC Administrator with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as an H-2A worker, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188.

*United States (U.S.).* The continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and, as of the transition program effective date, as defined in the Consolidated Natural Resources Act of

2008, Pub. L. 110–229, Title VII, the Commonwealth of the Northern Mariana Islands.

*United States worker (U.S. worker).* A worker who is:

(1) A citizen or national of the U.S.; or

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.; or

(3) An individual who is an authorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

*Wages.* All forms of cash remuneration to a worker by an employer in payment for personal services.

*Work contract.* All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 29 CFR part 501, or this subpart. The contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum will be the terms of the job order and any obligations required under 8 U.S.C. 1188, 28 CFR part 501, or this subpart.

(c) *Definition of agricultural labor or services.* For the purposes of this subpart, agricultural labor or services, pursuant to 8 U.S.C.

1101(a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; logging employment; reforestation activities; or pine straw activities.

(1) *Agricultural labor* for the purpose of paragraph (c) of this section means all service performed:

(i) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(ii) In the employ of the owner or tenant or other operator of a farm, in

connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(iii) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(iv) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(v) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (c)(1)(iv) but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(vi) The provisions of paragraphs (c)(1)(iv) and (c)(1)(v) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(vii) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

As used in this section, the term farm includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (c) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 1141j(g) of title 12, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. See sec. 29 U.S.C. 203(f), as amended (sec. 3(f) of the FLSA, as codified). Under 12 U.S.C. 1141j(g) agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: gum spirits of turpentine and gum rosin. In addition as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in sec. 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g) or as applied in sec. 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR Part 780.

(4) *Logging employment.* Operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites.

(5) *Reforestation activities.* Predominately manual forestry work that includes, but is not limited to, tree planting, brush clearing and pre-commercial tree thinning.

(6) *Pine straw activities.* Certain activities predominately performed using hand tools, including but not limited to the raking, gathering, baling, and loading of pine straw that is a product of pine trees that are managed using agricultural or horticultural/silvicultural techniques.

(d) *Definition of a temporary or seasonal nature.* For the purposes of

this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

### Prefiling Procedures

#### § 655.120 Offered wage rate.

(a) To comply with its obligation under § 655.122 (l), an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, or the Federal or State minimum wage, except where a special procedure is approved for an occupation or specific class of agricultural employment.

(b) If the prevailing hourly wage rate or piece rate is adjusted during a work contract, and is higher than the highest of the AEWR, the prevailing wage, or the Federal or State minimum wage, the employer must pay that higher prevailing wage or piece rate, upon notice to the employer by the Department.

(c) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the AEWRs for each State as a notice in the **Federal Register**.

#### § 655.121 Job orders.

(a) *Area of intended employment.*

(1) Prior to filing an *Application for Temporary Employment Certification*, the employer must submit a job order to the SWA serving the area of intended employment for intrastate clearance, identifying it as a job order to be placed in connection with a future *Application for Temporary Labor Certification* for H-2A workers. The employer must submit this job order no more than 75 calendar days and no fewer than 60 calendar days before the date of need. If the job opportunity is located in more than one State within the same area of intended employment, the employer may submit a job order to any one of the SWAs having jurisdiction over the anticipated worksites.

(2) Where the job order is being placed in connection with a future master application to be filed by an association of agricultural employers as a joint employer, the association may submit a single job order to be placed in the name of the association on behalf of all employers that will be duly named

on the *Application for Temporary Employment Certification*.

(3) The job order submitted to the SWA must satisfy the requirements for agricultural clearance orders in 20 CFR part 653, subpart F and the requirements set forth in § 655.122.

(b) *SWA review.* The SWA will review the contents of the job order for compliance with the requirements specified in 20 CFR part 653, subpart F and this subpart and work with the employer to address any noted deficiencies. Any issue with respect to whether a job order may properly be placed in the job order system that cannot be resolved with the applicable SWA must be first brought to the attention of the CO(s) in the NPC and, if necessary, the OFLC Administrator who may direct that the job order be placed following a written determination that the applicable program requirement(s) has been met. If the Department concludes that the job order is not acceptable, it will so inform the employer using the procedures applicable to a denial of certification set forth in § 655.164.

(c) *Intrastate clearance.* Upon its clearance of the job order, the SWA must promptly place the job order in intrastate clearance and commence recruitment of U.S. workers.

(d) *Duration of job order posting.* The SWA must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.135(d), and must refer each U.S. worker who applies (or on whose behalf an *Application for Temporary Labor Certification* is made) for the job opportunity.

(e) *Modifications to the job order.*

(1) Prior to the issuance of the final determination, the CO may require modifications to the job order when the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions. If any such modifications are required after a Notice of Acceptance has been issued by the CO as described in § 655.141 of this subpart, the modifications must be made or certification will be denied pursuant to § 655.164 of this subpart; however, the certification determination will not be delayed beyond 30 calendar days prior to the date of need as a result of such modification.

(2) The employer may request a modification of the job order prior to the submission of an *Application for Temporary Employment Certification*. However, the employer may not reject referrals against the job order based upon a failure on the part of the applicant to meet the amended criteria,

if such referral was made prior to the amendment of the job order. The employer may not amend the job order on or after the date of filing an *Application for Temporary Employment Certification*.

#### § 655.122 Contents of job offers.

(a) *Prohibition against preferential treatment of aliens.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers. This does not relieve the employer from providing to H-2A workers at least the same minimum level of benefits, wages, and working conditions which are being offered to U.S. workers consistent with this section.

(b) *Job qualifications and requirements.* Each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.

(c) *Minimum benefits, wages, and working conditions.* Every job offer accompanying an *Application for Temporary Employment Certification* must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (p) of this section.

(d) *Housing.*

(1) *Obligation to provide housing.* The employer must provide housing at no cost to the H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day. Housing must be provided through one of the following means:

(i) *Employer-provided housing.* Employer-provided housing must meet the full set of DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system, will be processed under the procedures set forth at § 654.403 of this chapter; or

(ii) *Rental and/or public accommodations.* Rental or public accommodations or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards, State standards will apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing. The employer must document to the satisfaction of the CO that the housing complies with the local, State, or Federal housing standards.

(2) *Standards for range housing.* Housing for workers principally engaged in the range production of livestock must meet standards of DOL OSHA for such housing. In the absence of such standards, range housing for shepherders and other workers engaged in the range production of livestock must meet guidelines issued by OFLC.

(3) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing must not be levied upon workers. However, employers may require workers to reimburse them for damage caused to housing by the individual worker(s) found to have been responsible for damage which is not the result of normal wear and tear related to habitation.

(4) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by the employer, the employer must pay any charges normally required for use of the public housing units directly to the housing's management.

(5) *Family housing.* When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, it must be provided to workers with families who request it.

(6) *Certified housing that becomes unavailable.* If after a request to certify housing, such housing becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with the local, State, or Federal housing standards applicable under this section. The employer must promptly notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance with the applicable local, State or Federal safety and health standards, in

accordance with the requirements of this section. If, upon inspection, the SWA determines the substituted housing does not meet the applicable housing standards, the SWA must promptly provide written notification to the employer to cure the deficiencies with a copy to the CO. An employer's failure to comply with the applicable standards will result in either a denial of a pending *Application for Temporary Employment Certification* or revocation of the temporary labor certification under this subpart.

(e) *Workers' compensation.*

(1) The employer must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment.

(2) Prior to issuance of the temporary labor certification, the employer must provide the CO with proof of workers' compensation insurance coverage meeting the requirements of this paragraph, including the name of the insurance carrier, the insurance policy number, and proof of insurance for the dates of need, or, if appropriate, proof of State law coverage.

(f) *Employer-provided items.* The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

(g) *Meals.* The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.173.

(h) *Transportation; daily subsistence.*

(1) *Transportation to place of employment.* If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for

transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad to the place of employment. When it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, or when the employer extends such benefits to similarly situated H-2A workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence payment must be at least as much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under paragraph (f) of this section. Note that the FLSA applies independently of the H-2A requirements and imposes obligations on employers regarding payment of wages.

(2) *Transportation from place of employment.* If the worker completes the work contract period, or if the employee is terminated without cause, and the worker has no immediate subsequent H-2A employment, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer who has not agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for such expenses. If the worker has contracted with a subsequent employer who has agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses. The employer is not relieved of its obligation to provide or pay for return transportation and subsistence if an H-2A worker is displaced as a result of the employer's compliance with the 50 percent rule as described in § 655.135(d) of this subpart

with respect to the referrals made after the employer's date of need.

(3) *Transportation between living quarters and worksite.* The employer must provide transportation between housing provided or secured by the employer and the employer's worksite at no cost to the worker.

(4) *Employer-provided transportation.* All employer-provided transportation must comply with all applicable Federal, State or local laws and regulations, and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.105 and 29 CFR 500.120 to 500.128. If workers' compensation is used to cover transportation, in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation and they must have property damage insurance.

(i) *Three-fourths guarantee.*

(1) *Offer to worker.* The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any.

(i) For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and that has been approved by the CO.

(ii) The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect.

(iii) Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the

worker would have to be guaranteed employment for at least 360 hours (10 weeks  $\times$  48 hours/week = 480 hours  $\times$  75 percent = 360). If a Federal holiday occurred during the 10-week span, the 8 hours would be deducted from the total hours for the work contract, before the guarantee is calculated. Continuing with the above example, the worker would have to be guaranteed employment for 354 hours (10 weeks  $\times$  48 hours/week = 480 hours - 8 hours (Federal holiday)  $\times$  75 percent = 354 hours).

(iv) A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If during the total work contract period the employer affords the U.S. or H-2A worker less employment than that required under this paragraph, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer will not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time as specified in the job order.

(2) *Guarantee for piece rate paid worker.* If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the AEWR, whichever is higher, to calculate the amount due under the guarantee.

(3) *Failure to work.* Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (i)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with this subpart.

(4) *Displaced H-2A worker.* The employer is not liable for payment of the three-fourths guarantee to an H-2A worker whom the CO certifies is

displaced because of the employer's compliance with the 50 percent rule described in § 655.35(d) with respect to referrals made during that period.

(5) *Obligation to provide housing and meals.* Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide housing and meals in accordance with paragraphs (d) and (g) of this section for each day of the contract period up until the day the workers depart for other H-2A employment, depart to the place outside of the U.S. from which the worker came, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.

(j) *Earnings records.*

(1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (i)(3) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from the worker's wages.

(2) Each employer must keep the records required by this part, including field tally records and supporting summary payroll records, safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. All records must be available for inspection and transcription by the Secretary or a duly authorized and designated representative, and by the worker and representatives designated by the worker as evidenced by appropriate documentation (an Entry of Appearance as Attorney or Representative, Form G-28, signed by the worker, or an affidavit signed by the worker confirming such representation). Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative, and by the worker and



designated representatives as described in this paragraph.

(3) To assist in determining whether the three-fourths guarantee in paragraph (i) of this section has been met, if the number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job offer, the records must state the reason or reasons therefor.

(4) The employer must retain the records for not less than 5 years after the date of the certification.

(k) *Hours and earnings statements.* The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(1) The worker's total earnings for the pay period;

(2) The worker's hourly rate and/or piece rate of pay;

(3) The hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (i) of this section, separate from any hours offered over and above the guarantee);

(4) The hours actually worked by the worker;

(5) An itemization of all deductions made from the worker's wages;

(6) If piece rates are used, the units produced daily;

(7) Beginning and ending dates of the pay period; and

(8) The employer's name, address and FEIN.

(l) *Rates of pay.* If the worker is paid by the hour, the employer must pay the worker at least the AEWR in effect at the time work is performed, the prevailing hourly wage rate, the prevailing piece rate, or the Federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period.

(1) The offered wage may not be based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, semi-monthly, or monthly basis that equals or exceeds the AEWR, prevailing hourly wage or piece rate, or the legal Federal or State minimum wage, whichever is highest; or

(2) If the worker is paid on a piece rate basis and at the end of the pay period the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate:

(i) The worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during

the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked;

(ii) The piece rate must be no less than the piece rate prevailing for the activity in the area of intended employment; and

(iii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for H-2A temporary labor certification after 1977, such standards must be no more than those normally required (at the time of the first *Application for Temporary Labor Certification*) by other employers for the activity in the area of intended employment.

(m) *Frequency of pay.* The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(n) *Abandonment of employment or termination for cause.* If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the NPC, and DHS in the case of an H-2A worker, in writing or by any other method specified by the Department or DHS in a manner specified in a notice published in the **Federal Register** not later than 2 working days after such abandonment occurs, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that H-2A worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (i) of this section.

Abandonment will be deemed to begin after an H-2A worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer.

(o) *Contract impossibility.* If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the CO. In the event of such termination of

a contract, the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination, as described in paragraph (i)(1) of this section. The employer must make efforts to transfer the worker to other comparable employment acceptable to the worker, consistent with existing immigration law, as applicable. If such transfer is not affected, the employer must:

(1) Return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H-2A employer (but only if the worker can provide documentation that would be acceptable for Form I-9 purposes supporting such employment as being authorized pursuant to 8 CFR 274a.12(b)(21) upon transfer), whichever the worker prefers;

(2) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment; and

(3) Pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Daily subsistence must be computed as set forth in paragraph (h) of this section. The amount of the transportation payment must not be less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(p) *Deductions.* The employer must make all deductions from the worker's paycheck required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such circumstances, the job offer must state that the worker will be reimbursed the full amount of such deduction upon the worker's completion of 50 percent of the work contract period. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(q) *Disclosure of work contract.* The employer must provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. At a minimum, the work contract must contain all of the

provisions required by this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and the certified *Application for Temporary Employment Certification* will be the work contract.

#### **Application for Temporary Employment Certification Filing Procedures**

##### **§ 655.130 Application filing requirements.**

All agricultural employers who desire to hire H-2A foreign agricultural workers must apply for a certification from the Secretary by filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator. The following section provides the procedures employers must follow when filing.

(a) *What to file.* An employer, whether individual, association, or H-2ALC, that desires to apply for temporary employment certification of one or more nonimmigrant foreign workers must file a completed *Application for Temporary Employment Certification* form and, unless a specific exemption applies, a copy of the DOL Agricultural and Food Processing Clearance Order form submitted to the SWA serving the area of intended employment, as set forth in § 655.121(a).

(b) *Timeliness.* A completed *Application for Temporary Employment Certification* must be filed no less than 45 calendar days before the employer's date of need.

(c) *Location and method of filing.* The employer may send the *Application for Temporary Employment Certification* and all required supporting documentation by U.S. Mail or private mail courier to the NPC. The Department will publish a Notice in the **Federal Register** identifying the address(es), and any future address changes, to which *Applications for Temporary Labor Certification* must be mailed, and will also post these addresses on the OFLC Internet Web site at <http://www.foreignlaborcert.doleta.gov/>. The Department may also require

*Applications for Temporary Labor Certification*, at a future date, to be filed electronically in addition to or instead of by mail, notice of which will be published in the **Federal Register**.

(d) *Original signature.* The *Application for Temporary Employment Certification* must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent). An association

filing a master application as a joint employer may sign on behalf of its employer members. An association filing as an agent may not sign on behalf of its members but must obtain each member's signature on each *Application for Temporary Labor Certification* prior to filing.

(e) Information received in the course of processing *Applications for Temporary Labor Certification* and program integrity measures such as audits may be forwarded from OFLC to Wage and Hour Division (WHD) for enforcement purposes.

##### **§ 655.131 Association filing requirements.**

If an association files an *Application for Temporary Labor Certification*, in addition to complying with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F, of this chapter, the following requirements also apply.

(a) *Individual applications.* Associations of agricultural employers may file an *Application for Temporary Employment Certification* for H-2A workers as a sole employer, a joint employer, or agent. The association must identify in the *Application for Temporary Employment Certification* in what capacity it is filing. The association must retain documentation substantiating the employer or agency status of the association and be prepared to submit such documentation in response to a Notice of Deficiency from the CO prior to issuing a Final Determination, or in the event of an audit.

(b) *Master applications.* An association may file a master application on behalf of its employer-members. The master application is available only when the association is filing as a joint employer. An association of agricultural producers may submit a master application covering the same occupation and comparable work available with a number of its employer-members in multiple areas of intended employment, just as though all of the covered employers were in fact a single employer, as long as a single date of need is provided for all workers requested by the *Application for Temporary Labor Certification* and all employer-members are located in the same State. The association must identify on the *Application for Temporary Employment Certification* by name, address, total number of workers needed, and the crops and agricultural work to be performed, each employer that will employ H-2A workers. The association, as appropriate, will receive

a certified *Application for Temporary Employment Certification* that can be copied and sent to the United States Citizenship and Immigration Services (USCIS) with each employer-member's petition.

##### **§ 655.132 H-2A Labor contractor (H-2ALC) filing requirements.**

If an H-2ALC intends to file an *Application for Temporary Employment Certification*, the H-2ALC must meet all of the requirements of the definition of employer in § 655.100(b), and comply with all the assurances, guarantees, and other requirements contained in this part, including Assurances and Obligations of H-2A Employers, and in part 653, subpart F, of this chapter.

(a) *Scope of H-2ALC Applications.* An *Application for Temporary Employment Certification* filed by an H-2ALC must be limited to a single area of intended employment in which the fixed-site employer(s) to whom the H-2ALC is furnishing employees will be utilizing the employees.

(b) *Required information and submissions.* In filing the *Application for Temporary Employment Certification*, the H-2ALC must include the following:

(1) Identify on the *Application for Temporary Employment Certification* and job offer the name and location of each fixed-site agricultural business to which the H-2ALC expects to provide H-2A workers, the expected beginning and ending dates when the H-2ALC will be providing the workers to each fixed-site, and a description of the crops and activities the workers are expected to perform at such fixed-site.

(2) Provide a copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.*, identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC.

(3) Provide proof of its ability to discharge financial obligations under the H-2A program through a surety bond as required by 29 CFR 501.9, with documentation from the issuer identifying the name, address, phone number, and contact person for the surety, and providing the amount of the bond (as calculated pursuant to 29 CFR 501.9) and any identifying designation utilized by the surety for the bond.

(4) Provide copies of the fully-executed work contracts with each fixed-site agricultural business identified under paragraph (b)(1) of this section.

(5) Where the fixed-site agricultural business will provide housing or

transportation to the workers, provide proof that:

(i) All housing used by workers and owned, operated or secured by the fixed-site agricultural business complies with the applicable standards as set forth in § 655.122(d) and certified by the SWA; and

(ii) All transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.105 and 500.120 to 500.128, except where workers' compensation is used to cover such transportation as described in § 655.125(h).

#### § 655.133 Requirements for agents.

(a) An agent filing an *Application for Temporary Employment Certification* on behalf of an employer must provide a copy of the agent agreement or other document demonstrating the agent's authority to represent the employer.

(b) In addition the agent must provide a copy of the MSPA FLC Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.*, identifying the specific farm labor contracting activities the agent is authorized to perform.

#### § 655.134 Emergency situations.

(a) *Waiver of time period.* The CO may waive the time period for filing for employers who did not make use of temporary alien agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by § 655.100.

(b) *Employer requirements.* The employer requesting a waiver of the required time period must concurrently submit to NPC and to the SWA serving the area of intended employment a completed *Application for Temporary Employment Certification*, a completed job offer on the Agricultural and Food Processing Clearance Order form, and a statement justifying the request for a waiver of the time period requirement. The statement must indicate whether the waiver request is due to the fact that the employer did not use H-2A workers during the prior agricultural season or whether the request is for good and substantial cause. If the waiver is requested for good and substantial

cause, the employer's statement must also include detailed information describing the good and substantial cause which has necessitated the waiver request. Good and substantial cause may include, but is not limited to, such things as the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.

(c) *Processing of emergency applications.* The CO will process emergency *Applications for Temporary Labor Certification* in a manner consistent with the provisions set forth in §§ 655.140–145 and make a determination on the *Application for Temporary Employment Certification* in accordance with §§ 655.160–167. The CO may advise the employer in writing that the certification cannot be granted because, pursuant to paragraph (a) of this section, the request for emergency filing was not justified and there is not sufficient time to test the availability of U.S. workers such that the CO can make a determination on the *Application for Temporary Labor Certification* in accordance with § 655.161. Such notification will so inform the employer using the procedures applicable to a denial of certification set forth in § 655.164.

#### § 655.135 Assurances and obligations of H-2A employers.

An employer seeking to employ H-2A workers must agree as part of the *Application for Temporary Employment Certification* and job offer that it will abide by the requirements of this subpart and make each of the following additional assurances:

(a) *Non-discriminatory hiring practices.* The job opportunity is, and through the recruitment period must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship. Rejections of any U.S. workers who applied or apply for the job must be only for lawful, job related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hires and rejections as required by § 655.167.

(b) *No strike or lockout.* The worksite for which the employer is requesting H-2A certification does not currently have workers on strike or being locked out in the course of a labor dispute.

(c) *Recruitment requirements.* The employer has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an

*Application for Temporary Employment Certification* is made) for the job opportunity until the end of the recruitment period as specified in paragraph (d) and must independently conduct the positive recruitment activities, as specified in § 655.154, until the actual date on which the H-2A workers depart for the place of work, or 3 calendar days prior to the first date the employer requires the services of the H-2A workers, whichever occurs first.

(d) *Fifty percent rule.* From the time the foreign workers depart for the employer's place of employment, the employer must provide employment to any qualified, eligible U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed. Start of the work contract timeline is calculated from the first date of need stated on the *Application for Temporary Employment Certification*, under which the foreign worker who is in the job was hired. This provision will not apply to any employer who certifies to the CO in the *Application for Temporary Employment Certification* that the employer:

(1) Did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, as defined in sec. 203(u) of Title 29;

(2) Is not a member of an association which has petitioned for certification under this subpart for its members; and

(3) Has not otherwise associated with other employers who are petitioning for temporary foreign workers under this subpart.

(e) *Comply with applicable laws.* During the period of employment that is the subject of the *Application for Temporary Employment Certification*, the employer must comply with all applicable Federal, State and local laws and regulations, including health and safety laws. H-2A employers may also be subject to the FLSA. The FLSA operates independently of the H-2A program and has specific requirements that address payment of wages, including deductions from wages, the payment of Federal minimum wage and payment of overtime.

(f) *Job opportunity is full-time.* The job opportunity is a full-time temporary position, calculated to be at least 35 hours per work week.

(g) *No recent or future layoffs.* The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment except for lawful, job related reasons within 60 days of the date of need, or if the

employer has laid off such workers, it has offered the job opportunity that is the subject of the *Application for Temporary Labor Certification* to those laid-off U.S. worker(s) and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity for lawful, job-related reasons.

(h) *No unfair treatment.* The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1188, or this subpart or any other Department regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1188 or this subpart or any other Department regulation promulgated thereunder.

(i) *Notify workers of duty to leave United States.*

(1) The employer must inform H-2A 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 under paragraph (2) below, unless the H-2A worker is being sponsored by another subsequent H-2A employer.

(2) As defined further in DHS regulations, a temporary labor certification limits the validity period of an H-2A petition, and therefore, the authorized period of stay for an H-2A worker. See 8 CFR 214.2(h)(5)(vii). A foreign worker may not remain beyond his or her authorized period of stay, as established by DHS, which is based upon the validity period of the labor certification under which the H-2A worker is employed, nor beyond separation from employment prior to completion of the H-2A contract, absent an extension or change of such worker's

status under DHS regulations. See 8 CFR 214.2(h)(5)(viii)(B).

(j) *Comply with the prohibition against employees paying fees.* The employer and its agents have not sought or received payment of any kind from any employee subject to 8 U.S.C. 1188 for any activity related to obtaining H-2A labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, 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. Subject to the provisions of the FLSA, this provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility of the worker, such as government-required passport fees.

(k) *Contracts with third parties comply with prohibitions.* The employer has contractually forbidden any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2A workers to seek or receive payments or other compensation from prospective employees, except as provided for in DHS regulations at 8 CFR 214.2(h)(5)(xi)(A). This documentation is available upon request by the CO or another Federal party.

(l) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary in English, and, to the extent necessary, language common to a significant portion of the workers if they are not fluent in English, which sets out the rights and protections for workers employed pursuant to 8 U.S.C. 1188.

### Processing of Applications for Temporary Employment Certification

#### § 655.140 Review of applications.

(a) *NPC review.* The CO will promptly review the *Application for Temporary Employment Certification* and job order for compliance with all applicable program requirements, including compliance with the requirements set forth in this subpart.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO(s) to an employer requiring a response will be sent using the provided address via traditional methods to assure next day delivery. The employer's response to such a notice or request must be filed using traditional methods to assure next day delivery and

be sent by the date due or the next business day if the due date falls on a Sunday or Federal Holiday.

#### § 655.141 Notice of acceptance.

(a) *Notification timeline.* When the CO determines the *Application for Temporary Labor Certification* and job order are complete and meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the *Application for Temporary Labor Certification*. A copy will be sent to the SWA serving the area of intended employment.

(b) *Notice content.* The notice must:

(1) Authorize conditional access to the interstate clearance system and direct the SWA to circulate a copy of the job order to other such States the CO determines to be potential sources of U.S. workers;

(2) Direct the employer to engage in positive recruitment of U.S. workers in a manner consistent with § 655.154 and to submit a report of its positive recruitment efforts as specified in § 655.156 prior to making a Final Determination on the *Application for Temporary Employment Certification*;

(3) State that positive recruitment is in addition to and will occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance under § 655.150 of this subpart and will terminate on the actual date on which the H-2A workers depart for the place of work, or 3 calendar days prior to the first date the employer requires the services of the H-2A workers, whichever occurs first;

(4) State that the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* no later than 30 calendar days before the date of need, except as provided for under § 655.144 for modified *Applications for Temporary Labor Certification*; and

(5) Will specify the time frames when positive recruitment must occur, including newspaper advertisements.

#### § 655.142 Electronic job registry.

(a) *Location of and placement in the electronic job registry.* Upon acceptance of the *Application for Temporary Labor Certification* under § 655.141, the CO will promptly place for public examination a copy of the job order on an electronic job registry maintained by the Department, including any required modifications approved by the CO, as specified in § 655.144.

(b) *Length of posting on electronic job registry.* Unless otherwise noted, the Department must keep the job order posted on the Electronic Job Registry

until the end of 50 percent of the contract period as set forth in § 655.135(d).

**§ 655.143 Notice of deficiency.**

(a) *Notification timeline.* When the CO determines the *Application for Temporary Labor Certification* and job order are incomplete, contain errors or inaccuracies, or do not meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the *Application for Temporary Employment Certification*. A copy of this notification will be sent to the SWA serving the area of intended employment.

(b) *Notice content.* The notice will:

(1) State the reason(s) why the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance, citing the relevant regulatory standard(s);

(2) Offer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* within 5 business days from date of receipt stating the modification that is needed for the CO to issue the Notice of Acceptance;

(3) Except as provided for under the expedited review or de novo administrative hearing provisions of this section, state that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification to the *Application for Temporary Employment Certification* within 5 business days and in a manner specified by the CO;

(4) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an Administrative Law Judge (ALJ), of the Notice of Deficiency. The notice will state that in order to obtain such a review or hearing, the employer, within 5 business days of the receipt of the notice, must file by facsimile or other means normally assuring next day delivery a written request to the Chief ALJ of DOL and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's action; and

(5) State that if the employer does not comply with the requirements under this section or request an expedited administrative judicial review or a de novo hearing before an ALJ within the 5 business days the CO will deny the

*Application for Temporary Employment Certification* in accordance with the labor certification determination provisions in § 655.164.

(c) *Appeal from notices of deficiency.* The employer may timely request an expedited administrative review or de novo hearing before an ALJ by following the procedures set forth in § 655.171.

**§ 655.144 Submission of modified applications.**

(a) *Submission requirements and certification delays.* If the employer chooses to submit a modified *Application for Temporary Employment Certification*, the CO's Final Determination will be postponed by 1 calendar day for each day that passes beyond the 5 business-day period allowed under § 655.143(b) to submit a modified *Application for Temporary Labor Certification*, up to maximum of 5 days. The *Application for Temporary Employment Certification* will be deemed abandoned if the employer does not submit a modified *Application for Temporary Labor Certification* within 12 calendar days after the notice of deficiency was issued.

(b) *Provisions for denial of modified Application for Temporary Employment Certification.* If the modified *Application for Temporary Employment Certification* is not approved, the CO will deny the *Application for Temporary Labor Certification* in accordance with the labor certification determination provisions in § 655.164.

(c) *Appeal from denial of modified Application for Temporary Employment Certification.* The procedures for appealing a denial of a modified *Application for Temporary Labor Certification* are the same as for a non-modified *Application for Temporary Labor Certification* as long as the employer timely requests an expedited administrative review or de novo hearing before an ALJ by following the procedures set forth in § 655.171.

**§ 655.145 Amendments to applications for temporary employment certification.**

(a) *Increases in number of workers.* *Application for Temporary Labor Certification* may be amended at any time before the CO's certification determination to increase the number of workers requested in the initial *Application for Temporary Labor Certification* by not more than 20 percent (50 percent for employers requesting 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, and the employer demonstrates that the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(b) *Minor changes to the period of employment.* *Applications for Temporary Labor Certification* may be amended to make minor changes in the total period of employment. Changes may not be effected until submitted in written form to the CO and the employer receives approval from the CO. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect any change(s) would have on the adequacy of the underlying test of the domestic labor market for the job opportunity. An employer must demonstrate that the change to the period of employment could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. If the request is for a delay in the start date and is made after workers have departed for the employer's place of work, the CO may only approve the change if the employer includes with the request a written assurance signed and dated by the employer that all workers who are already traveling to the job site will be provided housing and subsistence, without cost to the workers, until work commences. Upon acceptance of an amendment, the CO will submit to the SWA any necessary modification to the job order.

**Post-Acceptance Requirements**

**§ 655.150 Interstate clearance of job order.**

(a) *SWA posts in interstate clearance system.* The SWA, on behalf of the employer, must promptly place the job order in interstate clearance to all States designated by the CO. At a minimum, the CO will instruct the SWA to transmit a copy of its active job order to all States listed in the job order as anticipated worksites covering the area of intended employment.

(b) *Duration of posting.* Each of the SWAs to which the job order was transmitted must keep the job order on its active file until 50 percent of the contract term has elapsed, and must refer each U.S. worker who applies (or on whose behalf an *Application for Temporary Labor Certification* is made) for the job opportunity.

**§ 655.151 Newspaper advertisements.**

(a) *How to place advertisements.*

(1) The employer must place an advertisement (in a language other than English, where the CO determines appropriate) on 2 separate days, which may be consecutive, one of which must be a Sunday (except as provided in paragraph (b) of this section), in a newspaper of general circulation serving the area of intended employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity. Newspaper advertisements must satisfy the requirements set forth in § 655.152.

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the CO may direct the employer, in place of a Sunday edition, to advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

(b) *When to place advertisements.* The employer's obligation to place newspaper advertisements must occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance under § 655.150.

#### **§ 655.152 Advertising requirements.**

All advertising conducted to satisfy the required recruitment activities under § 655.151 must meet the requirements set forth in this section and must contain terms and conditions of employment which are not less favorable than those offered to the H-2A workers. All advertising must contain the following information:

(a) The employer's name, or in the event that a master application will be filed by an association, a statement indicating that the name and location of each member of the association can be obtained from the SWA of the State in which the advertisement is run;

(b) The geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;

(c) A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of services or labor to be performed and the anticipated start and end dates of employment of the job opportunity;

(d) The wage offer, or in the event that there are multiple wage offers (such as where a master application will be filed by an association and/or where there are multiple crop activities for a single employer), the range of applicable wage offers and, where a master application will be filed by an association, a statement indicating that the rate(s)

applicable to each employer can be obtained from the SWA of the State in which the advertisement is run;

(e) The three-fourths guarantee specified in § 655.122(i);

(f) If applicable, a statement that work tools, supplies, and equipment will be provided at no cost to the worker;

(g) A statement that housing will be made available at no cost to workers, including U.S. workers who cannot reasonably return to their permanent residence at the end of each working day;

(h) If applicable, a statement that transportation and subsistence expenses to the worksite will be provided by the employer or paid by the employer upon completion of 50 percent of the work contract, or earlier, if appropriate;

(i) A statement that the position is temporary and a specification of the total number of job openings the employer intends to fill;

(j) A statement directing applicants to report or apply for the job opportunity at the nearest office of the SWA of the State in which the advertisement; and if the worksite is remote relative to the population that is most likely to apply to the job opportunity, a alternative accessible to that population where an employer may conduct interviews; and

(k) Contact information for the applicable SWA and, if available, the job order number.

#### **§ 655.153 Contact with former U.S. employees.**

The employer must contact by mail or other effective means its former U.S. workers (except those who were dismissed for cause or abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job. This contact must occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance and documentation maintained in the event of an audit.

#### **§ 655.154 Additional positive recruitment.**

(a) *Where to conduct additional recruitment.* The employer must conduct positive recruitment within a multistate region of traditional or expected labor supply where the CO finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed.

(b) *Additional requirements should be comparable to non-H-2A employers in the area.* The CO will ensure that the effort, including the location(s) and method(s) of the positive recruitment

required of the potential H-2A employer must be no less than the normal recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of intended employment, and the kind and degree of recruitment efforts which the potential H-2A employer made to obtain foreign workers.

(c) *CO discretion to order additional positive recruitment.* The CO may require such additional recruitment as determined necessary.

(d) *Proof of recruitment.* The CO will specify the documentation or other supporting evidence that must be maintained by the employer as proof that the positive recruitment requirements were met.

#### **§ 655.155 Referrals of U.S. workers.**

SWAs may only refer for employment individuals who have been apprised of all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity, that he or she is qualified, able, willing, and available for employment.

#### **§ 655.156 Recruitment report.**

(a) *Requirements of a recruitment report.* The employer must prepare, sign, and date a written recruitment report. The recruitment report must be submitted on a date specified by the CO in the Notice of Acceptance set forth in § 655.141 and contain the following information:

(1) Identify the name of each recruitment source;

(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, and the disposition of each worker;

(3) Confirm that former U.S. employees were contacted and by what means; and

(4) If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

(b) *Duty to update recruitment report.* The employer must continue to maintain the recruitment report throughout the recruitment period including the 50 percent period. The updated report is not automatically submitted to the Department, but must be made available in the event of a post-certification audit or upon request by authorized representatives of the Secretary.

#### **§ 655.157 Withholding of U.S. workers prohibited.**

(a) *Filing a complaint.* Any employer who has reason to believe that a person

or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the worksite of H-2A workers in order to force the hiring of U.S. workers during the recruitment period, as set forth in § 655.135(d), may submit a written complaint to the CO. The complaint must clearly identify the person or entity who the employer believes has withheld the U.S. workers, and must specify sufficient facts to support the allegation (e.g., dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the CO.

(b) *Duty to investigate.* Upon receipt, the CO must immediately investigate the complaint. The investigation must include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld.

(c) *Duty to suspend the recruitment period.* Where the CO determines, after conducting the interviews required by paragraph (b), that the employer's complaint is valid and justified, the CO will immediately suspend the *Application for Temporary Labor Certification* of the recruitment period, as set forth in § 655.135(d), to the employer. The CO's determination is the final decision of the Secretary.

#### **§ 655.158 Duration of positive recruitment.**

Except as otherwise noted, the obligation to engage in positive recruitment described in §§ 655.150–655.154 shall terminate on the date H-2A workers depart for the employer's place of work.

### **Labor Certification Determinations**

#### **§ 655.160 Determination.**

Except as otherwise noted in this paragraph, the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* no later than 30 calendar days before the date of need identified in the *Application for Temporary Labor Certification*. An *Application for Temporary Employment Certification* that are modified under § 655.144 or that otherwise does not meet the requirements for certification in this subpart are is not subject to the 30-day timeframe for certification.

#### **§ 655.161 Criteria for certification.**

(a) The criteria for certification include whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis; complied with the requirements of parts 653 and

654 of this chapter; complied with all of this subpart, including but not limited to the timeliness requirements in § 655.130(b); complied with the offered wage rate criteria in § 655.120; made all the assurances in § 655.135; and met all the recruitment obligations required by § 655.121 and § 655.152.

(b) In making a determination as to whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an *Application for Temporary Employment Certification* is made) directly to the employer, but who was rejected by the employer for other than a lawful job-related reason or who has not been provided with a lawful job-related reason for rejection by the employer.

#### **§ 655.162 Approved certification.**

If temporary labor certification is granted, the CO will send the certified *Application for Temporary Employment Certification* and a Final Determination letter to the employer by means normally assuring next-day delivery and a copy, if appropriate, to the employer's agent or attorney.

#### **§ 655.163 Certification fee.**

A determination by the CO to grant an *Application for Temporary Employment Certification* in whole or in part will include a bill for the required certification fees. Each employer of H-2A workers under the *Application for Temporary Employment Certification* (except joint employer associations, which may not be assessed a fee in addition to the fees assessed to the members of the association) must pay in a timely manner a non-refundable fee upon issuance of the certification granting the *Application for Temporary Employment Certification* (in whole or in part), as follows:

(a) *Amount.* The *Application for Temporary Employment Certification* fee for each employer receiving a temporary agricultural labor certification is \$100 plus \$10 for each H-2A worker certified under the *Application for Temporary Labor Certification*, provided that the fee to an employer for each temporary agricultural labor certification received will be no greater than \$1,000. There is no additional fee to the association filing the *Application for Temporary Employment Certification*. The fees must be paid by check or money order made payable to United States Department of Labor. In the case of an agricultural association acting as a joint employer applying on behalf of its

H-2A employer members, the aggregate fees for all employers of H-2A workers under the *Application for Temporary Employment Certification* must be paid by one check or money order.

(b) *Timeliness.* Fees must be received by the CO no more than 30 days after the date of the certification. Non-payment or untimely payment may be considered a substantial violation subject to the procedures in § 655.182.

#### **§ 655.164 Denied certification.**

If temporary labor certification is denied, the Final Determination letter will be sent to the employer by means normally assuring next-day delivery and a copy, if appropriate, to the employer's agent or attorney. The Final Determination Letter will:

(a) State the reason(s) certification is denied, citing the relevant regulatory standards and/or special procedures;

(b) Offer the applicant an opportunity to request an expedited administrative review, or a de novo administrative hearing before an ALJ, of the denial. The notice must state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, must file by facsimile (fax), or other means normally assuring next day delivery, a written request to the Chief ALJ of DOL (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO's action; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ within the 7 calendar days, the denial is final and the Department will not further consider that *Application for Temporary Employment Certification*.

#### **§ 655.165 Partial certification.**

The CO may issue a partial certification, reducing either the period of need or the number of H-2A workers being requested or both for certification, based upon information the CO receives during the course of processing the *Application for Temporary Employment Certification*, an audit, or otherwise. The number of workers certified will be reduced by one for each referred U.S. worker who is able, willing, and qualified, and who will be available at the time and place needed and has not been rejected for lawful job-related reasons, to perform the services or labor. If a partial labor certification is issued, the Final Determination letter will:

(a) State the reason(s) why either the period of need and/or the number of H-

2A workers requested has been reduced, citing the relevant regulatory standards and/or special procedures;

(b) Offer the applicant an opportunity to request an expedited administrative review, or a de novo administrative hearing before an ALJ, of the decision. The notice will state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, will file by facsimile or other means normally assuring next day delivery a written request to the Chief ALJ of DOL (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO's action; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ within the 7 calendar days, the partial certification is final and the Department will not further consider that *Application for Temporary Employment Certification*.

#### **§ 655.166 Appeal procedures.**

If the employer timely requests an expedited administrative review or de novo hearing before an ALJ under § 655.165(c), the procedures at § 655.171 will be followed.

#### **§ 655.167 Document retention requirements.**

(a) *Entities required to retain documents.* All employers filing an *Application for Temporary Employment Certification* requesting H-2A agricultural workers under this subpart are required to retain the documents and records proving compliance with this subpart.

(b) *Period of required retention.* Records and documents must be retained for a period of 5 years from the date of certification of the *Application for Temporary Employment Certification* or from the date of determination if the *Application for Temporary Labor Certification* is denied or withdrawn.

(c) *Documents and records to be retained by all applicants.*

(1) Proof of recruitment efforts, including:

(i) Job order placement as specified in § 655.121;

(ii) Advertising as specified in § 655.152, or, if used, professional, trade, or ethnic publications;

(iii) Contact with former U.S. workers as specified in § 655.153; or

(iv) Additional positive recruitment efforts (as specified in § 655.154).

(2) Substantiation of information submitted in the recruitment report

prepared in accordance with § 655.156, such as evidence of nonapplicability of contact of former employees as specified in § 655.153.

(3) The final recruitment report and any supporting resumes and contact information as specified in § 655.156(b).

(4) Proof of workers' compensation insurance or State law coverage as specified in § 655.122(e).

(5) Records of each worker's earnings as specified in § 655.122(j).

(6) The work contract or a copy of the *Application for Temporary Employment Certification* as defined in 29 CFR 501.10 and specified in § 655.122(q).

(d) *Additional retention requirement for associations filing Application for Temporary Employment Certification.* In addition to the documents specified in paragraph (c) above, Associations must retain documentation substantiating their status as an employer or agent, as specified in § 655.131.

#### **Post Certification**

##### **§ 655.170 Extensions.**

An employer may apply for extensions of the period of employment in the following circumstances.

(a) *Short-term extension.* Employers seeking extensions of 2 weeks or less of the certified *Application for Temporary Employment Certification* must apply directly to DHS for approval. If granted, the *Application for Temporary Employment Certification* will be deemed extended for such period as is approved by DHS.

(b) *Long-term extension.* Employers seeking extensions of more than 2 weeks may apply to the CO. Such requests must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions). Such requests must be supported in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will notify the employer of the decision in writing if time allows, or will otherwise notify the employer of the decision. The CO will not grant an extension where the total work contract period under that *Application for Temporary Employment Certification* and extensions would be 12 months or more, except in extraordinary circumstances. The employer may not appeal a denial of a request for an extension.

##### **§ 655.171 Appeals.**

Where authorized in this subpart, employers may request an administrative review or de novo

hearing before an ALJ of a decision by the CO. In such cases, the CO will send a copy of the OFLC administrative file to the Chief ALJ by means normally assuring next-day delivery. The Chief ALJ will immediately assign an ALJ (which may be a panel of such persons designated by the Chief ALJ from the Board of Alien Labor Certification Appeals (BALCA)).

(a) *Administrative review.* Where the employer has requested administrative review, within 5 business days after receipt of the ETA administrative file the ALJ will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, the OFLC Administrator and DHS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary.

(b) *De novo hearing.*

(1) *Conduct of hearing.* Where the employer has requested a de novo hearing the procedures in 29 CFR part 18 apply to such hearings, except that:

(i) The appeal will not be considered to be a complaint to which an answer is required;

(ii) The ALJ will ensure that the hearing is scheduled to take place within 5 calendar days after the ALJ's receipt of the OFLC administrative file, if the employer so requests, and will allow for the introduction of new evidence; and

(iii) The ALJ's decision must be rendered within 10 calendar days after the hearing.

(2) *Decision.* After a de novo hearing, the ALJ must affirm, reverse, or modify the CO's determination, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, CO, OFLC Administrator and DHS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary.

##### **§ 655.172 Withdrawal of job order and application for temporary employment certification.**

(a) Employers may withdraw a job order from intrastate posting if the employer no longer plans to file an H-2A *Application for Temporary Labor Certification*. However, a withdrawal of a job order does not nullify existing obligations to those workers recruited in



connection with the placement of a job order pursuant to this subpart or the filing of an *Application for Temporary Employment Certification*.

(b) Employers may withdraw an *Application for Temporary Labor Certification* once it has been formally accepted by the NPC. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Labor Certification* with respect to workers recruited in connection with that application.

**§ 655.173 Setting meal charges; petition for higher meal charges.**

(a) *Meal charges.* Until a new amount is set under this paragraph, an employer may charge workers up to \$9.90 for providing them with three meals per day. The maximum charge allowed by this paragraph (a) will be changed annually by the same percentage as the 12 month percentage change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments will be effective on the date of their publication by the OFLC Administrator as a Notice in the **Federal Register**. When a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206 the charge or deduction must meet the requirements of 29 U.S.C. 203(m) of the FLSA, including the recordkeeping requirements found at 29 CFR 516.27.

(b) *Filing petitions for higher meal charges.* The employer may file a petition with the CO to charge more than the applicable amount for meal charges if the employer justifies the charges and submits to the CO the documentation required by paragraph (b)(1) of this section.

(1) Documentation submitted must include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs that have a direct relation to food service operations, such as wages of cooks and dining hall supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead and similar charges may not be included. Receipts and other cost

records for a representative pay period must be retained and must be available for inspection by the CO for a period of 1 year.

(2) The employer may begin charging the higher rate upon receipt of a favorable decision from the CO unless the CO sets a later effective date in the decision.

(c) *Appeal rights.* In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal the denial. Appeals will be filed with the Chief ALJ, pursuant to § 655.171.

**§ 655.174 Public disclosure.**

The Department will maintain an electronic file accessible to the public with information on all employers applying for temporary agricultural labor certifications. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

**Integrity Measures**

**§ 655.180 Audit.**

The Department will conduct audits of *Application for Temporary Employment Certification* for which certifications have been granted.

(a) *Discretion.* The *Application for Temporary Employment Certification* selected for audit will be chosen within the sole discretion of the Department.

(b) *Audit letter.* Where an *Application for Temporary Employment Certification* is selected for audit, the CO will issue an audit letter to the employer and a copy, if appropriate, to the employer's agent or attorney. 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 may result in the revocation of the certification or program debarment.

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

(d) *Potential referrals.* In addition to steps in this subpart, the CO may determine to provide the audit findings and underlying documentation to DHS or another appropriate enforcement agency. The CO will refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S.

worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

**§ 655.181 Revocation.**

(a) *Basis for DOL revocation.* The CO, in consultation with the OFLC Administrator, may revoke a temporary agricultural labor certification approved under this subpart, if the CO finds:

(1) The issuance of the temporary agricultural labor certification was not justified based on criteria set forth under 8 U.S.C. 1188;

(2) The employer substantially violated a material term or condition of the approved temporary agricultural labor certification, as defined in § 655.182(d);

(3) The employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit (as discussed in § 655.180), or law enforcement function under 8 U.S.C. 1188, 29 CFR part 501, or this subpart; or

(4) The employer failed to comply with one or more sanctions or remedies imposed by the WHD, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

(b) *DOL procedures for revocation.*

(1) *Notice of Revocation.* If the CO makes a determination to revoke an employer's temporary labor certification, the CO will send to the employer (and its attorney or agent) a Notice of Revocation. The Notice will contain a detailed statement of the grounds for the revocation, and it will inform the employer of its right to submit rebuttal evidence or to appeal. If the employer does not file rebuttal evidence or an appeal within 14 days of the date of the Notice of Revocation, the Notice is the final decision of the Secretary and will take effect immediately at the end of the 14-day period.

(2) *Rebuttal.* The employer may submit evidence to rebut the grounds stated in the Notice of Revocation within 14 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed by the employer, the CO will inform the employer of the CO's final determination on the revocation within 14 calendar days of receiving the rebuttal evidence. If the CO determines that the certification should be revoked, the CO will inform the employer of its right to appeal according to the procedures of § 655.171. The employer must file the appeal within 10 calendar days after the CO's final determination, or the CO's determination is the final

decision of the Secretary and will take effect immediately at the end of the 10-day period.

(3) *Appeal.* An employer may appeal a Notice of Revocation, or a final determination of the CO after the review of rebuttal evidence, according to the appeal procedures of § 655.171. The ALJ's decision is the final decision of the Secretary.

(4) *Stay.* The timely filing of rebuttal evidence or an administrative appeal will stay the revocation pending the outcome of those proceedings.

(5) *Decision.* If the temporary agricultural labor certification is revoked, the CO will send a copy of the final decision of the Secretary to DHS and the Department of State (DOS).

(c) *Employer's obligations in the event of revocation.* If an employer's temporary agricultural labor certification is revoked pursuant to this section, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.122(h)(1);

(2) The worker's outbound transportation expenses, as if the worker meets the requirements for payment under § 655.122(h)(2);

(3) Payment to the worker of the amount due under the three-fourths guarantee as required by § 655.122(i); and

(4) Any other wages, benefits, and working conditions due or owing to the worker under this subpart.

#### **§ 655.182 Debarment.**

(a) *Debarment of an employer.* The OFLC Administrator may debar an employer or any successor in interest to that employer from receiving future labor certifications under this subpart, subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer substantially violated a material term or condition of its temporary labor certification, with respect to H-2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced.

(b) *Debarment of an agent or attorney.* The OFLC Administrator may debar an agent or attorney from participating in any action under 8 U.S.C. 1188, this subpart, or 29 CFR part 501, if the OFLC Administrator finds that the agent or attorney participated in, had knowledge of, or had reason to know of, an employer's substantial violation. The OFLC Administrator may not issue future labor certifications under this subpart to any employer represented by

a debarred agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Statute of Limitations and Period of Debarment.*

(1) The OFLC Administrator must issue any Notice of Debarment no later than 2 years after the occurrence of the violation.

(2) No employer, attorney, or agent may be debarred under this subpart for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:

(i) Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2A workers and/or workers in corresponding employment;

(ii) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(iii) Failure to comply with the employer's obligations to recruit U.S. workers;

(iv) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H-2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 29 CFR part 501, or this subpart;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188 or 29 CFR part 501, or an audit under § 655.180 of this subpart;

(vii) Employing an H-2A worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;

(viii) A violation of the requirements of § 655.135(j) and (k);

(ix) A violation of any of the provisions listed in 29 CFR 501.4(a); or

(x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(2) The employer's failure to pay a necessary fee in a timely manner;

(3) Fraud involving the *Application for Temporary Employment Certification*; or

(4) The employer making a material misrepresentation of fact during the application process.

(e) *Determining whether a violation is substantial.* In determining whether a violation is so substantial so as to merit debarment, the factors the CO may consider include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1188, 29 CFR part 501, or this subpart;

(2) The number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) Efforts made in good faith to comply with 8 U.S.C. 1188, 29 CFR part 501, and this subpart;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest, or safety, and whether the person has previously violated 8 U.S.C. 1188;

(7) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s).

(f) *Debarment procedure.*

(1) *Notice of Debarment.* If the CO makes a determination to debar an employer, attorney, or agent, the CO will send that person a Notice of Debarment. The Notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and the Notice will state the person's opportunity to request a debarment hearing. The Notice will state that, to obtain such a hearing, the debarred party must, within 30 calendar days of the date of the Notice, file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, NW., Suite 400-N, Washington, DC 20001-8002, and simultaneously serve a copy to the Administrator, OFLC. The debarment will take effect 30 days from the date the Notice of Debarment is issued, unless a request for review is properly filed within 30 days from the issuance of the Notice of Debarment. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal.

(2) *Hearing.* Within 10 days of receipt of the request for a hearing, the OFLC Administrator will send a certified copy of the ETA case file to the Chief ALJ by means normally assuring next-day delivery. The Chief ALJ will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be

considered to be a complaint to which an answer is required.

(3) *Decision.* After the hearing, the ALJ must affirm, reverse, or modify the OFLC Administrator's determination. The ALJ will prepare the decision within 60 days after completion of the hearing and closing of the record. The ALJ's decision will be provided immediately to the employer, OFLC Administrator, DHS, and DOS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(4) *Review by the ARB.*

(i) Any party wishing review of the decision of an ALJ must, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. The ARB will decide whether to accept the petition within 30 days of receipt. If the ARB declines to accept the petition, or if the ARB does not issue a notice accepting a petition within 30 days after the receipt of a timely filing of the petition, the decision of the ALJ will be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ will be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding in person or by certified mail.

(ii) Upon receipt of the ARB's notice to accept the petition, the Office of Administrative Law Judges will promptly forward a copy of the complete hearing record to the ARB.

(iii) Where the ARB has determined to review such decision and order, the ARB will notify each party of the issue(s) raised, the form in which submissions must be made (e.g., briefs or oral argument), and the time within which such presentation must be submitted.

(5) *ARB Decision.* The ARB's final decision must be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ, in person or by certified mail. If the ARB fails to provide a decision within 90 days from the notice granting the petition, the ALJ's decision will be the final decision of the Secretary.

(g) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under this section or under 29 CFR 501.20. When considering debarment, OFLC and the WHD may

inform one another and may coordinate their activities, so that a specific violation for which debarment is imposed is cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS promptly.

(h) *Debarment involving members of associations.* If the OFLC Administrator determines that an individual employer-member of a joint employer association has committed a substantial violation, the debarment determination will apply only to that member unless the OFLC Administrator determines that the association or another association member participated in the violation, in which case the debarment will be invoked against the association or other complicit association member(s) as well.

(i) *Debarment involving associations acting as joint employers.* If the OFLC Administrator determines that an association acting as a joint employer with its members has committed a substantial violation, the debarment determination will apply only to the association, and will not be applied to any individual employer-member of the association. However, if the OFLC Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit association member as well. An association debarred from the H-2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(j) *Debarment involving associations acting as sole employers.* If the OFLC Administrator determines that an association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the association and any successor in interest to the debarred association.

#### **§ 655.183 Less than substantial violations.**

(a) *Requirement of special procedures.* If the OFLC Administrator determines that a less than substantial violation has occurred, but the OFLC Administrator has reason to believe that past actions on the part of the employer (or agent or attorney) may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the OFLC Administrator may require the employer to conform to special procedures before and after the temporary labor certification determination. These special procedures may include special on-site positive recruitment and streamlined

interviewing and referral techniques. The special procedures are designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary agricultural labor certification. Such requirements will be reasonable; will not require the employer to offer better wages, working conditions, and benefits than those specified in § 655.122; and will be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this subpart.

(b) *Notification of required special procedures.* The OFLC Administrator will notify the employer (or agent or attorney) in writing of the special procedures that will be required in the coming year. The notification will state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary agricultural labor certification, and will offer the employer an opportunity to request an administrative review or a de novo hearing before an ALJ. If an administrative review or de novo hearing is requested, the procedures prescribed in § 655.171 will apply.

(c) *Failure to comply with special procedures.* If the OFLC Administrator determines that the employer has failed to comply with special procedures required pursuant to paragraph (a) of this section, the OFLC Administrator will send a written notice to the employer, stating that the employer's otherwise affirmative H-2A certification determination will be reduced by 25 percent of the total number of H-2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year. Notice of such a reduction in the number of workers requested will be conveyed to the employer by the OFLC Administrator in the OFLC Administrator's written certification determination. The notice will offer the employer an opportunity to request administrative review or a de novo hearing before an ALJ. If administrative review or a de novo hearing is requested, the procedures prescribed in § 655.171 will apply, provided that if the ALJ affirms the OFLC Administrator's determination that the employer has failed to comply with special procedures required by paragraph (a) of this section, the reduction in the number of workers requested will be 25 percent of the total number of H-2A workers requested (which cannot be more than those

requested in the previous year) for a period of 1 year.

**§ 655.184 Applications involving fraud or willful misrepresentation.**

(a) *Referral for investigation.* If the CO discovers possible fraud or willful misrepresentation involving an *Application for Temporary Labor Certification*, the CO may refer the matter to the DHS and the Department's Office of the Inspector General for investigation.

(b) *Sanctions.* If the WHD, a court or the DHS determines that there was fraud or willful misrepresentation involving an *Application for Temporary Labor Certification* and certification has been granted, a finding under this paragraph will be cause to revoke the certification. The finding of fraud or willful misrepresentation may also constitute a debarable violation under § 655.182.

**§ 655.185 Job service complaint system; enforcement of work contracts.**

(a) *Filing with DOL.* Complaints arising under this subpart must be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E. Complaints involving allegations of fraud or misrepresentation must be referred by the SWA to the CO for appropriate handling and resolution. Complaints that involve worker contracts must be referred by the SWA to the WHD for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process, the WHD may report the results of its investigation to the OFLC Administrator for consideration of employer penalties or such other action as may be appropriate.

(b) *Filing with the Department of Justice.* Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same, will be referred to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC), in addition to any activity, investigation, and/or enforcement action taken by ETA or a SWA. Likewise, if OSC becomes aware of a violation of these regulations, it may provide such information to the appropriate SWA and the CO.

**TITLE 29—LABOR**

Revise part 501 to read as follows:

**PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT**

**Subpart A—General Provisions**

Sec.

- 501.0 Introduction.
- 501.1 Purpose and scope.
- 501.2 Coordination between Federal agencies.
- 501.3 Definitions.
- 501.4 Discrimination prohibited.
- 501.5 Waiver of rights prohibited.
- 501.6 Investigation authority of Secretary.
- 501.7 Cooperation with Federal officials.
- 501.8 Accuracy of information, statements, data.
- 501.9 Surety bond.

**Subpart B—Enforcement**

- 501.15 Enforcement.
- 501.16 Sanctions and remedies—general.
- 501.17 Concurrent actions.
- 501.18 Representation of the secretary.
- 501.19 Civil money penalty assessment.
- 501.20 Debarment and revocation.
- 501.21 Failure to cooperate with investigations.
- 501.22 Civil money penalties—payment and collection.

**Subpart C—Administrative Proceedings**

- 501.30 Applicability of procedures and rules.

**Procedures Relating to Hearing**

- 501.31 Written notice of determination required.
- 501.32 Contents of notice.
- 501.33 Request for hearing.

**Rules of Practice**

- 501.34 General.
- 501.35 Commencement of proceeding.
- 501.36 Caption of proceeding.

**Referral for Hearing**

- 501.37 Referral to Administrative Law Judge.
- 501.38 Notice of docketing.
- 501.39 Service upon attorneys for the Department of Labor—number of copies.

**Procedures Before Administrative Law Judge**

- 501.40 Consent findings and order.

**Post-Hearing Procedures**

- 501.41 Decision and order of Administrative Law judge.

**Review of Administrative Law Judge's Decision**

- 501.42 Procedures for initiating and undertaking review.
- 501.43 Responsibility of the Office of Administrative Law Judges (OALJ).
- 501.44 Additional information, if required.
- 501.45 Final decision of the Administrative Review Board.

**Record**

- 501.46 Retention of official record.
- 501.47 Certification.

Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.

**Subpart A—General Provisions**

**§ 501.0 Introduction.**

These regulations cover the enforcement of all contractual obligations, including requirements under 8 U.S.C. 1188 and 20 CFR part 655, subpart B applicable to the employment of H–2A workers and workers in corresponding employment, including obligations to offer employment to eligible United States (U.S.) workers and to not lay off or displace U.S. workers in a manner prohibited by these regulations or 20 CFR part 655, subpart B.

**§ 501.1 Purpose and scope.**

(a) *Statutory standards.* 8 U.S.C. 1188 provides that:

(1) A petition to import an alien as an H–2A worker (as defined at 8 U.S.C. 1188) may not be approved by the Secretary of the Department of Homeland Security (DHS) unless the petitioner has applied to the U.S. Secretary of Labor (Secretary) for a certification that:

(i) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(ii) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

(2) The Secretary is authorized to take actions that assure compliance with the terms and conditions of employment under 8 U.S.C. 1188, the regulations at 20 CFR part 655, subpart B, or these regulations, including imposing appropriate penalties, and seeking injunctive relief and specific performance of contractual obligations. See 8 U.S.C. 1188(g)(2).

(b) *Role of the Employment and Training Administration (ETA).* The issuance and denial of labor certification under 8 U.S.C. 1188 has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). In general, matters concerning the obligations of an employer of H–2A workers related to the labor certification process are administered by OFLC, including obligations and assurances made by employers, overseeing employer recruitment and assuring program integrity. The regulations pertaining to the issuance, denial, and

revocation of labor certification for temporary foreign workers by the OFLC are found in 20 CFR part 655, subpart B.

(c) *Role of the Employment Standards Administration (ESA), Wage and Hour Division (WHD).* Certain investigatory, inspection, and law enforcement functions to carry out the provisions under 8 U.S.C. 1188 have been delegated by the Secretary to the WHD. In general, matters concerning the obligations under a work contract between an employer of H-2A workers and the H-2A workers and workers in corresponding employment are enforced by WHD, including whether employment was offered to U.S. workers as required under 8 U.S.C. 1188 or 20 CFR part 655, subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing certification(s), and to seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages and reinstatement of laid off or displaced U.S. workers.

(d) *Effect of regulations.* The enforcement functions carried out by the WHD under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and these regulations apply to the employment of any H-2A worker and any other worker in corresponding employment as the result of any *Application for Temporary Employment Certification* filed with the Department on and after the effective date of these regulations.

#### **§ 501.2 Coordination between Federal agencies.**

(a) Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H-2A labor standards between the employer and the employee will be immediately forwarded to the appropriate WHD office for appropriate action under these regulations.

(b) Information received in the course of processing applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD, or other agencies as appropriate, including the Department of State (DOS) and DHS, for enforcement purposes.

(c) A specific violation for which debarment is imposed will be cited in a single debarment proceeding. OFLC and the WHD may coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to the DHS promptly.

#### **§ 501.3 Definitions.**

(a) *Definitions of terms used in this part.*

*Administrative Law Judge (ALJ).* A person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

*Adverse effect wage rate (AEWR).* The annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey.

*Agent.* A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(2) Is not itself an employer, or a joint employer, as defined in this section with respect to a specific *Application for Temporary Labor Certification*; and

(3) Is not under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review, or DHS under 8 CFR 292.3 or 1003.101.

*Agricultural association.* Any nonprofit or cooperative association of farmers, growers, or ranchers (including but not limited to processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses, or transports any worker that is subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

*Area of intended employment.* The geographic area within normal commuting distance of the place of the job opportunity for which the certification is sought. There is no rigid measure of distance that 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 the regional transportation network). 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.

*Corresponding employment.* The employment of workers who are not H-2A workers by an employer who has an approved H-2A *Application for Temporary Labor Certification* in any work included in the job order, or in any agricultural work performed by the H-2A workers. To qualify as corresponding employment the work must be performed during the validity period of the job order, including any approved extension thereof.

*Date of need.* The first date the employer requires the services of H-2A workers as indicated in the *Application for Temporary Employment Certification*.

*Employee.* A person who is engaged to perform work for an employer, as defined under the general common law of agency. 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 to perform the work; 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 may be considered and no one factor is dispositive.

*Employer.* A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employee) with respect to an H-2A worker or a worker in corresponding employment; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).

*Federal holiday.* Legal public holiday as defined at 5 U.S.C. 6103.

**Fixed-site employer.** Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this part, who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B or this part, as incident to or in conjunction with the owner's or operator's own agricultural operation.

**H-2A Labor Contractor (H-2ALC).** Any person who meets the definition of employer under this part and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B or this part.

**H-2A worker.** Any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a).

**Job offer.** The offer made by an employer or potential employer of H-2A workers to both U.S. and H-2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

**Job opportunity.** Full-time employment at a place in the U.S. to which U.S. workers can be referred.

**Job order.** The document containing the terms and conditions of employment that is posted by the SWA on its inter- and intra-state job clearance systems based on the employer's Form ETA-790, as submitted to the SWA.

**Joint employment.** Where two or more employers each have sufficient definitional indicia of an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.

**Prevailing wage.** Wage established pursuant to 20 CFR 653.501(d)(4).

**State Workforce Agency (SWA).** State government agency that receives funds pursuant to the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

**Successor in interest.** Where an employer has violated 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations, and has ceased doing

business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

- (1) Substantial continuity of the same business operations;
- (2) Use of the same facilities;
- (3) Continuity of the work force;
- (4) Similarity of jobs and working conditions;
- (5) Similarity of supervisory personnel;
- (6) Whether the former management or owner retains a direct or indirect interest in the new enterprise;
- (7) Similarity in machinery, equipment, and production methods;
- (8) Similarity of products and services; and
- (9) The ability of the predecessor to provide relief.

For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violations at issue.

**Temporary agricultural labor certification.** Certification made by the OFLC Administrator with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as an H-2A worker, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188.

**United States (U.S.).** The continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands, and, as of the transition program effective date, as defined in the Consolidated Natural Resources Act of 2008, Public Law 110-229, Title VII, the Commonwealth of the Northern Mariana Islands.

**United States worker (U.S. worker).** A worker who is:

- (1) A citizen or national of the U.S.; or
- (2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.; or
- (3) An individual who is an authorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the

employment in which the worker is engaging.

**WHD Administrator.** The Administrator of the Wage and Hour Division (WHD), and such authorized representatives as may be designated to perform any of the functions of the WHD Administrator under this part.

**Wages.** All forms of cash remuneration to a worker by an employer in payment for personal services.

**Work contract.** All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. The contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum will be the terms of the job order and any obligations required under 8 U.S.C. 1188, 20 CFR part 655, subpart B or this part.

(b) **Definition of agricultural labor or services.** For the purposes of this part, agricultural labor or services, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; logging employment; reforestation activities; or pine straw activities.

(1) **Agricultural labor** for the purpose of paragraph (b) of this section means all service performed:

(i) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(ii) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(iii) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the

Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(iv) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(v) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (b)(1)(iv) but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(vi) The provisions of paragraphs (b)(1)(iv) and (b)(1)(v) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(vii) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

As used in this section, the term farm includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (b) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 1141j(g) of title 12, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including

any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See* sec. 29 U.S.C. 203(f), as amended (sec. 3(f) of the FLSA, as codified). Under 12 U.S.C. 1141j(g) agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: gum spirits of turpentine and gum rosin. In addition as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in sec. 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g) or as applied in sec. 3(f) of FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780.

(4) *Logging employment.* Operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites.

(5) *Reforestation activities.* Predominately manual forestry work that includes, but is not limited to, tree planting, brush clearing and pre-commercial tree thinning.

(6) *Pine straw activities.* Certain activities predominately performed using hand tools, including but not limited to the raking, gathering, baling, and loading of pine straw that is a product of pine trees that are managed using agricultural or horticultural/silvicultural techniques.

(c) *Definition of a temporary or seasonal nature.* For the purposes of this part, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

#### § 501.4 Discrimination prohibited.

(a) A person may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1188 or these regulations;

(2) Instituted or caused to be instituted any proceedings related to 8 U.S.C. 1188 or these regulations;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or these regulations;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188, or to this subpart or any other Department regulation promulgated pursuant to 8 U.S.C. 1188; or

(5) Exercised or asserted on behalf of himself or others any right or protection afforded by 8 U.S.C. 1188 or these regulations.

(b) Allegations of discrimination against any person under paragraph (a) of this section will be investigated by the WHD. Where the WHD has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. The WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, initiate debarment proceedings, and recommend to OFLC revocation of any such violator's current labor certification. Complaints alleging discrimination against workers or immigrants based on citizenship or immigration status may also be forwarded by the WHD to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices.

#### § 501.5 Waiver of rights prohibited.

A person may not seek to have an H-2A worker, a worker in corresponding employment, or a U.S. worker improperly rejected for employment or improperly laid off or displaced waive any rights conferred under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations. Any agreement by an employee purporting to waive or modify any rights given to said person under these provisions shall be void as contrary to public policy except as follows:

(1) Waivers or modifications of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement; and

(2) Agreements in settlement of private litigation are permitted.

**§ 501.6 Investigation authority of Secretary.**

(a) *General.* The Secretary, through the WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations, either pursuant to a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, housing, vehicles, and records (and make transcriptions thereof), question any person and gather any information as may be appropriate.

(b) *Confidential investigation.* The WHD shall conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(c) *Report of violations.* Any person may report a violation of the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations to the Secretary by advising any local office of the SWA, ETA, WHD or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of WHD for the geographic area in which the reported violation is alleged to have occurred.

**§ 501.7 Cooperation with Federal officials.**

All persons must cooperate with any Federal officials assigned to perform an investigation, inspection, or law enforcement function pursuant to 8 U.S.C. 1188 and these regulations during the performance of such duties. The WHD will take such action as it deems appropriate, including initiating debarment proceedings, seeking an injunction to bar any failure to cooperate with an investigation and/or assessing a civil money penalty therefor. In addition, the WHD will report the matter to OFLC, and may recommend to OFLC that the person's existing labor certification be revoked. In addition, Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 114.

**§ 501.8 Accuracy of information, statements, data.**

Information, statements and data submitted in compliance with 8 U.S.C. 1188 or these regulations are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the U.S., knowingly and willfully falsifies, conceals, or covers up a material fact by any trick, scheme, or device, or makes any false, fictitious, or

fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both.

**§ 501.9 Surety bond.**

(a) Every H-2ALC must obtain a surety bond demonstrating its ability to discharge financial obligations under the H-2A program. Documentation from the issuer must be provided with the *Application for Temporary Employment Certification* identifying the name, address, phone number, and contact person for the surety, and providing the amount of the bond (as calculated in this section), date of its issuance and expiration and any identifying designation utilized by the surety for the bond.

(b) The bond must be payable to the Administrator, Wage and Hour Division, United States Department of Labor, 200 Constitution Avenue, NW., Room S-3502, Washington, DC 20210. It will obligate the surety to pay any sums to the WHD Administrator for wages and benefits owed to an H-2A worker or to a worker in corresponding employment, or to a U.S. worker improperly rejected or improperly laid off or displaced, based on a final decision finding a violation or violations of this part or 20 CFR part 655, subpart B relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond must be written to cover liability incurred during the term of the period listed in the *Application for Temporary Employment Certification* for labor certification made by the H-2ALC, and shall be amended to cover any extensions of the labor certification requested by the H-2ALC.

(c) The bond must be in the amount of \$5,000 for a labor certification for which a H-2ALC will employ fewer than 25 workers; \$10,000 for a labor certification for which a H-2ALC will employ 25 to 49 workers; \$20,000 for a labor certification for which a H-2ALC will employ 50 to 74 workers; \$50,000 for a labor certification for which a H-2ALC will employ 75 to 99 workers; and \$75,000 for a labor certification for which a H-2ALC will employ 100 or more workers. The amount of the bond may be increased by the WHD Administrator after notice and an opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet potential liabilities.

(d) The bond must remain in force for a period of no less than 2 years from the date on which the labor certification expires. If the WHD has commenced any enforcement action under these regulations against the employer or any successor in interest by that date, the bond shall remain in force until the conclusion of such action and any appeal or related litigation. Surety bonds may not be canceled or terminated unless 45 days' notice is provided by the surety in writing to the WHD Administrator, at the address set forth in paragraph (b).

**Subpart B—Enforcement****§ 501.15 Enforcement.**

The investigation, inspection, and law enforcement functions to carry out the provisions of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations, as provided in these regulations for enforcement by the WHD, pertain to the employment of any H-2A worker, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced. Such enforcement includes the work contract provisions as defined in § 501.3(a).

**§ 501.16 Sanctions and remedies—general.**

Whenever the WHD Administrator believes that 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a)(1) Institute appropriate administrative proceedings, including: The recovery of unpaid wages (including recovery of recruitment fees paid in the absence of required contract clauses (*see* 20 CFR 655.135(k))); the enforcement of provisions of the work contract, 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations; the assessment of a civil money penalty; make whole relief for any person who has been discriminated against; reinstatement and make-whole relief for any U.S. worker who has been improperly rejected for employment, laid off or displaced; or debarment for up to 3 years.

(2) The remedies referenced in paragraph (1) will be sought either directly from the employer, or from its successor in interest, as appropriate. In the case of an H-2ALC, the remedies will be sought from the H-2ALC directly and/or monetary relief (other than civil money penalties) from the insurer who issued the surety bond to the H-2ALC, as required by 20 CFR part



655, subpart B and section 501.9 of this part.

(b) Petition any appropriate District Court of the U.S. for temporary or permanent injunctive relief, including to prohibit the withholding of unpaid wages and/or for reinstatement, or to restrain violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations, by any person.

(c) Petition any appropriate District Court of the U.S. for an order directing specific performance of covered contractual obligations.

#### **§ 501.17 Concurrent actions.**

OFLC has primary responsibility to make all determinations regarding the issuance, denial, or revocation of a labor certification as described in § 501.1(b) of this part and in 20 CFR part 655, subpart B. The WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 501.1(c) of this part. The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations. OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under 20 CFR 655.182 or under § 501.20 of these regulations.

#### **§ 501.18 Representation of the Secretary.**

The Solicitor of Labor, through authorized representatives, shall represent the WHD Administrator and the Secretary in all administrative hearings under 8 U.S.C. 1188 and these regulations.

#### **§ 501.19 Civil money penalty assessment.**

(a) A civil money penalty may be assessed by the WHD Administrator for each violation of the work contract, or the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations. Each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations constitutes a separate violation.

(b) In determining the amount of penalty to be assessed for each violation, the WHD Administrator shall consider the type of violation committed and other relevant factors. The factors that may be considered include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations;

(2) The number of H-2A workers, workers in corresponding employment,

or U.S. workers who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) Efforts made in good faith to comply with 8 U.S.C. 1188, 20 CFR part 655, subpart B, and these regulations;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated 8 U.S.C. 1188;

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

(c) A civil money penalty for each violation of the work contract or a requirement of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations will not exceed \$1,500 per violation, with the following exceptions:

(1) A civil money penalty for each willful violation of the work contract, or of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations, or for each act of discrimination prohibited by § 501.4 shall not exceed \$5,000;

(2) A civil money penalty for a violation of a housing or transportation safety and health provision of the work contract, or any obligation under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations, that proximately causes the death or serious injury of any worker shall not exceed \$50,000 per worker;

(3) For purposes of this section, the term serious injury includes, but is not limited to:

(i) Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) Permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) Permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(4) A civil money penalty for a repeat or willful violation of a housing or transportation safety and health provision of the work contract, or any obligation under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations, that proximately causes the death or serious injury of any worker, shall not exceed \$100,000 per worker.

(d) A civil money penalty for failure to cooperate with a WHD investigation shall not exceed \$5,000 per investigation.

(e) A civil money penalty for laying off or displacing any U.S. worker

employed in work or activities that are encompassed by the approved *Application for Temporary Labor Certification* for H-2A workers in the area of intended employment either within 60 days preceding the date of need or during the validity period of the job order, including any approved extension thereof, other than for a lawful, job-related reason, shall not exceed \$15,000 per violation per worker. Such layoff shall be permitted where all H-2A workers were laid off first.

(f) A civil money penalty for improperly rejecting a U.S. worker who is an applicant for employment, in violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations, shall not exceed \$15,000 per violation per worker.

#### **§ 501.20 Debarment and revocation.**

(a) *Debarment of an employer.* The WHD Administrator may debar an employer or any successor in interest to that employer from receiving future labor certifications under 20 CFR part 655, subpart B, subject to the time limits set forth in paragraph (c) of this section, if: The WHD Administrator finds that the employer substantially violated a material term or condition of its temporary labor certification, with respect to H-2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced, by issuing a Notice of Debarment.

(b) *Debarment of an agent or an attorney.* The WHD Administrator may debar an agent or attorney from participating in any action under 8 U.S.C. 1188, 20 CFR part 655, subpart B or 29 CFR part 501, if the WHD Administrator finds that the agent or attorney participated in, had knowledge of, or had reason to know of, an employer's substantial violation, by issuing a Notice of Debarment. The OFLC Administrator may not issue future labor certifications to any employer represented by a debarred agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Statute of Limitations and Period of Debarment.*

(1) The WHD Administrator must issue any Notice of Debarment no later than 2 years after the occurrence of the violation.

(2) No employer, attorney, or agent may be debarred under this subpart for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:

(i) Failure to pay or provide the required wages, benefits or working conditions to the employer's H-2A workers and/or workers in corresponding employment;

(ii) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(iii) Failure to comply with the employer's obligations to recruit U.S. workers;

(iv) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H-2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188, 20 CFR part 655, Subpart B, or these regulations;

(vii) Employing an H-2A worker outside the area of intended employment, or in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;

(viii) A violation of the requirements of § 655.135(j) and (k);

(ix) A violation of any of the provisions listed in § 501.4(a) of this subpart; or

(x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(2) In determining whether a violation is so substantial as to merit debarment, the factors set forth in § 501.19(b) shall be considered.

(e) *Procedural Requirements.* The Notice of Debarment must be in writing, must state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, must identify appeal opportunities under § 501.33 and a time frame under which such rights must be exercised and must comply with § 501.32. The debarment will take effect 30 days from the date the Notice of Debarment is issued, unless a request for review is properly filed within 30 days from the issuance of the Notice of Debarment. The timely filing

of an administrative appeal stays the debarment pending the outcome of the appeal as provided in § 501.33(d).

(f) *Debarment involving members of associations.* If, after investigation, the WHD Administrator determines that an individual employer-member of a joint employer association has committed a substantial violation, the debarment determination will apply only to that member unless the WHD Administrator determines that the association or another association member participated in the violation, in which case the debarment will be invoked against the association or other complicit association member(s) as well.

(g) *Debarment involving associations acting as sole employers.* If, after investigation, the WHD Administrator determines that an association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the association and any successor in interest to the debarred association.

(h) *Debarment involving associations acting as joint employers.* If, after investigation, the WHD Administrator determines that an association acting as a joint employer with its members has committed a substantial violation, the debarment determination will apply only to the association, and will not be applied to any individual employer-member of the association. However, if the WHD Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit association member as well. An association debarred from the H-2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(i) *Revocation.* The WHD may recommend to the OFLC Administrator the revocation of a temporary agricultural labor certification if the WHD finds that the employer:

(1) Substantially violated a material term or condition of the approved temporary labor certification;

(2) Failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; or

(3) Failed to comply with one or more sanctions or remedies imposed by the WHD, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

(j) *Res Judicata.* In considering a recommendation made by the WHD to revoke a temporary agricultural labor certification, the OFLC Administrator shall treat a final agency determination that the employer has committed a violation as res judicata and shall not reconsider such a determination.

#### **§ 501.21 Failure to cooperate with investigations.**

(a) No person shall refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority.

(b) Where an employer (or employer's agent or attorney) does not cooperate with an investigation concerning the employment of an H-2A worker, a worker in corresponding employment, or a U.S. worker who has been improperly rejected for employment or improperly laid off or displaced, WHD may make such information available to OFLC and may recommend that OFLC revoke the existing certification that is the basis for the employment of the H-2A workers giving rise to the investigation. In addition, WHD may take such action as appropriate, including initiating proceedings for the debarment of the employer from future certification for up to 3 years, seeking an injunction, and/or assessing civil money penalties against any person who has failed to cooperate with a WHD investigation. The taking of any one action shall not bar the taking of any additional action.

#### **§ 501.22 Civil money penalties—payment and collection.**

Where a civil money penalty assessment is directed in a final order by the WHD Administrator, by an ALJ, or by the Administrative Review Board (ARB), the amount of the penalty is due within 30 days and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the WHD Administrator by certified check or by money order, made payable to the order of Wage and Hour Division, United States Department of Labor. The remittance shall be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

#### **Subpart C—Administrative Proceedings**

##### **§ 501.30 Applicability of procedures and rules.**

The procedures and rules contained herein prescribe the administrative process that will be applied with respect to a determination to assess civil money

penalties, to debar, or to increase the amount of a surety bond and which may be applied to the enforcement of provisions of the work contract, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations, or to the collection of monetary relief due as a result of any violation. Except with respect to the imposition of civil money penalties, debarment, or an increase in the amount of a surety bond, the Secretary may, in the Secretary's discretion, seek enforcement action in Federal court without resort to any administrative proceedings.

#### Procedures Relating to Hearing

##### § 501.31 Written notice of determination required.

Whenever the WHD Administrator decides to assess a civil money penalty, to debar, to increase a surety bond, or to proceed administratively to enforce contractual obligations, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations, including for the recovery of the monetary relief, the person against whom such action is taken shall be notified in writing of such determination.

##### § 501.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the WHD Administrator including the amount of any monetary relief due or actions necessary to fulfill a contractual obligation or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or these regulations, the amount of any civil money penalty assessment, whether debarment is sought and the term, and any change in the amount of the surety bond, and the reason or reasons therefor.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the WHD Administrator shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 501.33.

##### § 501.33 Request for hearing.

(a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 30 days after issuance of the notice referred to in § 501.32.

(b) No particular form is prescribed for any request for hearing permitted by

this part. However, any such request shall:

(1) Be typewritten or legibly written;

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

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

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

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

(c) The request for such hearing must be received by the official who issued the determination, at the WHD address appearing on the determination notice, within the time set forth in paragraph (a) of this section. Requests may be made by certified mail or by means normally assuring overnight delivery.

(d) The determination shall take effect on the start date identified in the written notice of determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings, provided that any surety bond remains in effect until the conclusion of any such proceedings.

#### Rules of Practice

##### § 501.34 General.

(a) Except as specifically provided in these regulations, 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 described in this part.

(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) will not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The ALJ may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

##### § 501.35 Commencement of proceeding.

Each administrative proceeding permitted under 8 U.S.C. 1188 and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 501.33.

##### § 501.36 Caption of proceeding.

(a) Each administrative proceeding instituted under 8 U.S.C. 1188 and these regulations shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In the Matter of \_\_\_\_\_, Respondent.

(b) For the purposes of such administrative proceedings the WHD Administrator shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

#### Referral for Hearing

##### § 501.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33, the WHD Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, will, by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or by the authorized representative of such person, to the Chief ALJ, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under these regulations or 29 CFR part 18.

(b) A copy of the Order of Reference, together with a copy of these regulations, shall be served by counsel for the WHD Administrator upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

##### § 501.38 Notice of docketing.

Upon receipt of an Order of Reference, the Chief ALJ shall appoint an ALJ to hear the case. The ALJ shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 days from the date on which the Order of Reference was filed.

##### § 501.39 Service upon attorneys for the Department of Labor—number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for the DOL. 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., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

### Procedures Before Administrative Law Judge

#### § 501.40 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to deter the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the ALJ, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the ALJ; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the ALJ; or

(2) Inform the ALJ that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefore, the ALJ, within 30 days thereafter, shall, if satisfied with its form and substance, accept such

agreement by issuing a decision based upon the agreed findings.

### Post-Hearing Procedures

#### § 501.41 Decision and order of Administrative Law Judge.

(a) The ALJ shall prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the WHD Administrator.

(b) The decision of the ALJ shall include a statement of the findings and conclusions, with reasons and basis therefor, 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 WHD Administrator. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the ARB in person or by certified mail.

(d) The decision concerning civil money penalties, debarment, monetary relief, and/or enforcement of other contractual obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and/or this part, when served by the ALJ shall constitute the final agency order unless the ARB, as provided for in § 501.42, determines to review the decision.

### Review of Administrative Law Judge's Decision

#### § 501.42 Procedures for initiating and undertaking review.

(a) A respondent, the WHD, or any other party wishing review, including judicial review, of the decision of an ALJ shall, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition shall be served on all parties and on the ALJ. If the ARB does not issue a notice accepting a petition for review of the decision within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the ALJ shall be deemed the final agency action.

(b) Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same shall be served upon the ALJ and upon all parties to the proceeding in person or by certified mail.

#### § 501.43 Responsibility of the Office of Administrative Law Judges (OALJ).

Upon receipt of the ARB's Notice pursuant to § 501.42 of these regulations, the OALJ shall promptly forward a copy of the complete hearing record to the ARB.

#### § 501.44 Additional information, if required.

Where the ARB has determined to review such decision and order, the ARB shall notify the parties of:

(a) The issue or issues raised;

(b) The form in which submissions shall be made (*i.e.*, briefs, oral argument, *etc.*); and

(c) The time within which such presentation shall be submitted.

#### § 501.45 Final decision of the Administrative Review Board.

The ARB's final decision shall be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ, in person or by certified mail.

### Record

#### § 501.46 Retention of official record.

The official record of every completed administrative hearing provided by these regulations shall be maintained and filed under the custody and control of the Chief ALJ, or, where the case has been the subject of administrative review, the ARB.

#### § 501.47 Certification.

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a U.S. District Court, after the administrative remedies have been exhausted, the Chief ALJ or, where the case has been the subject of administrative review, the ARB shall promptly index, certify and file with the appropriate U.S. District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

Signed in Washington this 27th day of August 2009.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

**Shelby Hallmark,**

*Acting Assistant Secretary, Employment Standards Administration.*

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