

**DEPARTMENT OF LABOR****Employment and Training  
Administration****20 CFR Part 655**

[DOL Docket No. ETA-2019-0001]

RIN 1205-AB92

**Labor Certification Process for  
Temporary Employment in the  
Commonwealth of the Northern  
Mariana Islands (CW-1 Workers)****AGENCY:** Employment and Training  
Administration, Department of Labor.**ACTION:** Interim final rule; request for  
comments.

**SUMMARY:** The Department of Labor (Department or DOL) is issuing new regulations governing the certification of temporary employment opportunities to be filled by nonimmigrant workers in the Commonwealth of the Northern Mariana Islands (CNMI) and the obligations applicable to employers of such workers under the CNMI-Only Transitional Worker visa program (CW-1). This interim final rule (IFR), implementing provisions of the Northern Mariana Islands U.S. Workforce Act of 2018 (Workforce Act), establishes the process by which a CNMI employer will obtain a prevailing wage determination (PWD) and temporary labor certification (TLC) from DOL for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in CW-1 status. Although the CW-1 visa classification predates the Workforce Act, classification as a CW-1 nonimmigrant does not currently require a labor certification. The Workforce Act institutes a labor certification requirement as a prerequisite for approval of a CW-1 petition by DHS and charges the Department with promulgating an IFR to administer this new labor certification requirement. We are also issuing regulations to provide for increased worker protections for both United States (U.S.) and foreign workers to ensure no U.S. worker is placed at a competitive disadvantage compared to a foreign worker or is displaced by a foreign worker.

**DATES:** This IFR is effective April 4, 2019, at 12:00 a.m. Eastern Time (ET). Interested parties are invited to submit written comments on this IFR on or before May 31, 2019.

**ADDRESSES:** You may submit comments, identified by the Regulatory Information Number (RIN) 1205-AB92, by any one of the following methods:

*Electronic Comments:* Comments may be sent via <http://www.regulations.gov>, a Federal E-Government website that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type in "DOL CNMI IFR" (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments.

*Mail:* Address written submissions to (including disk and CD-ROM submissions) to Adele Gagliardi, 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.

*Instructions:* Please submit only one copy of your comments by only one method. All submissions must include the agency name and the RIN 1205-AB92. Please be advised that comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided. Comments that are mailed must be received by the date indicated for consideration.

*Docket:* For access to the docket to read documentation prepared in support of this rule or comments, go to the Federal e-Rulemaking Portal at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Thomas M. Dowd, Deputy Assistant Secretary, Employment and Training Administration, Department of Labor, Box #12-200, 200 Constitution Ave. NW, Washington, DC 20210, telephone (202) 513-7350 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:****I. Executive Summary**

The Workforce Act, Public Law 115-218 (July 24, 2018), provides the Secretary of Homeland Security with authority to administer and enforce a system of allocating and determining the terms and conditions of visas to be issued to certain nonimmigrant workers performing services or labor for an employer in the CNMI. Department of Homeland Security (DHS) regulations establish the CW-1 visa classification to provide for an orderly transition from the CNMI permit system to the U.S. immigration system for a foreign national who is otherwise ineligible for

another classification under the Immigration and Nationality Act (INA). In accordance with the Workforce Act, DHS will update regulations to reflect the statutory requirement that a CW-1 petition for temporary employment in the CNMI be accompanied by an approved TLC from DOL. A TLC granted by DOL confirms that there are not sufficient U.S. workers in the CNMI who are able, willing, qualified, and available to fill the petitioning CW-1 employer's job opportunity. The TLC also confirms that a foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.

As explained more fully in the preamble, the IFR establishes the process by which employers obtain a TLC from DOL for use in petitioning DHS to employ a nonimmigrant worker in CW-1 status, which involves four basic steps. First, the employer must request and obtain a PWD from DOL's Office of Foreign Labor Certification (OFLC) before filing a *CW-1 Application for Temporary Employment Certification*. To make this request, the employer will submit a completed *Application for Prevailing Wage Determination* (Form ETA-9141C) with OFLC's National Prevailing Wage Center (NPWC) containing information about the job opportunity in which the nonimmigrant workers will be employed. Based on a review of the information provided by the employer on the Form ETA-9141C, the NPWC will issue a PWD, indicate the source and validity period for its use, and return the Form ETA-9141C with its endorsement to the employer.

Second, the employer must file a completed *CW-1 Application for Temporary Employment Certification* (Form ETA-9142C and appropriate appendices) with the OFLC National Processing Center (NPC) no more than 120 calendar days before the date of need. Consistent with the Workforce Act, the employer seeking to extend the employment of a CW-1 worker may file a *CW-1 Application for Temporary Employment Certification* no more than 180 calendar days before the date on which the CW-1 status expires. The NPC Certifying Officer (CO) will review the employer's application for compliance with all applicable program requirements and issue either a Notice of Deficiency (NOD) or Notice of Acceptance (NOA). Where deficiencies in the application are discovered, the NOD will direct the employer that it must respond within 10 business days to submit a modified application

correcting the deficiencies or the CO will deny the application.

Third, where all program requirements are met, the employer will receive a NOA from the CO directing the recruitment of U.S. workers for the job opportunity and requesting a written report of the employer's recruitment efforts. To encourage the hiring of U.S. workers for employment in the CNMI, the employer will be required to advertise the job opportunity on the CNMI Department of Labor's job listing system; contact its former U.S. workers and solicit their return to the job; post a copy of the *CW-1 Application for Temporary Employment Certification* at the place(s) of employment in which the work will be performed by the CW-1 workers; and conduct any other recruitment activities (e.g., contacting community-based organizations or trade unions) required by the CO. The recruitment period will last approximately 21 calendar days and all employer-conducted recruitment must be completed before the written recruitment report can be prepared, signed, and submitted to the NPC for review.

And finally, upon review of the recruitment report, the CO will make a determination either to certify or to deny the *CW-1 Application for Temporary Employment Certification*. The CO will certify the application only where the employer has met all regulatory requirements. If the employer has met all requirements, the CO will send a Final Determination notice and copy of the certified *CW-1 Application for Temporary Employment Certification* to the employer and a copy, if applicable, to the employer's agent or attorney. The employer will use the Final Determination notice, as well as any other required documentation, to support the filing of a CW-1 petition with U.S. Citizenship and Immigration Services (USCIS).

As a condition of receiving a TLC, the IFR provides a number of worker protections to ensure U.S. workers are not placed at a competitive disadvantage compared to a CW-1 worker, such as requiring a minimum number of hours per week for full-time employment; requiring that U.S. workers in corresponding employment receive the same wages and benefits as the CW-1 workers; and requiring the payment of wages by employers to be finally and unconditionally "free and clear" and no less frequent than every 2 weeks. It also requires that employers guarantee employment for a total number of work hours equal to at least three-fourths of the workdays of the total period of employment for both

CW-1 workers and workers in corresponding employment.

The IFR requires employers to pay visa and related fees of CW-1 workers, and it requires employers to pay the inbound transportation costs—including subsistence costs incurred in transit—of workers who complete 50 percent of the job order period and the outbound transportation costs—including subsistence costs incurred in transit—of employees who complete the entire job order period. To protect U.S. workers in their employment from displacement by a CW-1 worker, this IFR prohibits the employer from laying off any similarly employed U.S. worker in the occupation beginning 270 calendar days before the date of need through the end of the period of employment certified by DOL. It also prohibits employers from retaliating against employees for exercising rights under the CW-1 program and protects workers from discriminatory hiring practices.

Finally, the IFR contains a number of provisions that will lead to increased transparency and enhanced program integrity. It requires employers to provide workers with earnings statements on or before each payday, with hours worked and deductions clearly specified; requires employers to provide workers with copies of the work contract in a language understood by the worker; and requires DOL to maintain an electronic file accessible to the general public with information on all employers applying for TLC to employ CW-1 workers. Additionally, the IFR requires employers to retain all documents and records establishing compliance with the regulations for a period of 3 years after the *CW-1 Application for Temporary Employment Certification* is adjudicated or from the date the CO receives a letter of withdrawal. The employer must make these documents and records available to the DOL, DHS or to any Federal Government Official performing an investigation, inspection, audit, or other law enforcement activity. It also establishes a sanctions and penalties regime for employers that violate program requirements, such as more intensive or assisted recruitment requirements, revocation of a certified *CW-1 Application for Temporary Employment Certification*, or debarment from filing any labor certification application or labor condition application with the Department for up to 5 years. The debarment process for the CW-1 program will provide for notice, an opportunity for rebuttal, and a right to appeal the Department's determination. CW-1 debarment, once it takes effect however, will automatically

debar an individual or entity from other foreign labor certification programs as well. That is, an individual or entity debarred from the CW-1 program will be disqualified from filing any labor certification applications<sup>1</sup> or labor condition applications<sup>2</sup> with DOL, including an agent or attorney's filing of an application on the debarred entity's behalf, for the period of time set forth in the CW-1 Notice of Debarment, Final Determination (if rebuttal evidence is submitted), or ARB Decision (if the debarment action is appealed).

The Department has concluded that the procedures and requirements outlined in this IFR will help employers obtain a reliable and productive workforce while also providing appropriate incentives to encourage the hiring of U.S. workers in the CNMI and protect the integrity of the program. This IFR is considered an Executive Order (E.O.) 13771 regulatory action. Details on the estimated costs can be found in the rule's economic analysis. Implementing this new labor certification process will further the Congressional intent to incentivize the hiring of U.S. workers in the CNMI by developing and strengthening the CNMI labor force over time; contribute to the success of its economy and labor market by benefiting small business; and create greater job opportunities for U.S. workers in that geographical demarcation. The new regulations also seek to ensure that the wages of U.S. workers are protected, in addition to extending worker protection assurances currently afforded in other TLC programs.

## II. Background

### A. Legal Framework

President Donald J. Trump signed the Workforce Act into law on July 24, 2018. The purposes of the Workforce Act are to encourage the hiring of U.S. workers in the CNMI workforce and ensure that no U.S. worker is placed at a competitive disadvantage compared to a non-U.S. worker or is displaced by a non-U.S. worker. The Workforce Act

<sup>1</sup> See 20 CFR part 655, subpart A (governing H-2B temporary nonagricultural workers); 20 CFR part 655, subpart B (governing H-2A temporary agricultural workers); 20 CFR part 655, subpart F (governing the temporary employment of D-1 crewmembers on foreign vessels to perform longshore work at U.S. ports); and 20 CFR part 656 (permanent labor certification).

<sup>2</sup> See 20 CFR part 655, subpart H (governing labor condition applications for H-1B foreign nationals entering the U.S. on a temporary basis to work in specialty occupations or as fashion models, H-1b1 professionals entering under the U.S.-Chile or U.S.-Singapore Free Trade Agreements, and E-3 professionals entering under the U.S.-Australia Free Trade Agreement).

extends the transition period described below (and thus, the CW–1 visa program) through 2029. It also requires that a CW–1 petition for temporary employment filed with DHS be accompanied by an approved TLC from DOL. See Public Law 115–218, sec. 3, 48 U.S.C. 1806(a)(2) and (d)(2). The TLC from DOL must confirm that: (1) There are not sufficient U.S. workers in the CNMI who are able, willing, qualified, and available at the time and place needed to perform the services or labor involved in the petition; and (2) the employment of a nonimmigrant worker who is the subject of a petition will not adversely affect the wages and working conditions of similarly employed U.S. workers. 48 U.S.C. 1806(d)(2)(A).

In order to implement the second requirement that nonimmigrant employment will not adversely affect U.S. workers' wages and working conditions, the Workforce Act mandates the determination of the relevant wage rates. The first option for this determination is for DOL to use, or make available to employers, an occupational wage survey conducted by the Governor of the CNMI (Governor) that meets the statistical standards established by the Department for determining prevailing wages in the CNMI on an annual basis. 48 U.S.C. 1806(d)(2)(B). If that does not occur, then the Workforce Act requires that the prevailing wage for a given occupation in the CNMI be the arithmetic mean of the wages of workers similarly employed in the territory of Guam based on the Occupational Employment Statistics (OES) Survey conducted by the Department's Bureau of Labor Statistics (BLS). *Id.* The Secretary of Labor (Secretary) has delegated the statutory responsibilities of administering the TLC process through the ETA Assistant Secretary to OFLC.

The CNMI is a self-governing commonwealth and unincorporated territory of the United States. In 1976, Congress approved a Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (the Covenant), Public Law 94–241, sec. 1, 90 Stat. 263 (Mar. 24, 1976) (48 U.S.C. 1801 and 1801 note). The Covenant, which entered into full effect on Nov. 4, 1986, Presidential Proclamation No. 5564, 51 FR 40399 (Nov. 3, 1986) (48 U.S.C. 1801 note), established the terms of the political relationship between the United States and the CNMI, granted U.S. citizenship to eligible CNMI residents, exempted the CNMI from most U.S. immigration laws, and gave the CNMI local control over its own immigration system.

Congress retained the authority to extend U.S. immigration laws to the CNMI at any time.<sup>3</sup> In addition, the Covenant sought to increase the percentage of U.S. workers in the total workforce of the CNMI, while maintaining the minimum number of workers who are not U.S. workers to meet the changing demands of the CNMI economy; to encourage the hiring of U.S. workers into such workforce; and to ensure that no U.S. worker is at a competitive disadvantage for employment compared to a worker who is not a U.S. worker, or is displaced by a worker who is not a U.S. worker.

In 2008, Congress extended U.S. immigration laws to the CNMI through the Consolidated Natural Resources Act of 2008 (CNRA). See Public Law 110–229, Title VII, 122 Stat. 754, 853 (May 8, 2008) (48 U.S.C. 1806 note). Under the CNRA, which amended the Covenant, Federal immigration laws would fully apply after a 5-year (2009–2014) transition period. Once the Federal immigration laws were in place in 2014 without CNMI exceptions, a percentage of the workforce would likely not meet the requirements of U.S. temporary employment visas, and thus would be ineligible to enter or reenter the CNMI, negatively impacting the local economy. Thus, the CNRA provided for a new Commonwealth-Only Transitional Worker visa classification, to be administered by DHS, with the proviso that, to incrementally reduce the Commonwealth's dependence on foreign labor, the number of visas issued would decrease each year, ending with the issuance of zero visas by the end of the transition period. Congress later extended the period's end to December 31, 2019. See Public Law 110–229, sec. 702(a); S. Rep. No. 115–214 at 6–7; Report on 902 Consultations at 6–7; and Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113–235, sec. 10, 128 Stat. 2130, 2134 (Dec. 16, 2014) (extending the transition period to December 31, 2019). The CNRA did not stipulate the requirement of obtaining a labor certification prior to

<sup>3</sup> See history summarized in S. Rep. No. 115–214 at 6–7 (2018), <https://www.congress.gov/115/crpt/srpt214/CRPT-115srpt214.pdf>, accompanying S.2325, Northern Mariana Islands U.S. Workforce Act. Provisions of S. 2325 were enacted as part of the Workforce Act. See also immigration issues and recommendations discussed, pre-Workforce Act, in Special Representatives of the United States and the Commonwealth of the Northern Mariana Islands, “Report to the President on 902 Consultations 6–25” (Jan. 2017) (hereafter “Report on 902 Consultations”), <https://www.doi.gov/sites/doi.gov/files/uploads/902-consultations-report-january-2017.pdf>.

filing a petition for a CW–1 worker with DHS.

#### *B. Statutory Basis for an Interim Final Rule*

The Workforce Act requires the Secretary to promulgate an IFR implementing the CW–1 TLC and its related provisions, and exempts this rulemaking from the Administrative Procedure Act's (APA's) notice-and-comment requirement under 5 U.S.C. 553(b). See Public Law 115–218, sec. 3(b)(2).

This exemption reflects the exigency created by the new labor certification requirement. Under the CW–1 visa program as amended by the Workforce Act, the Secretary must develop and implement new standards, requirements, and procedures for employers to obtain a TLC before a CW–1 petition can be submitted to DHS. This new TLC process—including a procedure to obtain a PWD required to support the employer's TLC application—must enable employers to hire a nonimmigrant worker under the CW–1 classification with an employment start date as early as October 1, 2019, when the new requirement takes effect.<sup>4</sup> By statute, an employer that desires to renew the employment of a CW–1 worker may petition DHS no more than 180 calendar days before the expiration of that worker's visa status.<sup>5</sup> The earliest possible renewal petition date for a CW–1 worker with an October 1, 2019 start date is April 4, 2019. Accordingly, the Secretary must have a process for employers to obtain a PWD and TLC in place by April 4, 2019. See 48 U.S.C. 1806(d)(2)(A)(i).

Because of the exigency created by the statute, the Department is also issuing this IFR with an April 4, 2019 effective date, rather than providing for the usual 30-day waiting period required by section 553(d) of the APA. Under the APA, an agency is authorized to make a rule effective immediately upon a showing of good cause instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). An agency can show good cause for eliminating the 30-day waiting period when it demonstrates urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 290 (7th Cir.

<sup>4</sup> The governing statute, as amended by the Workforce Act, establishes a temporary labor certification requirement beginning with CW–1 petitions filed with DHS with employment start dates in FY 2020. See 48 U.S.C. 1806(d)(2)(A)(i).

<sup>5</sup> See 48 U.S.C. 1806(d)(3)(D), providing that an employer may petition DHS no earlier than 180 days before the expiration of a CW–1 visa, when the petition is for renewal of the visa.

1979); *United States v. Gavrilovic*, 551 F.2d 1099, 1104 (8th Cir. 1977). As explained above, because Congress has required that a labor certification process be in place to enable employers to hire CW-1 workers with start dates as early as October 1, 2019, this rulemaking must be effective no later than April 4, 2019, so that an employer may obtain a timely PWD. A valid PWD is required when an employer files its *CW-1 Application for Temporary Employment Certification*. Only after the employer receives a TLC from the Department may it petition USCIS for a CW-1 visa, so the Department is making this rule effective as soon as possible. Employers may request a PWD as early as April 4, 2019.

### C. CNMI Labor Market

The CNMI has a total population of 52,263, according to the CNMI Department of Commerce Central Statistics Division.<sup>6</sup> In the years that followed the establishment of the Covenant, the CNMI economy became reliant on the use of temporary foreign labor. The Government Accountability Office (GAO) found that in 2016, foreign workers made up 53 percent of those employed and filled the majority of all hospitality and construction jobs. The GAO also found that, if all CW workers were removed from the CNMI's labor market, the CNMI's gross domestic product (GDP) would be reduced by between 26 and 62 percent. The GAO report noted that the supply of workers in the unemployed domestic workforce would be well below the CNMI's demand for foreign labor.<sup>7</sup> The estimated employment level was 29,215 workers (15,559 foreign workers and 13,656 domestic workers) in 2016,<sup>8</sup> while the number of unemployed persons was 2,386 persons.<sup>9</sup> Historically, the unemployment rate in the CNMI has been higher than 10 percent because many unemployed

persons in the CNMI lack the skill sets and work experience required for the jobs filled by foreign workers, even though many of those jobs are for low-skilled workers.

According to the CNMI Department of Commerce Central Statistics Division, there were an estimated 2,646 unemployed persons in the CNMI in the 4th quarter of 2017, 53.1 percent (1,406) of whom were U.S. citizens and 11.7 percent (310) of whom were permanent residents.<sup>10</sup> The CNMI unemployment rate was 10.5 percent. The unemployment rate for U.S. citizens was 13.5 percent, for permanent residents was 9.2 percent, and for non-U.S. citizens was 8.2 percent. The unemployment rate was negatively associated with age: The highest rate was 26.2 percent for youth 16 to 19 years of age, while the lowest rate was 2.0 percent for persons 65 years of age and older. The unemployment rate was also inversely related to education level: Persons with less than a high school diploma had the highest unemployment rate at 21.3 percent, while those with at least a master's degree had the lowest unemployment rate at 3.7 percent. With respect to place of birth, the unemployment rate for persons born in a U.S. State or territory was 14.3 percent, for persons born in an Asian country was 7.3 percent, and for persons born in the Pacific Islands was 18.9 percent.<sup>11</sup>

In light of the CNMI economy's continuing dependence on foreign labor, the CNRA's requirement to reduce and eventually eliminate CW-1 visas generated significant concern among CNMI employers. Increased employer demand for CW-1 visas has resulted, in large part, from recent economic expansion in the construction, casinos, and related hospitality industry sectors. In its February 2018 report, the GAO noted that the U.S. Department of Commerce's Bureau of Economic Analysis (BEA) estimated that the CNMI's GDP increased by almost 29 percent in 2016 (to \$1.242 billion), after increasing by about 4 percent in 2015. BEA attributed this economic growth to a significant increase in visitor

spending, particularly for casino gambling, and investment in the construction of a casino resort in Garapan and other hotel construction in Saipan.<sup>12</sup> The number of visitors to the CNMI grew over 10 percent, primarily reflecting an increase in visitor arrivals from South Korea and China. Reflecting the increase in economic activity, employment rose by approximately 25 percent, from 23,344 in 2013 to 29,215 in 2016. However, documented patterns of labor abuse and exploitation of foreign workers by certain CNMI employers in recent decades have also led to calls for improving the employment opportunities of U.S. workers and strengthening labor protections.<sup>13</sup>

The number of guest workers in the CNMI surged in the 1980s when garment manufacturers from Hong Kong and Korea set up business in the CNMI. The CNMI economy became dependent on foreign labor as the garment and tourism industries expanded in the 1980s and 1990s. According to an October 1999 economic study by the Northern Marianas College, garment manufacturing and tourism accounted for about 85 percent of the CNMI's total economic activity and 96 percent of its exports.<sup>14</sup> The CNMI's guest worker program gained worldwide notoriety in the 1990s when reports of sweatshop conditions and widespread abuse of guest workers began to surface.<sup>15</sup> Notwithstanding large lawsuit settlements and independent monitoring at garment factories, the number of labor abuses continued to be significant.<sup>16</sup>

<sup>12</sup> See S. Rep. No. 115-214 at 7. See U.S. Govt. Accountability Office, "Commonwealth of the Northern Mariana Islands: Recent Economic Trends and Preliminary Observations on Workforce Data," GAO-18-373T (Feb. 2018), <https://www.gao.gov/products/GAO-18-373T>.

<sup>13</sup> See S. Rep. No. 115-214 at 8 (referring to protections such as "higher minimum wage requirements, the potential for revocation, legitimate business requirements, [and] a prohibition on the use of CW visas for construction workers").

<sup>14</sup> U.S. Government Accountability Office, "U.S. Insular Areas: Economic, Fiscal, and Financial Accountability Challenges," GAO-07-119 (Dec. 12, 2006) <https://www.gao.gov/products/GAO-07-119>.

<sup>15</sup> Scott L. Cummings, "Hemmed In Legal Mobilization in the Los Angeles Anti-Sweatshop Movement," *Berkeley Journal of Employment and Labor Law*, Volume 30, 2009.

<sup>16</sup> U.S. Department of the Interior, Office of Insular Affairs, "Federal Ombudsman's Report on the Status of Nonresident Workers in the Commonwealth of the Northern Mariana Islands: Current Conditions, Issues and Trends in the CNMI" (Mar. 29, 2006), <http://www.doi.gov/oia/reports/upload/OmbudsmansReport.pdf>. (concluding that while labor conditions had improved "significantly" in the CNMI since the late 1990s, "complaints of illegal recruitment scams and nonpayment of wages [were] still prevalent.").

<sup>6</sup> CNMI Department of Commerce, Central Statistics Division, "CNMI Labor Force Participation Measures" (May 2018), <http://ver1.cnmicommerce.com/wp-content/uploads/2018/05/20174QLFPFD-ver-1.1.pdf>.

<sup>7</sup> See Report on 902 Consultations at 6-7. See U.S. Govt. Accountability Office, "Commonwealth of the Northern Mariana Islands: Implementation of Federal Minimum Wage and Immigration Laws," GAO-17-437 (May 2017), <https://www.gao.gov/products/GAO-17-437>.

<sup>8</sup> U.S. Government Accountability Office, "Commonwealth of the Northern Mariana Islands: Recent Economic Trends and Preliminary Observations on Workforce Data," GAO-18-373T (Feb. 2018), <https://www.gao.gov/products/GAO-18-373T>.

<sup>9</sup> U.S. Government Accountability Office, "Commonwealth of the Northern Mariana Islands: Implementation of Federal Minimum Wage and Immigration Laws," GAO-17-437 (May 2017), <https://www.gao.gov/products/GAO-17-437>.

<sup>10</sup> The report included the following note regarding the presence of unemployed non-U.S. citizens: "Note that while there are Not U.S. Citizens in the unemployed population, they are likely to be more temporary, compared to U.S. Citizen and Permanent Resident, because of existing laws governing migrant workers. With no job, Not U.S. Citizen, migrant worker will eventually leave the CNMI."

<sup>11</sup> CNMI Department of Commerce, Central Statistics Division, "CNMI Labor Force Participation Measures" (May 2018), <http://ver1.cnmicommerce.com/wp-content/uploads/2018/05/20174QLFPFD-ver-1.1.pdf>.

Changes to international trade law and various external events led to declines in the garment and tourism industries in the early 2000s. In the process, the CNMI's dependence on foreign labor in those industries also declined. In 2016, foreign workers were primarily employed in the following occupations: Food preparation and serving related (1,434 foreign workers); management (1,423); office and administrative support (1,269); construction and extraction (1,221); and education, training, and library (1,016). Foreign workers especially outnumbered U.S. workers in education, training, and library (1,016 foreign workers compared to 214 U.S. workers); construction and extraction (1,221 foreign workers compared to 268 U.S. workers); and building and grounds cleaning and maintenance (895 foreign workers compared to 255 U.S. workers).<sup>17</sup>

#### *D. Comments on the Rulemaking From Governor of the CNMI*

Pursuant to section 3(b)(3) of the Workforce Act, the Governor submitted comments and recommendations on the development of this IFR in a September 2018 letter. In the letter, the Governor recommended that the Department adopt a regulatory framework for the Commonwealth's CW-1 program similar to the H-2B program's framework for Guam, in which the government of Guam approves TLCs. Specifically, the letter stated that "[g]iven the changing nature of the CNMI labor force, and the lack of DOL statistics for the CNMI labor force, it would be in the interest of both DOL and the CNMI to authorize that the preliminary determination of U.S. worker availability in occupational categories petitioned for CW-1 permits be granted to the CNMI government."

Alternatively, the Governor recommended that the Commonwealth collaborate with the Department by providing the Department with data on the number of U.S. workers available in the Commonwealth's major occupational categories. The Governor suggested that the Department use this information to determine whether applications for TLC must be approved.

In accordance with the Workforce Act, the Department has considered the Governor's recommendations in the development of this regulation. As stated in sec. 3(b)(3)(B) of the Workforce Act, the Department may include provisions in this IFR "that are

responsive to any recommendation of the Governor that is not inconsistent with this Act," including the need to protect U.S. workers.

The Governor's request for the authority to issue TLCs in the same manner as the government of Guam approves TLCs in the H-2B program is inconsistent with the statute. This procedure for Guam was established by DHS regulation, under which a petitioning employer must apply for a temporary labor certification with the Governor of Guam. 8 CFR 214.2(h)(6)(iii)(A). The Workforce Act mandates that the Secretary of Homeland Security may not approve a CW-1 petition unless the employer has received a TLC from the Secretary. Public Law 115-218 sec. 3(a)(2)(B), 48 U.S.C. 1806(d)(2)(A). The underlying statutory schemes and histories for these programs are different. Given DOL's longstanding role in issuing TLCs in other contexts, as well as Congress' express direction that DOL issue such TLCs, DOL respectfully declines the Governor's request.

The Governor also requested that the Department use Commonwealth-provided local data in major occupational categories as the primary means for granting TLCs. This request is inconsistent with statutory requirements. The statute states that a TLC must confirm the lack of qualified workers available at the time and place needed to perform the job for which foreign workers are sought. Public Law 115-218 sec. 3(a)(2)(A)(i)(I), 48 U.S.C. 1806(d)(2)(A)(i)(I). The statute requires a case-by-case determination of worker unavailability at the particular time and location of the job for which foreign workers are sought, as opposed to a determination based on general data about worker availability in certain occupational categories. Therefore, the Department did not accept this proposal. It should also be noted that the Governor's suggestion does not provide any details as to what kind of local data might be provided and that it is unclear how "major occupational categories" would be determined or whether those categories would align with the occupations for which there is demand in the CW-1 program. It is possible that local data could be useful to the CO when deciding whether additional recruitment methods are required, but without substantial details as to what kind of data is being proposed, it is not possible to determine whether such data would be useful to the CO.

#### *E. Request for Comments on all Aspects of This Interim Final Rule*

The Department invites the public to submit comments on this IFR. The standards and procedures for employers to obtain a TLC under this IFR are largely equivalent to the provisions governing the H-2B temporary nonagricultural program, 80 FR 24042 (Apr. 29, 2015) (2015 H-2B Rule).

### **III. Discussion of 20 CFR Part 655, Subpart E**

#### *A. Introductory Sections*

##### **1. Section 655.400, Scope and Purpose of Subpart E**

This section informs program users of the statutory authority for the CW-1 TLC process, and the scope of the Department's role in receiving, reviewing, and adjudicating applications for TLC, and in upholding the integrity of *CW-1 Applications for Temporary Employment Certification*. It is through the regulatory provisions in this subpart that the Secretary makes the statutory determination that: (1) There are not sufficient U.S. workers in the Commonwealth who are able, willing, qualified, and who will be available at the time and place needed to perform the services or labor for which an employer desires to import foreign workers; and (2) the employment of the CW-1 worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed. Under the authority in 48 U.S.C. 1806(d)(2)(A), this section also explains that this subpart establishes the minimum standards and obligations with respect to the terms and conditions of the TLC with which CW-1 employers must comply, as well as the rights and obligations of CW-1 workers and workers in corresponding employment.

##### **2. Section 655.401, Authority of Agencies, Offices and Divisions in the Department of Labor**

This section describes the authority of and division of activities related to the CW-1 program within DOL. It discusses the authority of OFLC, an office within the Department's Employment and Training Administration (ETA), to issue TLCs and carry out the Secretary's statutory responsibilities as required by 48 U.S.C. 1806.

##### **3. Section 655.402, Definition of Terms**

This section establishes definitions of the terms used in part 655, subpart E. To the extent possible, the definitions in this section are consistent with the definition of terms used in other TLC programs, such as the H-2A and H-2B programs.

<sup>17</sup> CNMI Department of Commerce, Statistical Yearbook 2017, Table 5.24 "Average Hourly Wages by Occupation and Citizenship, CNMI: 2016," <http://ver1.cnmicommerce.com/sy-2017-table-5-17-31-wage-survey/>.

a. Administrative Law Judge

Administrative Law Judge (ALJ) means a person within the Department's Office of Administrative Law Judges (OALJ) appointed under 5 U.S.C. 3105, or a panel of such persons designated by the Chief ALJ from the Board of Alien Labor Certification Appeals (BALCA or Board) established by part 656 of this chapter, but which must hear and decide administrative judicial reviews, as set forth in § 655.461.

b. Agent

Agent is a term commonly defined and used in other TLC programs and is defined in this section similarly as a person or entity authorized to act on behalf of the employer for TLC purposes, and does not itself employ workers with respect to a specific application. This definition further provides that the agent representing the CW-1 employer must not be disallowed from practice before any court, the Department, the Executive Office for Immigration Review (EOIR) or DHS under 8 CFR 292.3 or 1003.101.

c. Applicant

Applicant means a U.S. worker who is applying for a job opportunity, or on whose behalf an application is made, in response to the employer's recruitment efforts required by this subpart and for which an employer has filed a *CW-1 Application for Temporary Employment Certification*.

d. Application for Prevailing Wage Determination

The *Application for Prevailing Wage Determination* means the Office of Management and Budget (OMB)-approved Form ETA-9141C and the appropriate appendices, submitted by an employer, as set forth in § 655.410, to secure a PWD for use in filing a *CW-1 Application for Temporary Employment Certification*.

e. CW-1 Application for Temporary Employment Certification

The *CW-1 Application for Temporary Employment Certification* means the OMB-approved Form ETA-9142C and the appropriate appendices, a valid PWD, and all supporting documentation submitted by an employer, as set forth in §§ 655.420 through 655.422, to secure a TLC determination from OFLC Administrator.

f. Attorney

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, or the District of

Columbia. An attorney can act as an agent as defined in, and subject to the requirements of, this regulation.

g. Board of Alien Labor Certification Appeals or BALCA

BALCA means the permanent Board established by part 656 of this chapter, chaired by the Chief ALJ, and consisting of ALJs appointed pursuant to 5 U.S.C. 3105 and designated by the Chief ALJ to be members of BALCA, to handle all administrative judicial reviews in accordance with § 655.461 of this subpart.

h. Certifying Officer or CO

CO means the person who processes *CW-1 Applications for Temporary Employment Certification* submitted by employers with authority to grant or deny TLC, as set forth in § 655.450 of this subpart, under the CW-1 program. The OFLC Administrator is the national CO. Other COs may also be designated by the OFLC Administrator to make the determinations required under this subpart, including making PWDs.

i. Chief Administrative Law Judge or Chief ALJ

Chief ALJ means the chief official of the Department's OALJ or the Chief ALJ's designee.

j. CNMI Department of Labor

The CNMI Department of Labor means the executive Department of the Commonwealth Government that administers employment and job training activities for employers and U.S. workers in the Commonwealth.

k. Commonwealth or CNMI

Commonwealth or CNMI, used interchangeably in this subpart, means the Commonwealth of the Northern Mariana Islands.

l. Corresponding Employment

Corresponding employment means the employment of U.S. workers who are not CW-1 workers by an employer that has an approved *CW-1 Application for Temporary Employment Certification* in any work included in the approved job offer, or in any work performed by the CW-1 workers. Workers in corresponding employment may be either workers hired during the recruitment process, in connection with the *CW-1 Application for Temporary Employment Certification*, or workers who already work for the employer and who perform any work included in the approved job order or any work performed by CW-1 workers.

m. CW-1 Petition

The CW-1 petition means USCIS Form I-129CW, *Petition for a CNMI-Only Nonimmigrant Transitional Worker*, a successor form, other form, or electronic equivalent, any supplemental information requested by USCIS, and additional evidence as may be prescribed or requested by USCIS.

n. CW-1 Worker

The CW-1 worker means any foreign worker who is lawfully present in the Commonwealth and authorized by DHS to perform temporary labor or services under 48 U.S.C. 1806(d).

o. Date of Need

The date of need means the first date the employer requires services of the CW-1 workers as indicated on the *CW-1 Application for Temporary Employment Certification*.

p. Department of Homeland Security or DHS

DHS means the Federal Department having jurisdiction over certain immigration-related functions, acting through its component agencies, including USCIS.

q. Employee

Employee means 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. The terms employee and worker are used interchangeably in this subpart.

r. Employer

Employer means, in summary, a person with a physical location in the Commonwealth that has an employer relationship with a CW-1 worker or worker in corresponding employment under the common law of agency, and that possesses a Federal Employer Identification Number.

s. Employer-Client

Employer-client means an employer that has entered into an agreement with a job contractor and that is not an affiliate, branch, or subsidiary of the job

contractor, under which the job contractor provides services or labor to the employer-client on a temporary basis and will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

t. Employment and Training Administration or ETA

ETA means the agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the Workforce Act for the administration and adjudication of a *CW-1 Application for Temporary Employment Certification* and related functions.

u. Federal Holiday

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

v. Full-Time

Full-time for the CW-1 program is 35 or more hours of work per week.

w. Governor

Governor means the Governor of the Commonwealth of the Northern Mariana Islands.

x. Job Contractor

Job contractor means an employer that contracts services or labor on a temporary basis to one or more employers which is not an affiliate, branch, or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control over the services or labor other than hiring, paying, and releasing the workers.

Job contractors generally have an ongoing business of supplying workers to other employers where substantial, direct day-to-day supervision, scheduling, and assignment of work occurs. The following examples illustrate the differences between an employer that is a job contractor and an employer that is not. Employer A is a construction staffing company. It sends several of its employees to Acme Corporation to perform construction work on a commercial building for 11 months. Although Employer A has hired these employees and will be issuing paychecks to these employees for the time worked at Acme Corporation, Employer A will not exercise substantial, direct day-to-day supervision and control over its employees during their performance of services at Acme Corporation. Rather, Acme Corporation will direct and

supervise the Employer A employees during the 11-month project period. Under this particular set of facts, Employer A would be considered a job contractor. By contrast, Employer B is a computer repair company. It sends several of its employees to Acme Corporation and many other employers during the course of a year to disassemble desktop computers for repair and maintenance. Among the employees that Employer B sends to Acme Corporation and these other employers are several computer repair technicians and one supervisor. Employer B's supervisor instructs and supervises the technicians as to the desktops to be repaired at each employer's establishment. Under this particular set of facts, Employer B generally would not be considered a job contractor.

y. Job Offer

Job offer means the written offer made by an employer or potential employer of CW-1 workers to both U.S. and CW-1 workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits, for which the *CW-1 Application for Temporary Employment Certification* is filed. The minimum content requirements of the employer's job offer are discussed under § 655.441 of this subpart.

z. Job Opportunity

Job opportunity means full-time employment at a place in the Commonwealth to which U.S. workers can be referred.

aa. Joint Employment

Where two or more employers each have sufficient definitional indicia of being a joint employer of a worker under the common law of agency, they are, at all times, joint employers of that worker. The Department additionally notes that the CNMI program definitions of employer, employee, and joint employment that the Department provides herein are different from the definitions of "employer," "employee," and "employ" in the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA) and the definition of "employ" in the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 *et seq.* (MSPA). Thus, the statutory definitions in the FLSA and MSPA that determine the existence of an employment relationship or joint employer status neither apply nor are relevant to the determination of whether an entity is a CNMI employer or joint employer.

bb. Layoff

Layoff means any involuntary separation of one or more U.S. employees. This does not include an employer's cause-based termination actions.

cc. Long-Term Worker

Long-term worker means an alien who was admitted to the CNMI as a CW-1 nonimmigrant during fiscal year (FY) 2015, and who was granted CW-1 nonimmigrant status during each of FYs 2016 through 2018. Public Law 115-218 sec. 3(a)(3)(F), 48 U.S.C. 1806(d)(7)(B). As provided by the statute, long-term workers are exempt from the prohibition on Construction and Extraction Occupations under the Department's Standard Occupational Classification Group 47-0000. Public Law 115-218 sec. 3(a)(3)(C), 48 U.S.C. 1806(d)(3)(D)(v).

dd. National Prevailing Wage Center or NPWC

NPWC means that office within OFLC from which employers, agents, or attorneys who wish to file an *CW-1 Application for Temporary Employment Certification* receive a PWD.

ee. NPWC Director

The NPWC Director means the OFLC official to whom the OFLC Administrator has delegated authority to carry out certain NPWC operations and functions.

ff. National Processing Center or NPC

NPC means the office within OFLC in which the COs operate, and which are charged with the adjudication of *CW-1 Applications for Temporary Employment Certification*.

gg. NPC Director

The NPC Director is the OFLC official to whom the OFLC Administrator has delegated authority for purposes of certain NPC operations and functions.

hh. Occupational Employment Statistics or OES Survey

The OES survey means the program under the jurisdiction of BLS that reports annual wage estimates for Guam based on standard occupational classifications (SOCs).

ii. Offered Wage

The offered wage means the wage offered by an employer in the *CW-1 Application for Temporary Employment Certification* and job offer. The offered wage must equal or exceed the highest of the prevailing wage, the Federal minimum wage, or the Commonwealth minimum wage.

jj. Office of Foreign Labor Certification or OFLC

OFLC means the organizational component of the ETA, within the Department of Labor, that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities, including overseeing the CW-1 program and issuing determinations related to an employer's request for an *Application for Prevailing Wage Determination* or *CW-1 Application for Temporary Employment Certification*.

kk. Place of Employment

The place of employment means the worksite (or physical location) where work under the *CW-1 Application for Temporary Employment Certification*, including the job offer, actually is performed by the CW-1 workers and workers in corresponding employment. The employer must provide all known places of employment at the time of filing the *CW-1 Application for Temporary Employment Certification*.

ll. Prevailing Wage

A prevailing wage is the official wage issued by the NPWC on the Form ETA 9141C, *Application for Prevailing Wage Determination for the CW-1 Program*. The employer must pay all CW-1 workers and U.S. workers in corresponding employment the highest of the prevailing wage, the Federal minimum wage, or the Commonwealth minimum wage.

mm. Prevailing Wage Determination or PWD

A PWD is the prevailing wage determination issued by OFLC's NPWC on the Form ETA-9141C, *Application for Prevailing Wage Determination*. The PWD is used in support of the *CW-1 Application for Temporary Employment Certification*.

nn. Secretary

The Secretary means the U.S. Secretary of Labor, the chief official of the U.S. DOL, or the Secretary's designee.

oo. Secretary of Homeland Security

The Secretary of Homeland Security means the chief official of the U.S. DHS or the Secretary of Homeland Security's designee.

pp. Secretary of State

The Secretary of State means the chief official of the U.S. Department of State or the Secretary of State's designee.

qq. Strike

Strike means 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).

rr. Successor in Interest

Successor in interest means an employer, agent or attorney that is controlling and carrying on the business of a previous employer:

- Where an employer, agent, or attorney has violated 48 U.S.C. 1806 or these regulations, and has ceased doing business or cannot be located for purposes of enforcement, 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, agent, or attorney is a successor in interest; no one factor is dispositive, and all the circumstances will be considered as a whole:
  - Substantial continuity of the same business operations;
  - Use of the same facilities;
  - Continuity of the work force;
  - Similarity of jobs and working conditions;
  - Similarity of supervisory personnel;
  - Whether the former management or owner retains a direct or indirect interest in the new enterprise;
  - Similarity in machinery, equipment, and production methods;
  - Similarity of products and services;
  - and
  - 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.

ss. Temporary Labor Certification or TLC

TLC means the certification made by the OFLC Administrator, based on the *CW-1 Application for Temporary Employment Certification*, job offer, and all supporting documentation, with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as a CW-1 worker.

tt. United States

The United States means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

uu. U.S. Citizenship and Immigration Services or USCIS

USCIS means the Federal agency within DHS that makes the determination under the immigration laws whether to grant petitions filed by employers seeking CW-1 workers to perform temporary work in the Commonwealth.

vv. United States Worker

United States worker (U.S. worker) means a worker who is:

- A citizen or national of the United States;
- An alien lawfully admitted for permanent residence; or
- A citizen of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau, who has been admitted to the United States as a nonimmigrant and is employment-authorized under the Compacts of Free Association between the United States and those nations.

ww. Wages

Wages mean all forms of cash remuneration to a worker by an employer in payment for labor or services.

xx. Work Contract

Work contract means the document containing all the material terms and conditions of employment relating to wages, hours, working conditions, places of employment, and other benefits, including all assurances and obligations required to be included under this subpart.

4. Section 655.403, Persons and Entities Authorized To File

The employer, the employer's agent, or the employer's attorney is authorized to file *Applications for Prevailing Wage Determination* and/or *CW-1 Applications for Temporary Employment Certification*. To obtain a TLC, the employer must submit to OFLC a signed and dated Appendix C of the *CW-1 Application for Temporary Employment Certification* (Form ETA-9142C) attesting to comply with all of the terms, assurances, and obligations of the CW-1 program, regardless of whether it is represented by an agent or attorney. If an agent or attorney is identified in the *CW-1 Application for Temporary Employment Certification*, that agent or attorney must also sign and date Appendix C, declaring that the employer has designated the agent or attorney to act on the employer's behalf in connection with the *CW-1 Application for Temporary Employment Certification*. Employers, their agents, and their attorneys are each responsible



for the truthfulness and accuracy of the information and documentation submitted with the *CW-1 Application for Temporary Employment Certification*.

#### 5. Section 655.404, Requirements of Agents

In addition to signing Appendix C of the *CW-1 Application for Temporary Employment Certification*, an employer's agent is required to provide, as part of the *CW-1 Application for Temporary Employment Certification*, a copy of the current agreement, contract, or other document defining the scope of its relationship with the employer and demonstrating the agent's authority to represent the employer. The Department will review the agreement to determine if a bona fide relationship exists between the agent and the employer and, where the agent is also engaged in recruitment, review to ensure it includes language prohibiting the payment of fees by the worker, as required by § 655.423(n).

The Department reserves the right to further review the agreement in the course of an audit examination or other integrity measure and provide the agreement to DHS or any other Federal Government Official performing an investigation, inspection, audit, or law enforcement function. A certification of an employer's *CW-1 Application for Temporary Employment Certification* that includes such an agreement in no way indicates OFLC's approval of the agreement or the terms therein. The requirement does not obligate either the agent or the employer to disclose any trade secrets or other proprietary business information; rather it only requires the agent to provide sufficient documentation to demonstrate clearly the scope of the agent's relationship with the employer.

#### B. Prefiling Procedures

##### 1. Section 655.410, Offered Wage Rate and Determination of Prevailing Wage

The Workforce Act requires that an employer must pay each CW-1 worker "a wage that is not less than the greater of—(i) the statutory minimum wage in the Commonwealth; (ii) the Federal minimum wage; or (iii) the prevailing wage in the Commonwealth for the occupation in which the worker is employed." 48 U.S.C. 1806(d)(2)(C). The Workforce Act further provides that "the Secretary of Labor shall use, or make available to employers, an occupational wage survey conducted by the Governor that the Secretary of Labor has determined meets the statistical standards for determining prevailing

wages in the Commonwealth on an annual basis." Id. at 1806(d)(2)(B)(i). Finally, under the statute, "[i]n the absence of an occupational wage survey approved by the Secretary of Labor . . . the prevailing wage for an occupation in the Commonwealth shall be the arithmetic mean of the wages of workers similarly employed in the territory of Guam according to the wage component of the Occupational Employment Statistics Survey conducted by the Bureau of Labor Statistics." Id. at 1806(d)(2)(B)(ii). Section 655.410 of this IFR establishes the procedures for wage determinations, how employers will obtain a PWD, and employers record retention requirements for the PWD.

Consistent with 48 U.S.C. 1806(d)(2)(C), § 655.410(a) of the IFR requires an employer seeking to employ CW-1 workers to offer and pay the highest of the prevailing wage, the Federal minimum wage,<sup>18</sup> or the Commonwealth minimum wage to both CW-1 workers and workers in corresponding employment. While the statute does not expressly state that the employer must pay the offered wage to workers in corresponding employment, this requirement is necessary to prevent the employment of CW-1 workers from causing an adverse effect on the wages and working conditions of similarly employed U.S. workers. The statute prohibits the Department from approving an application for TLC unless the petitioner has demonstrated that there are not sufficient U.S. workers in CNMI and that employment of CW-1 workers will not adversely affect the wages of similarly employed U.S. workers. Without this wage requirement, U.S. workers performing the same work as the work requested in the job order, but earning less than the advertised wage, would be required to quit their current employment and re-apply for the same job with the same employer to obtain the higher wage rate offered to the CW-1 worker. Such a result is inconsistent with the requirement to protect against adverse effects on similarly employed U.S. workers. Section 655.410(a) also clarifies that the issuance of a PWD does not permit an employer to pay less than the highest wage required by any applicable Federal or Commonwealth law. This requirement is also consistent with similar requirements currently in place for other TLC programs.<sup>19</sup>

<sup>18</sup> Effective October 1, 2018, the full Federal minimum wage of \$7.25 per hour applies to workers in the Commonwealth.

<sup>19</sup> 20 CFR part 655, subpart A; While this requirement is true also for 20 CFR part 655, subpart B, in terms of the offered wage requirement,

As required by the Workforce Act, § 655.410(b)(1) provides that if the Governor conducts an annual survey for an occupational classification, and the survey meets the statistical requirements set forth in § 655.410(e), as determined by the OFLC Administrator, the wage reported by the Governor's survey must be the prevailing wage for the occupational classification. The regulation requires that the survey must include a mean hourly wage. The requirement that the Governor's survey reports a mean hourly wage provides consistency between prevailing wages issued from the Governor's survey and prevailing wages issued from the OES survey, which by statute must use the mean wage. See 48 U.S.C. 1806(d)(2)(B)(ii).

After the NPWC reviews the Governor's survey for consistency with the statistical standards in § 655.410(e), discussed below, OFLC will make available on its website a listing of all occupational classifications for which it has determined there is a valid Governor's survey wage with the accompanying prevailing wage. This will allow employers to determine the potential wage obligation associated with the CW-1 program, even before submitting a PWD request.

In the absence of an approved wage survey, the Department will establish the prevailing wage using the mean wage of workers similarly employed in Guam from the OES survey. The OES survey is among the largest continuous statistical wage survey programs and is cooperatively administered between BLS and the State Workforce Agencies (SWAs). For the territory of Guam, the OES survey is administered by BLS and the Guam Department of Labor. BLS funds the OES survey and provides the statistical procedures and technical support, while the SWAs and Guam Department of Labor collect most of the data. BLS creates a national sampling frame by combining the administrative lists of unemployment insurance (UI) program reports from all of the SWAs into a single database called the Quarterly Census of Employment and Wages.<sup>20</sup> Because the territory of Guam does not report data to the UI program, the Guam Department of Labor administers an Annual Census of Establishments survey program to create a database of employers in all industries

employers do not receive a PWD from DOL's NPWC for the H-2A program.

<sup>20</sup> See Bureau of Labor Statistics, "Survey Methods and Reliability Statement for the May 2017 Occupational Employment Statistics Survey for a comprehensive and technical discussion of the OES survey methodology," [https://www.bls.gov/oes/current/methods\\_statement.pdf](https://www.bls.gov/oes/current/methods_statement.pdf).

for use in the OES survey.<sup>21</sup> The OES survey sample is stratified by metropolitan and nonmetropolitan area, industry, and size, and the survey reports wage estimates based on geographic areas at the national and State levels and for certain territories in which the OES survey can report statistically valid data, including Guam, but not the CNMI.

Wages for the OES survey are straight-time, gross pay, exclusive of premium pay. For purposes of the OES survey, “pay” includes base rate; cost-of-living allowances; guaranteed pay; hazardous duty pay; incentive pay, including commissions and production bonuses; piece-rates; tips; and on-call pay.<sup>22</sup> The OES survey is a comprehensive and statistically valid wage survey and is widely used in the DOL’s nonagricultural foreign labor certification programs (H–2B, H–1B, and PERM). The frequency and precision of the data collected, as well as the comprehensive nature of the occupations for which such data are collected, make it an appropriate data source for determining applicable wages across the range of occupations found in the CW–1 program.

The OES prevailing wage that will be used for the CW–1 program is the mean wage paid to workers in a particular SOC in Guam. The use of the mean wage in this IFR is required by the Workforce Act. See 48 U.S.C. 1806(d)(2)(B)(ii). The Department will therefore issue prevailing wages at the mean of all workers “similarly employed in the territory of Guam” in the relevant SOC from the OES survey, without regard to industry, experience, or skill level.

The Workforce Act requires employers to pay a wage that is the highest of the Commonwealth minimum wage, the Federal minimum wage, or the prevailing wage in the Commonwealth. 48 U.S.C. 1806(d)(2)(C). However, the statute is silent about how the Department must set the prevailing wage if both: (1) The Governor’s annual survey for the occupation does not meet the Department’s statistical standards or the Governor does not submit a survey covering a given occupation; and (2) the

OES survey does not report a mean of the wages paid to workers in the SOC in Guam due to insufficient data. In the event this situation occurs, the Department remains statutorily bound to issue a prevailing wage given that the statute requires the employer to pay the highest of the statutory minimum wage, the Federal minimum wage, or the prevailing wage in the Commonwealth. See 48 U.S.C. 1806(d)(2)(C).

When the OES survey cannot produce a statistically valid wage estimate for a given geographic area, BLS reports a wage at the next largest geographic area until it reaches an area large enough that it has enough data to report.<sup>23</sup> As a result, when the BLS cannot produce a statistically valid wage rate for Guam in a given SOC, the reported wage rate is a national wage for the SOC. OFLC uses that national wage rate to establish the prevailing wage in Guam in the other foreign labor certification programs when BLS cannot report a mean wage based on wages paid to workers in Guam for a given SOC. However, the Workforce Act’s mandate for the Department to base prevailing wage rates on wages paid to workers in the Commonwealth or Guam as the first and second prevailing wage options establishes a clear preference in the CW–1 program for prevailing wage rates to be based on wages paid in these islands, rather than other geographic areas. As a result, the Department concludes that it would be inappropriate to require an employer to pay a prevailing wage that is based only on the national wage for the SOC from the OES survey, without adjustment, in the CW–1 program. Accordingly, if both prevailing wage sources expressly provided in the statute do not report a wage, the Department will base the prevailing wage on the national mean wage for the SOC from the OES, but will adjust the national SOC wage by the percentage difference between the mean wage paid to workers in all SOCs for which the OES survey can produce an average wage paid to workers in Guam compared with the national mean wage paid to workers in all SOCs in the United States. Given the lack of available, comprehensive, and reliable alternative data sources, this method will best meet: (1) The statutory requirement for the Department to require employers to pay a prevailing wage; and (2) the statutory intent for the Department to issue prevailing wage rates based on wages paid to similarly employed workers in the Commonwealth or Guam. The

Department requests comments on its use of an adjusted national wage to establish the prevailing wage for the CW–1 program if a mean wage is not available for the occupational classification from both a survey conducted by the CNMI Governor and from the OES for workers in Guam, as well as on alternative sources it might use to establish the prevailing wage in these circumstances.

Section 655.410(b)(2) provides that if the job duties on the *Application for Prevailing Wage Determination* do not fall within a single occupational classification, the NPWC will determine the prevailing wage by assigning the highest prevailing wage for all applicable occupational classifications. This approach ensures that employers do not adversely affect wages or discourage U.S. workers from applying for a job by advertising a job which contains the duties of distinct occupations, and asking workers to perform the duties of a higher wage occupation while being paid for the duties of a lower wage occupation. This is codifies existing NPWC procedures and practice for determining prevailing wages for other foreign labor certification programs (*i.e.*, H–1B, H–2B, and PERM) and protects against occupational misclassification.<sup>24</sup>

Section 655.410(c) requires an employer to electronically request and obtain a PWD from the NPWC before electronically submitting its CW–1 *Application for Temporary Employment Certification*. The PWD must be valid on the day the employer submits the CW–1 *Application for Temporary Employment Certification*. To avoid delays, the Department encourages employers to request a PWD in the CW–1 program at least 90 calendar days before the date the employer plans to file its CW–1 *Application for Temporary Employment Certification*.

CW–1 employers that lack adequate access to electronic filing, either due to lack of internet access or physical disability precluding electronic filing, may file the *Application for Prevailing Wage Determination* by mail with a statement of why it qualifies to file by mail. There is no specific format for the statement but it must accompany the application at the time of filing. The NPWC will return without review any application submitted by mail or any method other than the designated electronic method(s) provided in this regulation, unless the employer submits the application package in accordance

<sup>21</sup> The Bureau of Labor Statistics within the Guam Department of Labor is responsible for administering the Annual Census of Establishments, which is funded in part by the Department’s Employment and Training Administration under the Workforce Information Grants, <http://bls.guam.gov/annual-census-of-establishments/>.

<sup>22</sup> See “Occupational Employment Report Form, Instructions for Reporting Wage Information,” p. 2, available at [https://www.bls.gov/respondents/oes/pdf/forms/uuuuuu\\_fillable.pdf](https://www.bls.gov/respondents/oes/pdf/forms/uuuuuu_fillable.pdf).

<sup>23</sup> The BLS practice of survey expansion is generally described in GAL 2–98, at p. 4.

<sup>24</sup> See OFLC Frequently Asked Questions and Answers, <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>.

with paragraph (c)(1)(ii) of § 655.410 and with the statement of the need to file by mail. If an employer files its *Application for Prevailing Wage Determination* by mail with the required statement of need, the employer may file its *CW-1 Application for Temporary Employment Certification* by mail without a statement of need. This statement must be updated each fiscal year.

Section 655.410(d) provides that when the NPWC issues the prevailing wage, it must provide the following information: The prevailing wage, the source of the prevailing wage, and the *Application for Prevailing Wage Determination*, with the NPWC's endorsement to the employer.

Section 655.410(e) establishes the "statistical standards" the Department will use to evaluate a survey conducted by the Governor under 48 U.S.C. 1806(d)(2)(B)(i). The Department will use a survey conducted by the Governor to establish the prevailing wage for an occupational classification only if the survey meets the following requirements: (1) The survey must be independently conducted and issued by the Governor, including through any Commonwealth agency, Commonwealth college, or Commonwealth university; (2) the survey must provide the arithmetic mean of the wages of workers in the occupational classification in the Commonwealth; (3) the independent surveyor must either make a reasonable, good faith attempt to contact all employers in the Commonwealth employing workers in that occupation or conduct a randomized sampling of such employers, which means the surveyor must collect the wages of workers performing the job duties covered by the survey's occupational classification without regard to the education, experience, or immigration status of the workers in the occupational classification or the size of the employer; (4) if used, the randomized survey must include the wages of at least 30 workers in the Commonwealth; (5) if used, the randomized survey must include the wages of workers in the Commonwealth employed by at least 3 employers; (6) if used, the randomized survey must be conducted across industries that employ workers in the occupational classification;<sup>25</sup> (7) the wage reported in the survey must include all types of pay, consistent with the OES definition of "pay," as discussed above; (8) the survey must be based on wages paid to workers in the

occupational classification not more than 12 months before the date the survey is submitted to the OFLC Administrator for consideration; and (9) the Governor of the Commonwealth must submit the survey to the OFLC Administrator, with specific information about the survey methodology, including such items as sample size and source, sample selection procedures, types of payments (e.g., overtime, weekend or holiday pay premiums) included in the survey, and survey job descriptions, to allow a determination to be made about the adequacy of the data provided and the validity of the statistical methodology used in conducting the survey.

The statistical standards in this IFR for surveys conducted by the Governor in the CW-1 program are generally consistent with the regulatory standards for prevailing wage surveys in the H-2B program. See 20 CFR 655.10(f).<sup>26</sup> Adherence to the H-2B survey standards will promote consistency in the wage rates that apply to similarly employed workers across nonimmigrant programs in the Commonwealth. This alignment will also make the CW-1 regulation easier to implement because the Commonwealth government has experience in conducting prevailing wage surveys under the H-2B standards.

The CW-1 program is based on the statutory requirement that the Governor's survey must be conducted "on an annual basis." 48 U.S.C. 1806(d)(2)(B)(i). In comparison to the H-2B program, there are two notable changes. First, a survey for the CW-1 program must report the mean and cannot report only the median, unlike in the H-2B program, which permits a survey to report either a mean or a median only. As discussed above, this CW-1 requirement will align the survey methodology for the Governor's survey with the OES methodology required by the Workforce Act. Either a mean or median rate can be calculated from the underlying survey data, so limiting CW-1 surveys to those that produce a mean wage requires no change in the practice of conducting surveys that is used for H-2B. In addition, past prevailing wage surveys conducted by the

Commonwealth government for the H-2B program have reported a mean wage, and so the CW-1 regulation will not require a change to existing practice. Second, § 655.410(e)(8) of this IFR requires that the survey is based on wages paid to workers in the occupational classification not more than 12 months before the survey is submitted to OFLC, while the H-2B regulation permits employers to submit surveys based on wages paid no more than 24 months before the survey is submitted. This difference for the CW-1 program is based on the statutory requirement that the Governor's survey must be conducted "on an annual basis."

As provided in § 655.410(f), the OFLC Administrator will review the survey for compliance with the regulatory requirements. If the OFLC Administrator finds the wage reported for any occupational classification is unacceptable, the OFLC Administrator must inform the Governor in writing of the reasons for the finding. The Governor may respond to the finding by submitting corrected wage data or by conducting a new wage survey, and may submit the revised wage data to the OFLC Administrator for consideration.

Under § 655.410(g), a PWD issued based on either the Governor's survey or the OES survey will be valid for at least 90 calendar days and as many as 365 days, the same validity period used by the NPWC across programs. See, e.g., 20 CFR 656.40(c). The length of the validity period for the survey will depend, in part, on when the prevailing wage source used to establish the prevailing wage will be updated.

As provided in § 655.410(h), employers must retain the PWD for 3 years from the date of issuance if not used in support of a TLC application or if used in support of a TLC application that is denied, or 3 years from the end date of the validity period of the *CW-1 Application for Temporary Employment Certification*, whichever is later. The employer must submit the PWD to the CO if requested and to any Federal Government Official performing an investigation, inspection, audit, or law enforcement function.

Employers may request review of a PWD only through the appeals process described in § 655.411 of this IFR.

## 2. Section 655.411, Review of Prevailing Wage Determinations

Paragraph (a) of this section requires an employer that wants to appeal a PWD to make a written request to the NPWC Director within 7 business days from the date the PWD was issued. Requests made more than 7 business days after

<sup>25</sup> The occupational classification for the survey is based on the job duties performed and need not be identical to an SOC.

<sup>26</sup> The H-2B regulatory survey standards are discussed in depth in the 2015 H-2B Rule, 80 FR 24146 (Apr. 29, 2015). Except for limitations on who may conduct a survey—which are not relevant here because 48 U.S.C. 1806(d)(2)(B)(i) allows only for surveys conducted by the Governor and the BLS—the regulatory H-2B survey standards are unaffected by current appropriations riders in the H-2B program. See "Effects of the 2016 Department of Labor Appropriations Act" (Dec. 29, 2015), [https://www.foreignlaborcert.doleta.gov/pdf/H-2B\\_Prevailing\\_Wage\\_FAQs\\_DOL\\_Appropriations\\_Act.pdf](https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Prevailing_Wage_FAQs_DOL_Appropriations_Act.pdf).

the issuance of a PWD will be considered time barred. The request for review must clearly identify the PWD for which review is sought, set forth the particular grounds for the request, and include any materials submitted to the NPWC for the purposes of securing the PWD.

Under paragraph (b), the employer may submit supplementary material with its request for review by the NPWC Director. The NPWC Director will review the employer's request and accompanying documentation, including supplementary material provided. After performing a review of the documentation, the NPWC Director will issue a Final Determination letter to the employer and, if applicable, to the employer's agent or attorney, either affirming the PWD as issued or modifying the PWD.

If the employer desires review of the NPWC Director's decision, paragraph (c) establishes the process the employer must follow to request review by BALCA. Specifically, the employer must make a written request for review that must be received by BALCA within 10 business days from the date the Final Determination letter was issued by the NPWC Director, and the employer must simultaneously send a copy to the NPWC Director who issued the Final Determination. Upon receipt of the request, the NPWC will prepare an Appeal File and submit it to BALCA. The request for review, statements, briefs, and other submissions of the parties must contain only legal arguments and may only refer to evidence that was within the record upon which the decision on the PWD by the NPWC Director was based. BALCA will then handle the appeal in accordance with § 655.461 as explained further in the preamble to that section.

### C. CW-1 Application for Temporary Employment Certification Filing Procedures

#### 1. Section 655.420, Application Filing Requirements

In accordance with Section (2)(A)(i) of the Workforce Act, an employer must first obtain a TLC from the Department before filing a CW-1 petition with DHS. Public Law 115-218 sec. 3(a)(3)(B), 48 U.S.C. 1806(d)(2)(A). This section establishes the standards, timeframes, and procedures for employers to request TLC under the CW-1 program, including the requirement that the employer must file the TLC application electronically unless the employer has submitted a statement when filing the PWD request or files a statement when submitting the TLC application

indicating that it qualifies for one of the regulatory exemptions in the IFR. The Department believes that the below regulatory requirements will advance the Department's statutory obligations. Based on the Department's experience administering other TLC programs, the requirements outlined below appropriately ensure that U.S. workers have equal access to job opportunities and protect their wages and working conditions from adverse effect.

#### a. Paragraphs (a) and (b), What To File and Statutory Timeframes for Filing an CW-1 Application for Temporary Employment Certification

Paragraph (a) specifies that an employer seeking TLC must file a completed *CW-1 Application for Temporary Employment Certification*—consisting of the Form ETA-9142C, appropriate appendices, and a valid PWD—and all supporting documentation and information that this subpart requires at the time of filing. Incomplete applications will not be accepted for processing; OFLC will return them without review. In accordance with the Workforce Act, 48 U.S.C. 1806(d)(3)(D)(i), paragraph (b)(1) provides that an employer seeking to hire CW-1 workers must file a completed *CW-1 Application for Temporary Employment Certification* no more than 120 calendar days before the employer's date of need. However, where the employer is seeking TLC to support a petition to renew a visa (extending the employment of a CW-1 worker), paragraph (b)(2) requires that the employer file the application no more than 180 calendar days before the date on which the CW-1 status expires. See id.

#### b. Paragraph (c), Location and Methods of Filing

Paragraph (c) of this section establishes the location and method by which an employer may file a *CW-1 Application for Temporary Employment Certification* under the CW-1 program. In paragraph (c)(1), the Department requires an employer to submit the Form ETA-9142C and all required supporting documentation to the NPC using an electronic method(s) designated by the OFLC Administrator. Unless the employer qualifies to file by mail, the NPC will return, without review, any *CW-1 Application for Temporary Employment Certification* submitted using a method other than the electronic method(s) designated by the OFLC Administrator.

#### c. Paragraph (c)(1), Procedures for Electronic Filing of the CW-1 Application for Temporary Employment Certification

Absent an exemption employers or, if applicable, their agents or attorneys will prepare and electronically submit *CW-1 Applications for Temporary Employment Certification* using OFLC's new Foreign Labor Application Gateway (FLAG) System at <https://flag.dol.gov>. E-filing will be required for the Form ETA-9142C, applicable appendices, and all supporting documentation required by this subpart. All of these documents must be electronically submitted at the time of filing to constitute a complete, properly filed application. In addition, DOL's forms, will require employers and, if applicable, their authorized representatives, to designate a valid email address for sending and receiving official correspondence concerning the processing of these e-filings by the NPC.

#### d. Justification for Mandatory Electronic Filing of CW-1 Applications for Temporary Employment Certification

For the reasons discussed below in the preamble, the Department has concluded that the e-filing requirement for employers will modernize the end-to-end electronic processing of *CW-1 Applications for Temporary Employment Certification* and create significant administrative efficiencies for employers in the CNMI and the Department. The Department has also estimated that mandating e-filing should minimize costs and burdens for employers and the Department, improve the quality of the information collected by minimizing errors through system-generated prompts, ensure required information and document uploads are provided to reduce the frequency of delays related to filing applications, improve the quality of information collected, and promote administrative efficiency and accountability.

Electronic submissions do not require manual data entry by NPC staff and can be instantaneously categorized and assigned for review by the NPC. If an electronic *CW-1 Application for Temporary Employment Certification* requires amendments or other corrections, those amendments and corrections can be automatically entered by NPC staff. Furthermore, as previously stated, electronic submissions are more likely to include all necessary documentation and information because the system will require electronic validation of the form entries and supporting documentation prior to acceptance. Again, employers will have an immediate opportunity to correct the

errors or upload the missing documentation. Electronic filing also expedites the process of addressing any potential problems with an application because the NPC is able to email an employer or their representative directly from the electronic filing module to alert it of information which must be corrected or if it needs clarification about something. Electronic contact with the employer or their representative allows for instantaneous delivery of questions to employers and allows employers to respond quickly as well, which is much faster than transmitting questions by mail. The electronic system will also allow an employer or their representative to upload necessary documentation directly to their case file, which expedites review of applications and the issuance of final determinations. The Department's e-filing requirement will improve the customer experience by permitting more prompt adjudication of applications and reducing paperwork burdens and mailing costs. This approach should reduce processing delays and costs employers with access to the internet, as they would otherwise need to pay for expedited mail or private courier services to submit corrected applications, as has been OFLC's experience in connection with its other temporary labor certification programs.<sup>27</sup>

The Department's e-filing requirement is consistent with several Federal statutes. First, the Government Paperwork Elimination Act (GPEA), Public Law 105-277, Title XVII (secs. 1701-1710), 112 Stat. 2681-749 (Oct. 21, 1998), 44 U.S.C. 3504 note, was enacted to improve customer service and governmental efficiency through the use of information technology. The GPEA directs federal agencies, when possible, to use electronic forms, e-filing, and electronic submissions to conduct agency business with the public. Second, the E-Government Act of 2002, Public Law 107-347, 116 Stat. 2899 (Dec. 17, 2002), 44 U.S.C. 3601 note, was enacted to encourage use of technology to enhance governmental functions and services, integrate related interagency functions, achieve more efficient agency performance, increase public access to Government information, and reduce costs and burdens for businesses and other Government entities. Third, the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, was enacted with the goal of reducing paperwork burdens imposed by Government information

collections, improving the efficiency of Government information collection and the quality of information collected, and minimizing Government costs associated with the creation, collection, maintenance, use, and disposition of information. Finally, this e-filing requirement is consistent with several other open Government initiatives and information technology modernization policies expressed in memoranda and Executive Orders, such as E.O. 13571,<sup>28</sup> which require agencies to use innovative technology to reduce costs and streamline customer service processes.

The Department is aware that some employers in the CNMI, especially those located on islands without adequate technological infrastructure, may be unable to take advantage of the more efficient e-filing process. Therefore, the Department will permit these employers to file using a paper-based process if they lack adequate access to e-filing. This IFR also establishes that individuals with disabilities may file by mail.

e. Paragraphs (c)(2) and (3), Alternative Filing Procedures for Employers Lacking Adequate Access to Electronic Filing or Due to a Disability in the CNMI

The Department is also establishing procedures allowing employers in the CNMI that lack adequate access to e-filing to file by mail and, for those employers who are unable or limited in their ability to use or access the electronic application due to a disability, file the application through other means.

f. Paragraph (d), Original Signature and Acceptance of Electronic Signatures

Paragraph (d) of this section requires that the *CW-1 Application for Temporary Employment Certification*, as filed, contains an electronic (scanned) copy of the employer's original signature (and that of the employer's authorized attorney or agent, if the employer is represented by an attorney or agent) or, in the alternative, use a verifiable electronic signature method, as directed by the OFLC Administrator. If the employer, under paragraph (c) of this section, is permitted to file by mail, the *CW-1*

<sup>28</sup> E.O. 13571, Streamlining Service Delivery and Improving Customer Service (Apr. 27, 2011) (requiring agencies to enhance customer service by "identifying ways to use innovative technologies . . . [to] lower[] costs, decrease[] service delivery times, and improve[] the customer experience."); see also OMB Memorandum M-11-24, "Implementing Executive Order 13571 on Streamlining Service Delivery and Improving Customer Service" (June 13, 2011) (implementing E.O. 13571).

*Application for Temporary Employment Certification*, when filed, must bear the original signature of the employer and, if applicable, the employer's authorized attorney or agent.

When electronically filing the *CW-1 Application for Temporary Employment Certification*, the FLAG System will require the employer and, if applicable, the employer's authorized attorney or agent to digitally sign the Form ETA-9142C, Appendix C,<sup>29</sup> or require the system account holder to upload an electronic (scanned) copy of the originally signed and dated Appendix C. In the case of a job contractor filing as a joint employer with its employer-client, a separate signed and dated Appendix C for the employer-client must also be submitted concurrently with the *CW-1 Application for Temporary Employment Certification*, as required by § 655.421 of this subpart. The Appendix C is a crucial component of the *CW-1 Application for Temporary Employment Certification* because it contains the requisite program assurances and obligations an employer must provide to the Department. An employer that fails to provide a signed and dated Appendix C at the time of filing the *CW-1 Application for Temporary Employment Certification*, in accordance with the original signature requirements of this paragraph, is ineligible to file and its application will be returned by the NPC without review.

The Department has concluded that this provision will maximize efficiencies in the application process and establish parity between paper and electronic documents by expanding the ability of employers, agents, and attorneys to use electronic methods to comply with signature requirements for the *CW-1* program. As a matter of longstanding policy, the Department considers an original signature to be legally binding evidence of the intention of a person with regard to a document, record, or transaction. Since the implementation of an e-filing option in late 2012 for the H-2A and H-2B programs, the Department also has considered a signature valid where the employer's original signature on a document retained in the employer's file is photocopied, scanned, or similarly reproduced for electronic transmission to the Department, whether at the time of filing or during the course of processing a *CW-1 Application for Temporary Employment Certification*. Although acceptance of

<sup>29</sup> Appendix C includes a declaration to be signed by the employer's attorney or agent, and a separate, lengthier declaration to be signed by the employer.

<sup>27</sup> 20 CFR part 655, subpart A; 20 CFR part 655, subpart B.

electronic (scanned) copies of original signatures on documents generates efficiencies in the application process, modern technologies and evolving business practices are rendering the distinction between original paper and electronic signatures nearly obsolete. The Department and employers can achieve even greater efficiencies using and accepting electronic signature methods.

Under this provision, the Department will permit an employer, agent, or attorney to sign or certify a document required under this subpart using a valid electronic signature method. This proposal is consistent with the principles of two Federal statutes that govern an agency's implementation of electronic document and signature requirements. First, the GPEA requires Federal agencies to allow individuals or entities that deal with the agencies, when practicable, the option to submit information or transact with the agencies electronically and to electronically maintain those records. The GPEA and e-Gov also specifically states that electronic records and their related electronic signatures are not to be denied legal effect, validity, or enforceability merely because they are in electronic form, and encourages Federal Government use of a range of electronic signature alternatives. See sections 1704, 1707 of the GPEA. Second, the Electronic Signatures in Global and National Commerce (E-SIGN) Act, Public Law 106-229, 114 Stat. 464 (June 30, 2000), 15 U.S.C. 7001 *et seq.*, generally provides that electronic documents have the same legal effect as their hard copy counterparts.

The GPEA and E-SIGN Act adopt a "functional equivalence approach" to electronic signature requirements where the purposes and functions of the traditional paper-based requirements for a signature must be considered, together with how those purposes and functions can be fulfilled in an electronic context. The functional equivalence approach rejects the precept that Federal agency requirements impose on users of electronic signatures more stringent standards of security than required for handwritten or other forms of signatures in a paper-based environment.

Consistent with the GPEA, the Department will accept an electronic signature on CW-1 applications as long as it: (1) Identifies and authenticates a particular person as the source of the electronic communication; and (2) indicates such person's approval of the information contained in the electronic

communication.<sup>30</sup> In addition, OMB guidelines state that a valid and enforceable electronic signature would require satisfying the following signing requirements: (1) The signer must use an acceptable electronic form of signature; (2) the electronic form of signature must be executed or adopted by the signer with the intent to sign the electronic record; (3) the electronic form of signature must be attached to or associated with the electronic record being signed; (4) there must be a means to identify and authenticate a particular person as the signer; and (5) there must be a means to preserve the integrity of the signed record.<sup>31</sup> The Department will rely on best practices for electronic signature safety and integrity, such as these five signing requirements. Consistent with the GPEA and E-SIGN Act, the Department adopts a technology "neutral" policy with respect to the requirements for electronic signature. That is, the employer, agent, or attorney can apply an electronic signature required on a document using any available technology that meets the five signing requirements.

The Department concludes that these standards for electronic signature are reasonable and accepted by Federal agencies. Promoting the use of electronic signatures will enable employers, agents, and attorneys to reduce printing, paper, and storage costs. For employers that need to retain and refer to multiple *CW-1 Applications for Temporary Employment Certification*, the time and costs savings can be considerable. Since the CW-1 program serves employers located thousands of miles from the continental United States on the westward side of the International Date Line, implementing electronic signatures will help reduce operational costs and maximize processing efficiency for the Department.

#### g. Paragraph (e), Requests for Multiple Positions on the CW-1 Application for Temporary Employment Certification

Similar to the Department's administration of other TLC programs,<sup>32</sup> paragraph (e) of this section permits an employer to request certification of

<sup>30</sup> Section 1710(1) of the GPEA. The definition of electronic signature in the E-SIGN Act essentially is equivalent to the definition in the GPEA. The E-SIGN Act defines an electronic signature as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." 15 U.S.C. 7006(5).

<sup>31</sup> Federal Chief Information Council, "Use of Electronic Signatures in Federal Organization Transactions," Version 1.0 (Jan. 25, 2013).

<sup>32</sup> 20 CFR part 655, subparts A and B.

more than one position on its *CW-1 Application for Temporary Employment Certification* as long as all CW-1 workers will perform the same services or labor under the same terms and conditions, in the same occupation, during the same period of employment, and at a location (or locations) covered by the application. The Department's experience in managing similar programs demonstrates this policy reduces the paperwork and advertising burden on employers while also preventing the NPC from receiving and processing multiple applications for the same employer and job opportunity. Filing more than one *CW-1 Application for Temporary Employment Certification* is necessary when an employer needs CW-1 workers to perform full-time job opportunities that do not involve the same occupation or comparable work, or needs workers to perform the same full-time work, but in different areas of intended employment or with different starting and ending dates.

#### h. Paragraph (f), Scope of CW-1 Applications for Temporary Employment Certification

Paragraph (f) of this section specifies the scope of all *CW-1 Applications for Temporary Employment Certification* submitted by employers to the NPC. First, paragraph (f)(1) provides that each *CW-1 Application for Temporary Employment Certification* must be limited to places of employment within the Commonwealth. In circumstances where the job opportunity covers places of employment located on more than one of the islands within the Commonwealth, the employer may submit a single *CW-1 Application for Temporary Employment Certification* to the NPC. However, an employer submitting a *CW-1 Application for Temporary Employment Certification* containing places of employment outside the Commonwealth, regardless of the period of employment, will not be accepted by the CO.

The CO will use the places of employment identified in the *CW-1 Application for Temporary Employment Certification* for the purpose of determining the recruitment requirements employers must follow to locate qualified and available U.S. workers, and to aid the CO in assessing whether the wages, job requirements, and terms and conditions of the job opportunity will adversely affect U.S. workers similarly employed within the Commonwealth.

Second, paragraph (f)(2) prohibits an association or other organization of employers from filing a *CW-1*

*Application for Temporary Employment Certification* on behalf of more than one employer-member under the CW-1 program. An association or other organization of employers is permitted by this subpart to file *CW-1 Applications for Temporary Employment Certification* as either a sole employer of CW-1 workers, or as an agent representing one employer-member seeking to employ CW-1 workers.

However, this subpart does not permit an association or other organization of employers to file *CW-1 Applications for Temporary Employment Certification* on behalf of multiple employer-members, each seeking to employ CW-1 workers in full-time employment. This type of filing is often referred to as a “master” application and is likewise prohibited in the H-2B program. Only an agricultural association seeking to employ H-2A workers jointly with its employer-members is expressly permitted by the INA to file an *Application for Temporary Employment Certification* in this manner. Accordingly, except where otherwise permitted under § 655.421 of this subpart governing job contractors, each employer-member of an association or other organization of employers seeking to employ CW-1 workers in full-time employment within the Commonwealth must submit separate *CW-1 Applications for Temporary Employment Certification* to the NPC.

i. Paragraph (g), Maximum Period of Employment on the CW-1 Application for Temporary Employment Certification

Under paragraph (g) of this section, an employer seeking to employ a CW-1 worker is permitted to identify a period of employment lasting not more than 1 year. However, an employer seeking to employ a long-term CW-1 worker, as defined under § 655.402 of this subpart, is permitted to identify a period of employment lasting not more than 3 years. The effect of these provisions is that the period of employment on the *CW-1 Application for Temporary Employment Certification* will be consistent with the maximum periods of admission permitted by the Workforce Act,<sup>33</sup> regardless of whether the employer’s need for the services or labor

to be performed is temporary or permanent in nature.

Under this provision, an employer seeking a TLC would be required to disclose the period of employment for the job opportunity in the *CW-1 Application for Temporary Employment Certification*. Generally, the employer will be held to recruiting and filling with a CW-1 worker(s) a job opportunity that lasts no longer than 1 year. If, however, the employer attests in the *CW-1 Application for Temporary Employment Certification* that it intends to employ a long-term CW-1 worker, and that the period of employment will be longer than 1 year, the CO would approve a labor certification lasting no longer than 3 years, the maximum period permitted by the statute.

Before issuing a NOA under § 655.433, the Department would review the expected start and end dates of work identified in the *CW-1 Application for Temporary Employment Certification* as discussed above. The Department’s NOA would not serve as an approval that the application demonstrated the work under the certification will be performed by a long-term CW-1 worker. As the Department does not have access to the identities of CW-1 beneficiaries, only USCIS is able to make a determination with respect to whether the CW-1 beneficiary involved in the petition qualifies as a long-term worker.

j. Paragraph (h), Return of CW-1 Applications for Temporary Employment Certification Based on USCIS Reaching Statutory Cap

The Workforce Act raised the annual numerical limits, or “visa caps,” on the total number of foreign nationals who may be issued a CW-1 visa or otherwise granted CW-1 status by DHS for FY 2019, and established new, annually reduced caps for subsequent fiscal years. See 48 U.S.C. 1806(d)(3)(B).<sup>34</sup> As employer demand for foreign workers in the CNMI could remain high in relation to these statutory visa caps, the Department anticipates receiving more requests for TLC than will result in CW-1 visas in some fiscal years. Based on OFLC’s experience administering the H-1B and H-2B programs, both of which are subject to statutory visa caps, the Department has determined that an effective and efficient administration of the CW-1 program must provide for the suspension of the acceptance of employer applications for TLC as soon

as the statutory visa cap in a fiscal year is reached.

Accordingly, if USCIS issues a public notice stating that it has received a sufficient number of CW-1 petitions to meet the statutory numerical limit on the total number of foreign nationals who may be issued a CW-1 visa or otherwise granted CW-1 status for the fiscal year, paragraph (h)(1) of this section authorizes the OFLC Administrator to return without review any *CW-1 Applications for Temporary Employment Certification* with dates of need in that fiscal year and received on or after the date that the OFLC Administrator provides public notice.

Paragraph (h)(2) of this section specifies that the OFLC Administrator will announce, through a notice on OFLC’s website, the last receipt date of the applications OFLC will review, and the return of *CW-1 Applications for Temporary Employment Certification* received after that date reflecting dates of need in the fiscal year for which the statutory limit has been met. This notice will be effective on the date it is posted on OFLC’s website and will remain in effect until the close of the fiscal year, unless: (1) USCIS subsequently issues a public notice stating additional CW-1 visas are available for that fiscal year; and (2) the OFLC Administrator publishes a new notice announcing that OFLC will accept additional TLCs with dates of need in the fiscal year. This provision provides the OFLC Administrator with flexibility to adapt to future changes DHS may announce in the availability of CW-1 visas within a fiscal year. The Department reminds employers that the notices issued under this paragraph are premised on interagency consultation and visa cap processing considerations by DHS. Except where a qualifying exemption applies, the Department will not suspend filing or lift a suspension of filing notice due to the individual circumstances of employers, workers, or other interested stakeholders.

Finally, paragraph (h)(3) of this section establishes the two instances when the OFLC Administrator’s notice to return *CW-1 Applications for Temporary Employment Certification* filed after the effective date, will not be applied. First, OFLC will not return, but will continue to process *CW-1 Applications for Temporary Employment Certification* filed before the last receipt date listed on the notice in accordance with all requirements of this subpart. Second, OFLC will continue to accept the filing of *CW-1 Applications for Temporary Employment Certification* by employers that identify in the *CW-1 Application*

<sup>33</sup> See 48 U.S.C. 1806(d)(7)(A)(i) (generally limiting CW-1 permit validity to a period not to exceed 1 year, renewable for no more than 2 consecutive 1-year periods) and 1806(d)(7)(B) (a long-term worker may receive a permit that is valid for a period not to exceed 3 years, renewable for additional 3-year periods during the transition period).

<sup>34</sup> The fiscal year in which the annual statutory numerical limits apply spans October 1 through September 30.

for *Temporary Employment Certification* that the CW-1 workers to be employed under the application will be exempt from the statutory visa cap for that fiscal year.<sup>35</sup> Since DHS is the agency responsible for administering the annual CW-1 visa cap and for making final determinations regarding any exemptions to the visa cap, the designation of cap-exempt status in the *CW-1 Application for Temporary Employment Certification* is an attestation by the employer at the TLC stage. Even when an application is prepared by an authorized agent or attorney, the Department reminds employers that they are obligated to read and review the *CW-1 Application for Temporary Employment Certification* prior to its submission to OFLC, including every page of the Form ETA-9142C and any applicable appendices and supporting documentation, as they will be held, through their original signature, to the assurance that the information contained therein is true and accurate, subject to penalties contained in this rulemaking and otherwise according to law.

## 2. Section 655.421, Job Contractor Filing Requirements

This section establishes the requirements under which job contractors may file *CW-1 Applications for Temporary Employment Certification* in the CW-1 program. Generally, a job contractor, as defined under § 655.402, has no need for workers itself. Rather, its need for labor is based on the underlying need of its employer-clients. A job contractor generally has an ongoing business of supplying workers to its employer-clients.

Paragraph (a) of this section provides that a job contractor may file an application on behalf of itself and an employer-client. When the job contractor does so, the Department will deem the job contractor a joint employer. Pursuant to paragraph (b), job contractors must also have a separate contract with each employer-client, and each agreement may only support one *CW-1 Application for Temporary Employment Certification*. While either a job contractor or the employer-client may file an *Application for Prevailing Wage Determination*, paragraph (c) specifies that each of the joint employers is separately responsible for

ensuring that the wage offer(s) listed in the *CW-1 Application for Temporary Employment Certification* and related recruitment at least equals the prevailing wage obtained from the NPWC, or the Federal or Commonwealth minimum wage, whichever is higher, and that all other wage obligations are met.

As required by paragraph (d) of this section, a job contractor filing as a joint employer with its employer-client must submit to the NPC a completed *CW-1 Application for Temporary Employment Certification* clearly identifying its employer-client. This must be accompanied by the contract or agreement establishing the employers' relationship to the workers sought. Consistent with the requirements for original signature explained in further detail under § 655.420(d), the *CW-1 Application for Temporary Employment Certification* must bear the original signature of both the job contractor and the employer-client, or use a verifiable electronic signature method. By signing the *CW-1 Application for Temporary Employment Certification*, each employer independently attests to the conditions of employment required of an employer participating in the CW-1 program. Each employer assumes full responsibility for the accuracy of the representations made in the application and for an employer's obligations in the CW-1 program, as defined in this IFR. If a violation of these obligations has occurred, either or both employers may be found to be responsible for attendant penalties and for remedying the violation.

To ensure an adequate level of transparency in the recruitment of U.S. workers in the CNMI, paragraph (e) establishes standards related to advertising the job opportunity, interviewing prospective U.S. workers, and preparing the recruitment report. Specifically, although either the job contractor or its employer-client may place advertisements for the job opportunity, conduct the recruitment required by the CO, and assume responsibility for interviewing U.S. workers who apply, both joint employers must sign the recruitment report that is submitted to the NPC as a condition of receiving a final determination. All recruitment conducted by the joint employers must satisfy the job-offer-assurance and advertising content requirements, as specified and further explained under § 655.441.

In order to fully inform prospective applicants of the job opportunity and avoid potential confusion inherent in a job opportunity involving two

employers, paragraph (e) also requires that the advertisements clearly identify both employers (the job contractor and its employer-client) by name and the place(s) of employment where workers will perform labor or services. In situations where all of the employer-clients' job opportunities are in the same occupation and have the same requirements and terms and conditions of employment (including dates of employment), this paragraph permits a job contractor to combine more than one of its joint-employer employer-clients' job opportunities in a single advertisement. The regulation provides a sample format to assist job contractors in properly disclosing the job opportunities and creates standard language that job contractors must use in their advertisements to inform U.S. workers fully on how to apply for the job opportunities.

Finally, paragraph (f) of this section provides that if a TLC for the joint employers is granted by the CO, the Final Determination notice certifying the *CW-1 Application for Temporary Employment Certification* will be sent to both the job contractor and its employer-client, in accordance with the procedures set forth under § 655.452, governing approved certifications.

## 3. Section 655.422, Emergency Situations

This section provides an employer in a qualifying emergency situation with some flexibility to participate in the CW-1 program without first obtaining a PWD from the NPWC. Specifically, paragraph (a) permits the CO to waive the requirement for an employer to obtain a PWD prior to filing a *CW-1 Application for Temporary Employment Certification*, provided the employer can demonstrate good and substantial cause and meets the requirements of subpart E. The requirement to obtain a PWD prior to filing the TLC application is the only provision of this rule that is waived by the emergency situation procedures. If the employer's request for emergency situation procedures is granted, it must comply with all other requirements under this subpart. To rely on this provision, paragraph (b) requires the employer to submit to the NPC a completed *Application for Prevailing Wage Determination*, a completed *CW-1 Application for Temporary Employment Certification*, and a detailed statement describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include the substantial loss of U.S. workers due to Acts of God, similar unforeseeable man-made catastrophic events (such as a

<sup>35</sup> As currently, designed, the form will ask the employer (or preparer) to indicate the type of CW-1 application it is filing: Whether it will support a petition for a new visa or a renewal and, separately, whether it involves long-term workers, cap-exempt workers, or an emergency situation.



hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside the employer's control.

However, an employer may not justify an emergency situation based on the Department's promulgation of this IFR and the associated timeframes for requesting prevailing wage and TLC determinations, which are foreseeable events required by the statute. A denial of a previously submitted *CW-1 Application for Temporary Employment Certification* or *CW-1* petition with USCIS also does not constitute good and substantial cause. Consistent with OFLC's treatment of emergency requests for the H-2B program, another program subject to a visa cap, the *CW-1* visa cap does not constitute "good and substantial cause" justifying an emergency application. Unlike the H-2B regulations, however, the *CW-1* regulation makes explicit that the visa cap may not be the basis for such an application, thus clarifying that the Department does not consider an impending visa cap to be an unforeseeable event beyond the employer's control. Finally, an employer may also not use the procedures contained in this section to either request a waiver of the timeframe for filing an *CW-1 Application for Temporary Employment Certification* earlier than that permitted under § 655.420(b) or request an amendment to the date of need for an *CW-1 Application for Temporary Employment Certification* that has already been submitted to the NPC for processing.

Paragraph (c) of this section establishes the procedures under which the CO will handle the employer's requests for a waiver. Upon receipt of the request, the CO will process the *Application for Prevailing Wage Determination* and *CW-1 Application for Temporary Employment Certification* concurrently and in a manner consistent with the provisions of this subpart E. While § 655.420(a) states that incomplete applications are to be returned unprocessed, in the case of applications which request emergency situation procedures at the time of filing and do not provide good and substantial cause for doing so, the application will be returned unprocessed, but with an explanation as to why the employer failed to justify good and substantial cause for the use of the procedures. Prior to returning the application, the CO at its discretion, may request additional details about the employer's good and substantial cause.

*CW-1 Applications for Temporary Employment Certification* processed under the emergency situation provision are subject to the same recruitment requirements, audit processes, and other integrity measures as nonemergency *CW-1 Applications for Temporary Employment Certification*. However, DOL intends to subject emergency applications to a higher level of scrutiny than nonemergency applications in order to ensure that this provision is not misused. The regulation provides the CO with the discretion to reject the emergency filing based on the totality of the circumstances and documentation provided in the *CW-1 Application for Temporary Employment Certification*. The CO will determine the foreseeability of the emergency based on the precise circumstances of each situation presented. The burden is on the employer to demonstrate the unforeseeability of the events leading to a request for a filing on an emergency basis.

#### 4. Section 655.423, Assurances and Obligations of *CW-1* Employers

This section contains the terms, assurances, and obligations of the *CW-1* program, similar to requirements for the H-2A and H-2B TLC programs the Department administers, that will be enforced to ensure the employment of *CW-1* workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. The terms, assurances, and obligations contained in this section are essential for the protection of U.S. workers from adverse effects related to the hiring of *CW-1* workers. As participants in the *CW-1* program, employers are required to review and comply with program provisions to protect similarly employed U.S. workers. Further, employers are to ensure that their hiring of *CW-1* workers will not disadvantage the U.S. workers in their employ. Requiring employers to comply with these terms, assurances, and obligations, which are incorporated into the Form ETA-9142C, Appendix C, is the most effective way to meet the requirements of the Workforce Act. The Form ETA-9142C, Appendix C, reiterates necessary worker protections for the *CW-1* program and by completing Appendix C the employer attests its agreement to ensuring the protection of *CW-1* workers and, further, ensuring that U.S. workers are both protected and not disadvantaged by the employer's *CW-1* employment. As discussed in the preamble to § 655.402, workers engaged in corresponding employment are entitled to the same protections and

benefits, set forth below, that are provided to *CW-1* workers.

#### a. Paragraph (a), Rate of Pay

Paragraph (a)(1) of this section, consistent with the Workforce Act, provides that to protect U.S. worker wages the offered wage in the work contract must equal or exceed the highest of the prevailing wage or Federal minimum wage, or Commonwealth minimum wage. If, during the course of the period certified in the *CW-1 Application for Temporary Employment Certification*, the Federal or Commonwealth minimum wage increases to a level higher than the prevailing wage certified in the *CW-1 Application for Temporary Employment Certification*, then the employer is obligated to pay that higher rate for the work performed after the new minimum wage takes effect. It also requires the employer to pay such wages, free and clear, during the entire period of the *CW-1 Application for Temporary Employment Certification* granted by OFLC. See 29 CFR 531.35. In addition, to ensure the wage equals or exceeds the highest of the prevailing wage, Federal minimum wage, or Commonwealth minimum wage, paragraph (a)(2) provides that the wage may not be based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

If one or more minimum productivity standards is required of workers as a condition of job retention, paragraph (a)(3) requires the employer to disclose the minimum productivity standards in the work contract and the employer must be able to demonstrate that such standards are normal and usual for non-*CW-1* employers for the same occupation in the Commonwealth. Productivity standards must be expressed in objective and quantifiable terms based on the hours or days of work needed to produce a unit of production, and the standards must be specified in a manner that is easily understood by the worker. The CO will not accept productivity standards that fail to quantify specifically the expected output per worker or do not clearly communicate to the worker the output required for job retention. For example, requiring workers to "perform work in a timely and proficient manner," "perform work at a sustained, vigorous pace," "make bona fide efforts to work efficiently and consistently considering climatic and other working conditions," "keep up with the work crew," "produce at a rate that does not

detrimentally affect other workers' productivity," or "perform work in the amount, quality, and efficiency of other workers" are unacceptable because such statements lack objectivity, quantification, and clarity regarding job performance expectations for workers.

Consistent with the Department's administration of the H-2B program, if an employer wishes to provide productivity standards as a condition of job retention, the burden of proof rests with the employer to show that such productivity standards are normal and usual for employers in the same occupation that are not employing CW-1 workers, in order to ensure there is no adverse effect on similarly employed U.S. workers. Some examples of evidence that may be used to prove that productivity standards are normal and usual include industry-level reports of typical production standards for a job, copies of production reports from other employers, and copies of job advertisements from employers with similar production requirements.

Finally, pursuant to paragraph (a)(4), an employer that pays on a piece-rate basis must demonstrate that the piece-rate is no less than the normal rate paid by non-CW-1 employers to workers performing the same activity in the Commonwealth, and that each workweek the average hourly piece-rate earnings result in an amount at least equal to the offered wage (or the employer must make up the difference).

#### b. Paragraph (b), Wages Free and Clear

To protect the wages of CW-1 workers and workers in corresponding employment, paragraph (b) requires the employer to timely pay wages either in cash or in negotiable instrument payable at par. The payment of wages to workers must also be made finally and unconditionally and "free and clear," in accordance with WHD regulations at 29 CFR part 531. This assurance clarifies the preexisting obligation for both employers and employees to ensure that wages are not reduced below the required rate.

#### c. Paragraph (c), Deductions

Paragraph (c) of this section ensures workers are paid the wage offered in the job opportunity by limiting deductions that reduce wages to below the offered wage indicated on the *CW-1 Application for Temporary Employment Certification*. Specifically, this section requires the employer make all deductions required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due under a court order. The section also limits other authorized

deductions to those that are for the reasonable cost or fair value of board, lodging, or facilities furnished that primarily benefit the employee, or that are amounts paid to third parties authorized by the employee or a collective bargaining agreement. The work contract must specify all deductions not required by law that the employer will make from the worker's pay. Any such deductions not disclosed in the work contract are prohibited.

The section also specifies deductions that are never permissible to the extent they reduce the actual wage below the offered wage. Additionally, these deductions are always prohibited: those for costs that are primarily for the benefit of the employer; those not specified in the work contract; "kick-backs" of worker wages, directly or indirectly, to the employer or to another person for the employer's benefit; and amounts paid to third parties which are unauthorized, unlawful, or from which the employer or its foreign labor contractor, recruiter, agent, or affiliated person benefits.

Consistent with the FLSA and 29 CFR part 531, for deductions not required by law to be permissible, they must, among other requirements, be truly voluntary, and may not be a condition of employment as determined under the totality of the circumstances. Moreover, for purposes of paragraph (c), a deduction for any cost that is primarily for the benefit of the employer is never permitted under this IFR. Some examples of costs that the Department has long held to be primarily for the benefit of the employer are tools of the trade and other materials and services incidental to carrying on the employer's business; the cost of any construction by and for the employer; the cost of required uniforms (whether purchased or rented) and their laundering; and transportation charges where such transportation is an incident of and necessary to the employment. 29 CFR 531.3(d)(1). This list is not all-inclusive. Further, the concept of de facto deductions initially developed under the FLSA, where employees are required to purchase items like uniforms or tools that are employer business expenses, is equally applicable to purchases that bring CW-1 workers' wages below the required wage, as the payment of the prevailing wage is necessary to ensure that the employment of foreign workers does not adversely affect the wages and working conditions of similarly employed U.S. workers. Allowing worker deductions for business expenses would undercut the prevailing wage and, as a result, would hurt U.S. workers.

#### d. Paragraph (d), Job Opportunity Is Full-Time

Paragraph (d) of this section requires that the job opportunity for which the employer is seeking to employ CW-1 workers is a full-time position, and that the employer use a single workweek as its standard for computing wages due. Additionally, consistent with the FLSA, this section provides that the workweek must be a fixed and regularly recurring period of 168 hours, *i.e.*, 7 consecutive 24-hour periods, which may start on any day and any hour of the day. This establishment of a clear period for determining whether wages are properly paid by the employer will help workers understand their wage guarantees and aid the Department in determining compliance during the audit examination process.

The requirement that the position be full-time is for the protection of U.S. workers in the CNMI and for the protection of U.S. workers in corresponding employment. By virtue of the CW-1 TLC, the Department requires the employer to ensure that the employment of CW-1 workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. Comparably, the full-time requirement is consistent with the Department's administration of its other TLC programs, the H-2B and H-2A programs, both of which require full-time positions for issuance of the labor certification.<sup>36</sup> Most similar to the H-2B program, the CW-1 program has a statutory numerical visa cap, which limits the number of annually available visas. As with the capped H-2B program, the Department believes that allowing CW-1 employers to hire part-time workers in instances in which an employer could, instead, choose to hire one or more full-time workers, could serve to dissuade U.S. workers from the job opportunity or place U.S. workers, who may be less likely to seek part-time work, at a competitive disadvantage for employment compared to CW-1 workers. The Department believes such an allowance would undercut the law as intended, which serves to encourage the hiring of U.S. workers in the CNMI.

<sup>36</sup> See 20 CFR part 655, subpart A (governing H-2B temporary nonagricultural workers); 20 CFR part 655, subpart B (governing H-2A temporary agricultural workers). The TLC programs are unlike the Department's H-1B program, which is a labor condition application program, for which the U.S. labor market is only tested in very limited circumstances for H-1B dependent employers and willful violators not claiming an exemption, and for which certification is granted unless the application is obviously inaccurate or incomplete. See 20 CFR part 655, subpart H (governing H-1B labor condition applications for H-1B workers).

e. Paragraph (e), Job Qualifications and Requirements

Paragraph (e) of this section requires that each qualification and requirement for the job be listed in the work contract, and be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-CW-1 employers in the same occupation and in the CNMI. This protects U.S. workers and is consistent with requirements for the Department's administration of similar TLC programs.<sup>37</sup> Further, the employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on CW-1 workers. The CO has the authority to require the employer to provide sufficient justification for any job qualification or requirement imposed for the particular job opportunity.

Consistent with the Department's administration of similar TLC programs,<sup>38</sup> job qualifications and requirements must be customary, *i.e.*, they may not be used to discourage applicants capable of performing the needed work from applying for the job opportunity. The standard for employment of CW-1 workers is that there are not sufficient U.S. workers in the CNMI who are able, willing, and qualified, and who will be available to perform such services or labor. For purposes of complying with this statutory mandate, the Department has clarified the meaning of qualifications and requirements. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. Such characteristics include the ability to use specific equipment or any education or experience required for performing a certain job task. A requirement, on the other hand, means a term or condition of employment that a worker must accept in order to obtain or retain the job opportunity.

To the extent an employer has requirements that are related to the U.S. workers' qualifications or availability, the Department uses the Occupational Information Network database (O\*NET) as a primary source for occupational qualifications and requirements, and will therefore consult O\*NET when making a determination as to whether qualifications or requirements are normal for a specific job. For example, the Department recognizes that

background checks are used in private industry, so employers may conduct them to the extent that the requirement is a bona fide, normal, and accepted requirement applied by non-CW-1 employers for the occupation in the area of employment, and the employer applies the same criteria to both CW-1 and U.S. workers. However, where such job requirements are included in the recruitment materials, the Department may inquire further as to whether such requirements are normal and accepted by non-CW-1 employers in the CNMI and by which methods the employer will use such requirements.

f. Paragraph (f), Three-Fourths Guarantee

To ensure CW-1 workers and workers in corresponding employment are provided full-time employment under the work contract, the employer must guarantee under paragraph (f)(1) to offer each worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period of employment specified in the work contract, 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.

Paragraph (f)(1)(i) defines a workday to mean the number of hours in a workday as stated in the work contract. 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. In the event the worker begins working later than the specified beginning date, paragraph (f)(1)(ii) clarifies that 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. To assist employers in complying with the three-fourths guarantee, paragraph (f)(1)(iii) provides a practical example of how to calculate the guaranteed total number of work hours for a 10-week work contract period.

Paragraph (f)(1)(iv) establishes additional standards for employers to comply with this provision. Specifically, although a worker may be offered more than the specified hours of work on a single workday, the worker

cannot be required to work for more than the number of hours specified in the work contract for a workday. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. 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 of the work contract period if each workday did not consist of a full number of hours of work time as specified in the work contract.

To ensure workers are not adversely impacted in their employment, if during the total work contract period the employer affords the U.S. or CW-1 worker less employment than that required under the three-fourths guarantee, 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. For workers that are paid on a piece-rate basis, paragraph (f)(2) specifies that the employer must use the worker's average hourly piece-rate earnings or the offered wage, whichever is higher, to calculate the amount due under the guarantee in accordance with paragraph (f)(1) of this section.

Pursuant to paragraph (f)(3), any hours the worker fails to work, up to a maximum of the number of hours specified in the work contract for a workday, when the worker has been offered an opportunity to work, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this subpart.

Based on its experience with administering TLC programs, the Department has concluded that a three-fourths guarantee strikes an appropriate balance of guaranteeing the benefits of full-time employment to workers, while providing employers with sufficient flexibility to spread the required work contract hours over a sufficiently long period of time such that the vagaries of the weather or other events out of their control that affect their need for labor do not prevent employers from fulfilling their guarantee. When employers file applications for CW-1 TLCs, they represent that they have a need for full-time workers during the entire certification period. Therefore, it is important to the integrity of the program, which is a capped visa

<sup>37</sup> 20 CFR part 655, subpart A; 20 CFR part 655, subpart B.

<sup>38</sup> 20 CFR part 655, subpart A; 20 CFR part 655, subpart B.

program, to have a methodology for ensuring that employers have fairly and accurately estimated their temporary need.

The guarantee also deters employers from misusing the program by overstating their need for full-time workers. This will prevent employers from overestimating the hours of work needed per week, or the total number of workers required to do the work available. The guarantee will not only result in U.S. and CW-1 workers actually working most of the hours promised in the work contract, but also free up capped CW-1 visas for other employers whose businesses need CW-1 workers.

#### g. Paragraph (g), Impossibility of Fulfillment

Paragraph (g) of this section allows an employer to terminate the work contract in certain narrowly prescribed circumstances where 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, or similar unforeseeable man-made catastrophes (such as oil spills or controlled flooding) wholly outside the employer's control that makes fulfillment of the work contract impossible. In such an event, the employer must fulfill the three-fourths guarantee for the time that has elapsed from the start date listed in the work contract or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination.

To safeguard the employment of the workers, this paragraph also requires the employer to make efforts to transfer the CW-1 worker (to the extent permitted by DHS) and worker in corresponding employment to other comparable employment acceptable to the worker. Actions employers could take include contacting any known CW-1 employers with comparable employment or the CNMI Department of Labor for assistance in placing workers with other CNMI employers with comparable job vacancies. Absent such placement, the employer is required to comply with the transportation requirement, as set forth under § 655.423(j), to return the worker to the place from which the worker came prior to entering the Commonwealth (disregarding intervening employment<sup>39</sup>) or transport

<sup>39</sup> In terms of the referenced transportation requirements in an intervening employment situation for the CW-1 worker, where there is an initial CW-1 employer and a subsequent non-CW-1 employer, the obligation to pay for the transportation costs between the place of employment with the CW-1 employer and the

the worker to the worker's next certified CW-1 employer,<sup>40</sup> whichever the worker prefers. CO approval is required before terminating the work contract with the workers. Simply submitting a request to the CO is insufficient to terminate the work contract and absolve the employer of the three-fourths guarantee.

#### h. Paragraph (h), Frequency of Pay

Paragraph (h) of this section requires that the employer indicate the frequency of pay in the work contract, and guarantee to pay workers at least every 2 weeks and when wages are due. The requirement that workers be paid at least every 2 weeks is designed to protect financially vulnerable workers. Allowing an employer to pay less frequently than every 2 weeks would impose an undue burden on workers who are often paid low wages and may lack the means to make their income last through a month until they get paid.

#### i. Paragraph (i), Earnings Statements

To ensure compliance with the wage requirements of this subpart and transparency of the requirement to workers, paragraph (i)(1) of this section requires the employer to maintain accurate and adequate records with respect to the workers' earnings and to specify the minimum amount of information to be retained. The employer is further required under paragraph (i)(2) to furnish to each worker an appropriate written earnings statement on or before each payday, specifying the information that the employer must include in such a statement (*e.g.*, the worker's total earnings for each workweek in the pay period, the hourly rate or piece-rate of pay, the hours of employment offered and hours actually worked by the worker, and an itemization of all deductions from the worker's wages).

The Department notes that this paragraph also requires employers to maintain records of any additions made to a worker's wages and to include such

subsequent place of employment with the non-CW-1 employer depends on the subsequent employer's work contract. In the absence of a contractual agreement to pay for travel costs, the CW-1 employer is obligated to pay the travel expenses between its place of employment and the immediate subsequent place of employment with the non-CW-1 employer.

<sup>40</sup> In terms of the referenced transportation requirements in an intervening employment situation for the CW-1 worker, where there is an initial CW-1 employer and a subsequent CW-1 employer, the initial CW-1 employer is responsible for transporting the CW-1 worker from its place of employment to the subsequent CW-1 employer's place of employment, but the subsequent CW-1 employer is responsible for reimbursing the initial CW-1 employer with transportation costs.

information in the earnings statements furnished to the worker. Such additions could include performance bonuses, cash advances, or reimbursements for costs incurred by the worker. This requirement is consistent with the recordkeeping requirements under the FLSA in 29 CFR part 516. See 29 CFR part 785 for guidance regarding what constitutes hours worked.

The Department has concluded that any administrative burden resulting from this provision is outweighed by the importance of providing workers with this crucial information, especially because an earnings statement provides workers with an opportunity to quickly identify and resolve any anomalies with the employer and will hold employers accountable for proper payment. Similar to § 655.20(i) in the H-2B program, this IFR requires an employer to record the reasons why a worker declined any offered hours of work, which will support the Department's audit examination activities related to the three-fourths guarantee previously discussed under paragraph (f) of this section.

#### j. Paragraph (j), Transportation and Visa Fees

Consistent with the Department's transportation provisions in similar TLC programs, paragraph (j)(1)(i) of this section requires an employer to provide inbound transportation and subsistence during transportation to CW-1 employees and to U.S. employees in corresponding employment who have traveled to take the position from such a distance that they are not reasonably able to return to their residence each day, if the workers complete 50 percent of the period of employment covered by the work contract (not counting any extensions). Before the 50 percent point, employers have no responsibility under the CW-1 program to pay these expenses. Transportation and subsistence costs must be paid for travel between the place from which the worker has come to work for the employer, whether in the United States, including another part of the CNMI, or abroad, to the place of employment. This paragraph provides that employers may arrange and pay for the transportation and subsistence directly; advance, at a minimum, the most economical and reasonable common carrier cost and subsistence; or reimburse the worker's reasonable costs. If the employer advances or provides transportation and subsistence costs to foreign workers, or it is the prevailing practice of non-CW-1 employers in the CNMI to do so, the employer must advance such costs or provide the

services to workers in corresponding employment traveling to the place of employment. The Department has concluded that this approach is appropriate and adequately protects the interests of both U.S. and CW-1 workers and employers because it does not require employers to pay the inbound transportation and subsistence costs of U.S. workers recruited pursuant to CW-1 job offers who do not remain on the job for more than a very brief period.

Paragraph (j)(1)(ii) requires the employer, at the end of the employment, to provide or pay for the U.S. or foreign worker's return transportation and daily subsistence from the place of employment to the place from which the worker departed to work for the employer, if the worker has no immediate subsequent approved CW-1 employment. However, this obligation attaches only if the worker completes the period of employment covered by the work contract or if the worker is dismissed from employment for any reason before the end of the certified period of employment. The employer is required to provide or pay for the return transportation and daily subsistence of a worker who has completed the period of employment listed on the certified CW-1 Application for Temporary Employment Certification, regardless of any subsequent extensions of the work contract for that worker. An employer is not required to provide return transportation if separation is due to a worker's voluntary abandonment or termination for cause, as set forth under § 655.423(v). If the worker has been contracted to work for a subsequent and certified employer, the last CW-1 employer to employ the worker is required to provide or pay the U.S. or foreign worker's return transportation. Therefore, prior employers are not obligated to pay for such return transportation costs.

Paragraph (j)(1)(iii) of this section requires that all employer-provided transportation—including transportation to and from the place of employment, if provided—comply with all applicable Federal and Commonwealth laws and regulations including vehicle safety standards, driver licensure requirements, and vehicle insurance coverage.

And finally, to protect CW-1 workers from predatory and abusive labor practices, paragraph (j)(2) of this section requires the employer to pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the CW-1 worker, but not for passport expenses or

other charges primarily for the benefit of the worker.

Under the FLSA and as the Department has explained in Wage and Hour's Field Assistance Bulletin No. 2009-2 (Aug. 21, 2009), transportation, subsistence, and visa and related expenses for CW-1 workers are for the primary benefit of employers. The employer primarily benefits because it obtains foreign workers where the employer has demonstrated that there are not sufficient qualified U.S. workers available to perform the work; the employer has demonstrated that unavailability by engaging in prescribed recruiting activities that do not yield sufficient U.S. workers.

The CW-1 workers, on the other hand, only receive the right to work for a particular employer, in a particular location, and for a particular period of time. If they leave that specific job, they generally must leave the country. Transporting these CW-1 workers from remote locations to the workplace thus primarily benefits the employer who has sought authority to fill its workforce needs by bringing in workers from foreign countries. Similarly, because a CW-1 worker's visa (including all the related expenses, which vary by country, including the visa processing interview fee and border crossing fee) is an incident of and necessary to employment under the program, the employer is the primary beneficiary of such expenses. The visa does not allow the employee to find work in the United States generally, but rather permits the visa holder to apply for admission in CW-1 nonimmigrant status in the CNMI, which restricts the worker to the employer with an approved TLC and petition to the particular approved work described in the employer's application.

In addition, the FLSA applies independently of the CW-1 requirements and imposes obligations on employers regarding payment of wages. Employers covered by the FLSA must generally pay such expenses to nonexempt employees in the first workweek, to the level necessary to meet the FLSA minimum wage. *See, e.g., Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 898-99 (9th Cir. 2013); *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002); *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d 1163 (11th Cir. 2003); *Gaxiola v. Williams Seafood of Arapahoe, Inc.*, 2011 WL 806792 (E.D.N.C. 2011); *Teoba v. Trugreen Landcare LLC*, 2011 WL 573572 (W.D.N.Y. 2011); *DeLeon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295 (N.D. Ga. 2008); *Rosales v. Hispanic Employee Leasing Program*, 2008 WL 363479 (W.D. Mich.

2008); *Rivera v. Brickman Group*, 2008 WL 81570 (E.D. Pa. 2008). *But see Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010) (en banc). Payment sufficient to satisfy the FLSA in the first workweek is also required because § 655.423(w) specifically requires employers to comply with all applicable Federal and Commonwealth employment-related laws and regulations, including health and safety laws. Furthermore, because U.S. workers are entitled to receive at least the same terms and conditions of employment as CW-1 workers, in order to prevent adverse effects on U.S. workers from the presence of foreign workers, employers must provide the same reimbursement for U.S. workers in corresponding employment who are unable to return to their residence each workday, such as those from another U.S. State or territory who saw the position advertised on the CNMI Department of Labor's job listing system.

The Department has determined these provisions fulfill its statutory mandate to protect U.S. workers from adverse effects due to the presence of temporary foreign workers. As discussed above, under the FLSA, numerous courts have held in the context of both H-2B and H-2A workers that the inbound and outbound transportation costs associated with employing workers are an inevitable and inescapable consequence of employers choosing to participate in these visa programs. Moreover, the courts have held that such transportation expenses are not ordinary living expenses, because they have no substantial value to the employee independent of the job and do not ordinarily arise in an employment relationship, unlike normal daily home-to-work commuting costs.

Therefore, the courts view employers as the primary beneficiaries of such expenses under the FLSA; in essence the courts have held that inbound and outbound transportation are employer business expenses. A similar analysis applies to the CW-1 required wage. This requirement ensures the integrity of the full CW-1 required wage, over the full term of employment. Both CW-1 workers and U.S. workers in corresponding employment will receive the CW-1 required wage they were promised, as well as reimbursement for the reasonable transportation and subsistence costs that primarily benefit the employer, over the full period of employment.

Finally, to comply with the provisions of this section, transportation must be reimbursed from wherever the place from which the worker has come to

work for the employer to the place of employment; therefore, the employer must pay for transportation from the place of recruitment to the city with the consulate that adjudicates the worker's visa application and then on to the place of employment. Similarly, the employer must pay for subsistence during that period, so if an overnight stay at a hotel in the consular city is required while the employee is interviewing for and obtaining a visa, that subsistence must be reimbursed.

**k. Paragraph (k), Employer-Provided Items**

Consistent with the requirement under the FLSA regulations at 29 CFR part 531, paragraph (k) of this section requires the employer provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. The employer may not shift to the employee the burden to pay for damage to, loss of, or normal wear and tear of, such items. This provision gives workers additional protections against improper deductions for the employer's business expenses from required wages.

Section 3(m) of the FLSA (29 U.S.C. 203(m)) prohibits employers from making deductions for items that are primarily for the benefit of the employer if such deductions reduce the employee's wage below the Federal minimum wage. Therefore, an employer that does not provide tools but requires its employees to bring their own would already be required under the FLSA to reimburse its employees for the difference between the weekly wage minus the cost of equipment and the weekly minimum wage. Paragraph (k) simply extends this protection in a manner that protects the integrity of the required CW-1 wage rate and thereby avoids adverse effects on the wages of U.S. workers. However, this requirement does not prohibit employees from voluntarily choosing to use their own specialized equipment; rather, it simply requires employers to make available to employees adequate and appropriate equipment.

**l. Paragraph (l), Disclosure of Work Contract**

Paragraph (l) of this section requires the employer to provide a copy of the work contract, including any subsequent approved modifications, to a CW-1 worker outside of the United States no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences. To clarify, the time at

which the worker applies for the visa should be read as the time before the worker has made any payment, whether to a recruiter or directly to the consulate, to initiate the visa application process. The Department has concluded that it is most practical to require disclosure of the work contract at the time the worker applies for a visa, to ensure that workers fully understand the terms and conditions of their job offer before they make a commitment to come to the United States.

For CW-1 workers who are moving to a subsequent CW-1 employer, the work contract must be provided no later than the time the subsequent offer of employment is made. At a minimum, the work contract must contain all of the provisions required to be included by this section and must be in a language understood by the worker. In the absence of a separate, written work contract between the employer and the worker, the required terms of the certified *CW-1 Application for Temporary Employment Certification* are those in the work contract.

The Department has determined that the disclosure required by this paragraph is a vital component of strengthening program compliance and provides workers with sufficient notice of the terms and conditions of the job so that they can make an informed decision of the terms under which they are accepting the job. In addition, providing the terms and conditions of employment to each worker in a language that the individual understands protects those workers.

**m. Paragraph (m), No Unfair Treatment**

To protect vulnerable U.S. workers and CW-1 workers, paragraph (m) of this section provides nondiscrimination and nonretaliation protections for workers. Workers are protected from retaliation, including retaliation based on contact or consultation with an employee of a legal assistance program, labor union, workers' center, or community organization, or an attorney on matters related to perceived violations. These entities frequently have the first contact with temporary foreign workers when they seek help to correct or report perceived violations. This provision applies to oral complaints and complaints made internally to employers, and it also applies to current, former, and prospective workers.

This provision protects workers from discrimination and retaliation for asserting rights under any applicable Federal or Commonwealth law or regulation, including the CW-1

program. For example, if workers sought legal assistance relating to the terms and conditions of employment, such as employer-provided housing because an employer charged for housing that was listed as free of charge in the work contract, this serves as a protected act; however, a routine landlord-tenant dispute may not fall under the protections of this section. This section provides protection to U.S. workers and CW-1 workers alike.

**n. Paragraph (n), Comply With the Prohibitions Against Employees Paying Fees**

Paragraph (n), similarly to the Department's H-2B regulation at 20 CFR 655.20(o), of this section prohibits the employer and its attorneys, agents, or employees from seeking or receiving payment of any kind from workers for any activity related to obtaining CW-1 labor certification or employment, including payment of the employer's attorney or agent fees, application and *CW-1 Petition* fees, recruitment costs, or any fees attributed to obtaining the approved *CW-1 Application for Temporary Employment Certification*. Payments under this provision include but are not limited to monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in-kind payments, and free labor. However, this provision allows employers and their agents to receive reimbursement for fees that are primarily for the benefit of the worker, such as Government-required passport fees, which can be used for personal travel or for travel to another job. This provision also reiterates that employers must pay all wages to workers free and clear. *Paragraph (o), Contracts with Third Parties to Comply with Prohibitions.*

Paragraph (o) of this section requires that an employer contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in recruitment of CW-1 workers to seek or receive payments or other compensation from prospective workers. For employers' convenience, this paragraph contains the exact language of the required contractual prohibition that must appear in such agreements.

**o. Paragraph (p), Prohibition Against Preferential Treatment of Foreign Workers**

For the protection of U.S. workers, paragraph (p) of this section requires the employer to offer and provide 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 CW-1 workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's CW-1 workers. Employers are required to offer and provide CW-1 workers at least the minimum benefits, wages, and working conditions outlined in this paragraph. This provision will protect U.S. workers by ensuring that employers do not understate wages and/or benefits in an attempt to discourage U.S. applicants or to provide preferential treatment to temporary foreign workers.

The employer is not precluded from offering a higher wage rate or more generous benefits or working conditions to U.S. workers, so long as the employer offers to U.S. workers all the wages, benefits, and working conditions offered to and required for CW-1 workers pursuant to the certified *CW-1 Application for Temporary Employment Certification*.

p. Paragraph (q), Nondiscriminatory Hiring Practices

For the protection of U.S. workers, paragraph (q) of this section sets forth a nondiscriminatory hiring provision by guaranteeing the job opportunity is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. This paragraph works together with paragraph (p) of this same section, which specifies that job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on CW-1 workers. Thus, for example, an employer violates this provision if it requires drug tests or criminal background checks for U.S. workers but not for CW-1 workers.

Additionally, where an employer conducts criminal background checks on prospective employees, in order to be lawful and job-related, the employer's consideration of any arrest or conviction history must be consistent with applicable guidance from the Equal Employment Opportunity Commission on employer consideration of arrest and conviction history under Title VII of the Civil Rights Act of 1964. Thus, employers may reject U.S. workers solely for lawful, job-related reasons, and they must also comply with all applicable employment-related laws, as set forth under § 655.423(w). All U.S. workers not rejected on this basis must be hired. This paragraph also reminds the employer of its obligation to retain records of all hired workers as well as those rejected, as set forth under § 655.456.

q. Paragraph (r), Recruitment Requirements

Paragraph (r) of this section requires employers to assure the Department that they will conduct all recruitment for U.S. workers required by §§ 655.440 through 655.445, including any activities directed by the CO. Such required recruitment activities are discussed further in the preamble to those applicable sections.

r. Paragraph (s), No Strike or Lockout

Paragraph (s) of this section requires an employer to assure the Department that there is no strike or lockout at any of the employer's place(s) of employment within the Commonwealth for which the employer is requesting CW-1 certification. If there is a strike or lockout at the place(s) of employment when the employer requests CW-1 workers, the CO may deny the CW-1 certification to ensure that U.S. workers are not adversely impacted by the hiring of a CW-1 worker(s). This provision will protect U.S. workers in their employment by preventing employers from filling positions with CW-1 workers at places of employment where such positions are vacated by U.S. workers due to a strike or lockout.<sup>41</sup>

s. Paragraph (t), No Recent or Future Layoffs

Paragraph (t) of this section establishes the standards under which an employer cannot lay off similarly employed U.S. workers who would be considered in corresponding employment upon approval of a TLC. Specifically, the employer must assure the Department that it has not laid off any similarly employed U.S. worker in the occupation that is the subject of the *CW-1 Application for Temporary Employment Certification* in the Commonwealth within the period beginning 270 calendar days before the date of need and will not lay off any similarly employed U.S. worker in the occupation that is subject to the *CW-1 Application for Temporary Employment Certification* in the Commonwealth through the end of the period of certification. However, the provision specifically permits layoffs due to lawful, job-related reasons, such as lack of work or the end of a season, as long as, if applicable, the employer lays off its CW-1 workers first before any U.S. worker in corresponding employment.

The Department has determined that the 270-day period before the date of need is an appropriate timeframe to prohibit layoffs of similarly employed

U.S. workers, because it represents the earliest possible period the employer may request a PWD from the NPWC for a job opportunity that it may seek to fill with a nonimmigrant worker in CW-1 status. By extending this prohibition through the end of the certified period of employment, the Department is seeking to maximize the protection of U.S. workers in their employment and discourage employers from seeking to use the CW-1 program to displace their current U.S. workforce.

t. Paragraph (u), No Work Performed Outside the Commonwealth and Job Opportunity

Paragraph (u) of this section helps ensure integrity of the CW-1 program by prohibiting the employer from placing any CW-1 workers outside the Commonwealth or in a job opportunity not listed on the approved *CW-1 Application for Temporary Employment Certification*. The requirement that all work must be performed within the Commonwealth is consistent with the statutory mandate prohibiting individuals in CW-1 status from being present anywhere in the United States other than the Commonwealth, with limited exception. Furthermore, placing CW-1 workers to perform labor or services outside the scope of the job opportunity certified by the CO can depress the wages of similarly employed U.S. workers and undermines the labor market test upon which the CO granted TLC.

u. Paragraph (v), Abandonment/Termination of Employment

Paragraph (v) of this section requires the employer to notify OFLC within 2 working days of the separation of a CW-1 worker or worker in corresponding employment if the separation occurs before the end date of the period of employment certified in the *CW-1 Application for Temporary Employment Certification*. It also deems that an abandonment or abscondment begins after a worker fails to report for work at the regularly scheduled time without the employer's consent for 5 consecutive working days, and adds language relieving the employer of the subsequent transportation and subsistence requirements, previously discussed under § 655.423(j), only where the separation is due to a worker's voluntary abandonment or termination for cause. Additionally, the section clarifies that if a worker voluntarily abandons employment or is terminated for cause, and appropriate notification under this section is provided, an employer is not required to guarantee three-fourths of the work

<sup>41</sup> This provision is consistent with the H-2B provisions at 20 CFR 655.20(u).

contract, as previously discussed under § 655.423(f).<sup>42</sup>

OFLC's awareness of early separations is critical to program integrity, and timely notification of CW-1 workers who voluntarily abandon employment is likewise vital to identifying workers who are no longer covered by an approved temporary labor certification and no longer have a legal purpose for being in the CNMI. Timely notification also allows the agency to conduct audit examinations or refer matters for further investigation to DHS or any other Federal Government Office. Absent proper notification, employers with histories of frequent and unjustified early dismissals of workers could continue to have their *CW-1 Applications for Temporary Employment Certification* certified and a *CW-1 Petitions* approved.

#### v. Paragraph (w), Compliance With Applicable Laws

During the period of employment certified by the CO on the *CW-1 Application for Temporary Employment Certification*, paragraph (w) of this section requires CW-1 employers to comply with all applicable Federal and Commonwealth employment and labor laws and regulations, including health and safety laws. It also explicitly references 18 U.S.C. 1592(a), which prohibits holding or confiscating workers' immigration documents, such as passports or visas, under certain circumstances.

#### D. Processing of an *CW-1 Application for Temporary Employment Certification*

##### 1. Section 655.430, Review of Applications

This section establishes requirements for the CO to review *CW-1 Applications for Temporary Employment Certification*, methods of communication between the CO and employer, and authority for the CO to share information with other Federal Government Officials performing enforcement and/or investigative activities.

Paragraph (a) requires the CO to conduct a comprehensive review of the *CW-1 Application for Temporary Employment Certification*, including all applicable addenda and supporting documentation, for compliance with all applicable program requirements. After performing a review, the CO will provide written notification to the employer and, if applicable, to the employer's agent or attorney indicating

whether the *CW-1 Application for Temporary Employment Certification* can be accepted for further processing. If the CO determines all applicable program requirements have been met, a NOA authorizing the recruitment of U.S. workers in the CNMI will be issued, as required by § 655.433. However, if the CO determines the *CW-1 Application for Temporary Employment Certification* contains one or more deficiencies, a NOD will be issued, as required by § 655.431, requiring a response from the employer addressing each deficiency before a NOA can be issued.

To ensure communications between the CO and employer are accomplished in a reliable and efficient manner, paragraph (b) of this section requires the CO to send all notices or requests to the employer electronically or using first class U.S. Mail based on address information supplied by the employer on the *CW-1 Application for Temporary Employment Certification*. Similarly, the employer's response to a notice or request received from the CO must be sent electronically or via traditional methods that assure expedited delivery. If the due date for the employer's response falls on a Saturday, Sunday or Federal Holiday, this paragraph requires the employer to send the response by the date due or the next business day.

To ensure program integrity and effective coordination with other Federal Government Officials, and consistent with how the Department administers other TLC programs, paragraph (c) provides that OFLC may forward to DHS or any other Federal Government Official performing an investigation, inspection, audit, or law enforcement function, the information that OFLC receives in the course of processing a request for an *CW-1 Application for Temporary Employment Certification* or of administering program integrity measures such as audits under this subpart.

##### 2. Section 655.431, Notice of Deficiency

This section establishes the procedures under which the CO will issue a NOD after reviewing the employer's *CW-1 Application for Temporary Employment Certification*. The purpose of the NOD is to provide employers, especially those participating in the CW-1 program for the first time, an opportunity to comply with program requirements before a denial determination needs to be issued by the CO, thereby avoiding a burdensome and costly administrative judicial review process. Thus, paragraph (a) provides that a NOD will be issued to the employer where the CO

determines the *CW-1 Application for Temporary Employment Certification*, including the material terms and conditions of the job offer, contains errors or inaccuracies, or fails to comply with applicable requirements set forth in this subpart. A copy of the NOD will be sent to the employer's agent or attorney, as applicable.

Paragraph (b) of this section specifies the content requirements of the NOD. The NOD will include the specific reason(s) the *CW-1 Application for Temporary Employment Certification* fails to meet the criteria for acceptance and will identify the type(s) of response(s) or modification(s) needed for the CO to issue a NOA. The employer will be offered an opportunity to submit a modified *CW-1 Application for Temporary Employment Certification* within 10 business days from the date of the NOD addressing each deficiency noted by the CO. Finally, the NOD will state that if the employer does not submit a modified *CW-1 Application for Temporary Employment Certification*, in accordance with the standards and procedures set forth under § 655.432, the CO will deny the *CW-1 Application for Temporary Employment Certification*.

Based on the Department's experience administering other TLC programs, there are circumstances in which the modified *CW-1 Application for Temporary Employment Certification* submitted by the employer does not resolve the stated deficiency or creates a question or concern requiring additional clarification before a NOA can be issued. Therefore, as § 655.432(a) provides, the CO may issue one or more NODs, as necessary, to work with employers to resolve deficiencies that are preventing acceptance of their *CW-1 Application for Temporary Employment Certification* and achieve program compliance.

##### 3. Section 655.432, Submission of Modified Applications

This section establishes the procedures under which the CO will handle responses to a NOD, including any modifications to the *CW-1 Application for Temporary Employment Certification*, submitted by an employer as well as other necessary modifications requested by the CO before a final determination is issued. Upon receipt of a response to a NOD, including any modifications to the *CW-1 Application for Temporary Employment Certification*, paragraph (a) specifies the CO will review the response and may issue one or more additional NODs to ensure compliance with regulatory

<sup>42</sup> This provision is consistent with H-2B program requirements at 20 CFR 655.20(y).



requirements before issuing a decision under this section. However, an employer's failure to comply with a NOD, including not responding in a timely manner or not providing all required documentation requested by the CO, will result in a denial of the *CW-1 Application for Temporary Employment Certification*.

If the CO accepts the response submitted by the employer, paragraph (b) provides that the CO will issue a NOA. In the NOA, the CO directs the employer to conduct recruitment of U.S. workers for the job opportunity, in accordance with the procedures and requirements set forth under § 655.433. If the modified application fails to cure the deficiencies or otherwise comply with program requirements, and the CO finds the employer's response to the NOD unacceptable, paragraphs (c) and (d) provide that the CO will deny the *CW-1 Application for Temporary Employment Certification*, and offer the employer an opportunity to request administrative judicial review of the denial, in accordance with the procedures set forth under § 655.461.

Notwithstanding the decision to accept the *CW-1 Application for Temporary Employment Certification*, paragraph (e) of this section authorizes the CO to require additional modifications where the CO determines the job offer identified in the *CW-1 Application for Temporary Employment Certification* does not contain all the minimum benefits, wages, and working conditions specified under § 655.441. The CO's ability to require modification(s) of a job offer strengthens *CW-1* program integrity. In some cases, information may come to the CO's attention after acceptance indicating that the job offer does not contain all the applicable minimum benefits, wages, and working conditions that are required for certification. This provision enables the CO to ensure that the job offer meets all regulatory requirements before a decision to grant TLC is issued.

The CO may request additional modifications at any time after the NOA is issued and before the CO makes the final determination to grant or deny the *CW-1 Application for Temporary Employment Certification*. The employer must make the requested modifications, or the CO will deny the TLC in accordance with the procedures set forth under § 655.453. Once all requested modifications are made and approved by the CO, paragraph (e) requires that the employer provide to all workers recruited in connection with the job opportunity a copy of the modified *CW-1 Application for*

*Temporary Employment Certification* no later than the date work commences.

#### 4. Section 655.433, Notice of Acceptance

This section establishes the procedures under which the CO will issue a NOA after reviewing the employer's *CW-1 Application for Temporary Employment Certification*. The purpose of the NOA is to provide the employer with specific instructions on where to conduct recruitment in the CNMI and the length of time advertisements for the job opportunity must appear to prospective U.S. workers. Paragraph (a) provides that a NOA will be issued to the employer where the CO determines the *CW-1 Application for Temporary Employment Certification*, including the material terms and conditions of the job offer, contains no errors or inaccuracies, and meets the requirements set forth in this subpart. A copy of the NOA will be sent to the employer's agent or attorney, as applicable.

Paragraph (b) of this section specifies the content requirements of the NOA. The NOA will direct the employer to recruit for U.S. workers by placing an advertisement on the CNMI Department of Labor's job listing system, as further explained under § 655.442; contacting its former U.S. employees employed during the previous year and soliciting their return to the jobs, as further explained under § 655.443; and posting notice of the job opportunity in at least two conspicuous locations at the place(s) of employment, as further explained under § 655.444. Additionally, the NOA may contain instructions for the employer to conduct additional recruitment where the CO determines qualified U.S. workers will be available for the work, as further explained under § 655.445.

To ensure employers initiate recruitment in a timely manner, the NOA will require all employer-conducted recruitment to begin within 14 calendar days from the date the NOA is issued. Finally, in the NOA the CO will require the employer to submit a report of its recruitment efforts by a specific date, as further explained under § 655.446, for the CO to determine whether there is a sufficient number of qualified U.S. workers in the CNMI who will be available for the employer's job opportunity.

#### 5. Section 655.434, Amendments to an Application

This section establishes the standards and procedures under which the employer may request to amend its *CW-1 Application for Temporary*

*Employment Certification* to increase the number of workers requested, modify the period of employment, and/or request other minor changes to the application. All amendment requests must be made in writing and before a certification determination is issued on the employer's *CW-1 Application for Temporary Employment Certification* and will not be effective until approved by the CO.

Paragraph (a) permits the employer to request a minor amendment to increase the number of workers requested in the initial *CW-1 Application for Temporary Employment Certification*. The employer may request an increase of not more than 20 percent (50 percent for employers requesting less than 10 workers) of the number of workers requested on the initial application without requiring an additional recruitment period for U.S. workers. Requests for increases above the prescribed percentages, which are similar to other TLC programs<sup>43</sup> administered by the Department, may be approved without additional recruitment only when the employer demonstrates that the need for additional workers could not have been foreseen and is wholly outside of the employer's control.

Paragraph (b) permits the employer to request minor changes in the total period of employment in the initial *CW-1 Application for Temporary Employment Certification*. The employer may request an amendment of not more than 14 calendar days to the total period of employment without requiring an additional recruitment period for U.S. workers. Requests for minor changes to the period of employment must be in writing and may be approved by the CO only when the employer demonstrates that the need for such changes could not have been foreseen and is wholly outside of the employer's control. To ensure amendments to the period of employment are approved in a manner consistent with the statute, the CO will deny any request to change the period of employment where the total amended period of employment will exceed the maximum applicable duration permitted under § 655.420(g). Additionally, the Department does not intend for employers to use this provision to amend their dates of need in order to gain a competitive advantage with respect to accessing the USCIS-administered *CW-1* visa cap. Therefore, the Department will not approve cap-

<sup>43</sup> The H-2B provisions may be found at 20 CFR 655.35. The H-2A provisions may be found at 20 CFR 655.145.

related amendment requests on the *CW-1 Application for Temporary Employment Certification*.

Paragraph (c) permits the employer to request other minor changes to the initial *CW-1 Application for Temporary Employment Certification* before the CO's certification determination is issued. After reviewing an employer's request to amend its *CW-1 Application for Temporary Employment Certification*, the CO will approve these changes if the CO determines the proposed amendment(s) are justified after review of pertinent information, including what effect, if any, the proposed amendments have on the underlying labor market test in the CNMI for U.S. workers.

This provision provides clarity to employers and workers alike of the limitations on and processes for amending a *CW-1 Application for Temporary Employment Certification* and the need to inform any U.S. workers already recruited of the changed job opportunity. For any amendments approved by the CO under this section, the employer is required to promptly provide copies of any approved amendments to all U.S. workers recruited and hired under the original job offer. These provisions also recognize that business operations are dynamic and employers can face changed circumstances from varying sources—from climatic conditions to cancelled contracts. Accordingly, the Department includes these provisions to provide a limited degree of flexibility to enable employers to assess and respond to such changes. However, as provided for in paragraph (d) of this section, these provisions permit an employer to seek such amendments only prior to the CO issuing a determination to certify the *CW-1 Application for Temporary Employment Certification*, not after certification.

#### E. Post-Acceptance Requirements

##### 1. Section 655.440, Employer-Conducted Recruitment

This section establishes the requirements for employers to conduct recruitment for U.S. workers in the CNMI and provides that such recruitment may occur only after the employer files a *CW-1 Application for Temporary Employment Certification* and receives a NOA from the CO. To carry out the statutory requirement that certifications be granted only if no U.S. workers are available, paragraph (a) contains the general requirement that employers must conduct recruitment in the CNMI to ensure that there are not able and qualified U.S. workers who

will be available for the positions listed in the *CW-1 Application for Temporary Employment Certification*. The requirement that employers seeking TLC conduct a thorough test of the CNMI labor market is an essential requirement to ensure that the importation of foreign workers will not have an adverse effect on U.S. workers.

Paragraph (b) requires that the employer begin specific recruitment steps outlined in §§ 655.442 through 655.445 within 14 calendar days from the date the NOA is issued, unless the CO provides different instructions to the employer in the NOA. This requirement provides the employer with time to initiate all recruitment steps and ensures all advertisements and notices of the job opportunities appear to prospective U.S. workers in the same time period. To ensure U.S. workers are fully considered for the job opportunities, this paragraph also requires that all employer-conducted recruitment be completed before the employer submits the recruitment report to the CO as specified in the NOA and required in § 655.446.

Where the employer desires to conduct interviews with U.S. workers for the job opportunity, paragraph (c) requires that such interviews with U.S. workers be done by telephone or at a location where workers can participate at little or no cost to the workers. This provision does not require employers to conduct employment interviews under this provision. Rather, where employers choose to conduct interviews, employers are barred from offering preferential treatment to potential *CW-1* workers, including any requirement to interview for the job opportunity. In addition, this provision ensures that employers conduct a fair labor market test by requiring employers to conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Accordingly, an employer who requires a U.S. worker to undergo an interview must provide such worker with a reasonable opportunity to meet such a requirement. The purpose of these requirements is to ensure that the employer does not use the interview process to the disadvantage of U.S. workers.

To ensure no adverse effect to U.S. workers, paragraph (d) requires the employer to consider all U.S. applicants interested in the position, and hire all U.S. applicants who are qualified and who will be available for the job opportunity. This paragraph further provides that U.S. applicants can be

rejected only for lawful, job-related reasons, and those not rejected on this basis will be hired by the employer.

And finally, in order for the CO to issue a final determination on the *CW-1 Application for Temporary Employment Certification*, paragraph (e) requires the employer to prepare and submit a written report of its recruitment activities, in accordance with the requirements set forth under § 655.446.

##### 2. Section 655.441, Job Offer Assurances and Advertising Contents

This section establishes the standards and minimum content requirements for an employer to advertise the job opportunity to U.S. workers for employment in the CNMI. The job offer is essential for U.S. workers to make informed employment decisions. The job offer serves to apprise U.S. workers of the available job opportunity and, further, provides U.S. and *CW-1* workers with the material terms and conditions of employment under this program. To apprise both U.S. and *CW-1* workers, it must include not only standard information about the job opportunity, including wage information to avoid any U.S. worker wage depression, but also key assurances to which the employer is committed by filing an *CW-1 Application for Temporary Employment Certification* to employ *CW-1* workers and to which U.S. workers are also entitled. Accordingly, paragraph (a) provides that all recruitment contain terms and conditions of employment that are not less favorable than those offered to the *CW-1* workers and comply with the assurances applicable to job offers, as set forth in § 655.423.

Paragraph (b) provides a list of the minimum terms and conditions of employment that must be included in all advertising, including a requirement that the employer make the appropriate disclosure when it is offering or providing board, lodging or other facilities, as well as identify any deductions not required by law, if applicable, that will be applied to the employee's pay for the provision of such accommodations. The terms and conditions of employment, as well as the required disclosures, serve to inform U.S. workers of the available job opportunity. In requiring that advertisements comply with minimum content requirements, but not requiring that advertisements contain all the text of the applicable regulatory assurances associated with these terms and conditions of employment under § 655.423, the Department is striking an appropriate balance between the

employer's cost in placing potentially lengthy advertisements and the need to ensure consistent disclosure of all necessary information to prospective U.S. workers. In addition, as a continuing practice in other TLC programs administered by the Department, employers will be able to use abbreviations in the advertisements so long as they clearly and accurately capture the underlying content requirement.

In order to help employers comply with these requirements, the Department provides specific language which is sufficient on the material terms and conditions of employment related to transportation; the three-fourths guarantee; availability of overtime; availability of on-the-job training; and tools, equipment, and supplies to apprise U.S. applicants of those required items in the advertisement. As provided above, the employer may abbreviate some of this language so long as the underlying guarantee is clearly stated for U.S. workers and can be clearly understood by a prospective applicant. To apprise U.S. workers of the available job opportunity, the following statements in an employer's advertisements are permitted:

1. **Transportation:** Transportation (including meals and, to the extent necessary, lodging) to the place of employment will be provided, or its cost to workers reimbursed, if the worker completes half the employment period. Return transportation will be provided if the worker completes the employment period or is dismissed early by the employer.

2. **Three-fourths guarantee:** Employment will be offered for a total number of work hours equal to at least three fourths of the workdays of the total period of employment.

3. **Availability of overtime:** Overtime hours may be available and will be paid at \$ \_\_\_ per hour.

4. **Availability of on-the-job training:** Employer will provide on-the-job training to perform the duties safely and effectively.

5. **Tools, equipment, and supplies:** Employer will provide workers at no charge all tools, supplies, and equipment required to perform the job.

To afford U.S. workers access to available job opportunities, this paragraph also requires all advertisements include the name and contact information of the employer, and a statement directing applicants to apply for the job with the employer using two verifiable methods, one of which must be electronic, and the time applicants will be considered for the job opportunity. Contact information of the

employer must be a person employed by the employer with authority to consider U.S. workers who apply for the job opportunity. Electronic methods by which applicants may apply for the job can include a telephone number, electronic mail address, or website where applications or resumes can be submitted for the specific job opportunity. At any time during the processing of a *CW-1 Application for Temporary Employment Certification* or a post-certification audit examination, the CO has the authority to verify the methods by which applicants apply for the job opportunity to ensure each is bona fide.

### 3. Section 655.442, Place Advertisement With CNMI Department of Labor

This section requires the employer to place an advertisement with the CNMI Department of Labor. Specifically, paragraph (a) requires the employer to place an advertisement with the CNMI Department of Labor that satisfies the requirements set forth in § 655.441 and remains open to prospective U.S. workers for 21 consecutive calendar days, which is similar to the H-2B program. Also similar to other TLC programs,<sup>44</sup> the advertisement must be sufficient under § 655.441 to ensure that the advertisement informs U.S. workers of the employer's available job opportunity and to ensure that U.S. workers are not placed at a competitive disadvantage. Further, the advertisement provides the means by which U.S. workers will contact employers for the available job opportunity. The employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on *CW-1* workers.

The CNMI Department of Labor is the government agency responsible for providing employment and training services, and maintaining an electronic system for registered and approved employers to post job vacancy announcements and receive referrals of qualified U.S. workers in the CNMI. Registration for employers to post vacancy announcements on the job listing system is a one-time, free process, and readily accessible through the CNMI Department of Labor's website. Consistent with the requirements in other TLC programs<sup>45</sup> for employers to place job orders with

SWAs, the Department has concluded that the requirement for employers to place an advertisement with the CNMI Department of Labor represents a reliable method of recruitment for the job opportunity with a capacity to reach a large number of prospective U.S. workers in the CNMI.

Paragraph (b) also requires the employer to maintain documentation that the advertisement was placed with the CNMI Department of Labor to establish compliance with the requirements of this section. The employer's documentation must include printouts of web pages in which the advertisement appeared on the CNMI Department of Labor job listing system, or other verifiable evidence from the CNMI Department of Labor containing the text of the advertisement. The documentation must also clearly show the dates on which the advertisement appeared on the CNMI Department of Labor's job listing system in order to establish compliance with the 21-day recruitment period. The Department reminds employers that the CO may request this documentation during the course of processing the *CW-1 Application for Temporary Employment Certification* or a post-certification audit examination.

### 4. Section 655.443, Contact With Former U.S. Workers

This section requires the employer to make reasonable efforts to contact by mail or other effective means its former U.S. workers, including those who were laid off within 270 calendar days before the date of need listed in the *CW-1 Application for Temporary Employment Certification*, employed by the employer in the occupation and at the places of employment listed in the application during the previous year to solicit their return to the job. However, employers are not required to contact U.S. workers who were dismissed for cause or who abandoned the places of employment. The dismissal-for-cause exception does not apply to workers improperly fired in retaliation for their exercise of rights protected under the program. The Department has concluded that this provision will help ensure that the greatest number of U.S. workers, particularly those who have previously held these positions, have awareness of and access to these job opportunities.

Each employer must provide its former U.S. workers with a full disclosure of the material terms and conditions of the job offer and solicit the U.S. workers' return to the job. This contact must occur during the period of time that the job offer is being advertised on the CNMI Department of

<sup>44</sup> 20 CFR 655.41; 20 CFR 655.18; 20 CFR 655.151; 20 CFR 655.122.

<sup>45</sup> 20 CFR part 655, subpart A; 20 CFR part 655, subpart B.

Labor's job listing system, and the employer must maintain documentation sufficient to prove such contact in the event of an investigation, inspection, audit, or law enforcement function performed by the Department, DHS, or any Federal Government Official. This documentation may consist of a dated copy of a form letter or other written notification sent to all former U.S. workers, along with evidence of its transmission (postage account, address list, etc.).

The Department recognizes that collective bargaining agreements may exist between employers and workers and contain requirements for the employer to contact laid-off workers in accordance with specific terms governing recall and a recall period. The requirement in this section that the employer contact former U.S. workers employed by the employer during the 270 calendar days before the date of need would not substitute for the terms in a collective bargaining agreement. The employer is separately obligated to comply with the terms and conditions of the bargaining agreement, which may include recall provisions that cover workers employed by the employer beyond the 270 calendar day period.

#### 5. Section 655.444, Notice of Posting Requirement

Consistent with the Department's TLC programs, for the protection of U.S. workers, this section requires employers to post notice of the job opportunity sufficient to apprise U.S. workers of the available opportunity. For this notice requirement, the employer must post a copy of the *CW-1 Application for Temporary Employment Certification* in at least two conspicuous locations at all places of employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the CW-1 workers. The notice must be posted at all places of employment for a period of 21 consecutive calendar days. Posting on a website may fulfill this requirement in some circumstances.

The posting of the notice at the employer's place(s) of employment is intended to provide notice that all the employer's U.S. workers are afforded the same access to the job opportunities for which the employer intends to hire CW-1 workers. In addition, the posting of the notice may result in the sharing of information between the employer's unionized and nonunionized workers and therefore result in more referrals and a greater pool of qualified U.S. workers. This IFR provides flexibility for complying with this requirement;

specifically, the regulation includes the language "or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the CW-1 workers." This permits the employer to devise an alternative method for disseminating this information to the employer's U.S. workers, for example, by posting the notice in the same manner and location as for other notices, such as safety and health occupational notices, that the employer is required by law to post. This provision further provides that electronic posting, such as displaying the notice prominently on any internal or external website that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as the posting otherwise meets the requirements of this section. Finally, this section requires the employer maintain proof the *CW-1 Application for Temporary Employment Certification* was posted and identify the location(s) and the specific period of time on which the notice appeared to U.S. workers, in accordance with § 655.456.

#### 6. Section 655.445, Additional Employer-Conducted Requirement

Where the CO determines that the employer-conducted recruitment described in §§ 655.442 through 655.444 is not sufficient to attract qualified U.S. workers, this section provides the CO with discretion to require the employer to engage in additional recruitment activities. Paragraph (a) provides the CO with discretion to order additional reasonable recruitment where the CO has determined that there is a likelihood that U.S. workers who are qualified will be available for the work. This discretion may be exercised where additional recruitment efforts will likely result in more opportunities for and a greater response from available and qualified U.S. workers. The additional recruitment ordered by the CO under this section will be conducted within the same time period as placement of the advertisement with the CNMI Department of Labor and the other mandatory employer-conducted recruitment described above.

Paragraph (b) provides that, if the CO elects to require additional recruitment, the CO will describe the number and type of additional recruitment efforts required. This paragraph also provides a nonexhaustive list of the types of additional recruitment that may be required by the CO, including advertising on the employer's website or

another website, with community-based organizations, local unions or trade unions, or via a professional, trade, or other publication where such a publication is appropriate for the workers likely to apply for the job opportunity. When assessing the appropriateness of a particular recruitment method, the CO will take into consideration all options at her/his disposal, and will consider both the cost and the likelihood that the additional recruitment will identify qualified and available U.S. workers, and will, where appropriate, opt for the least burdensome method(s).

The Department recognizes that the increased rate of technological innovation, including its implications for communication of information about job opportunities, is changing the way many U.S. workers search for and find jobs. In part due to these changes, the inclusion of this requirement is intended to allow the CO flexibility to keep pace with the ever-changing labor market trends. To administer this provision effectively, the Department intends to leverage its relationship with the CNMI Department of Labor to obtain information on the primary sources and methods of recruitment that are reasonable and most likely to attract U.S. workers in the CNMI for those jobs employers who are seeking CW-1 workers.

Paragraph (c) provides that, where the CO requires additional recruitment, the CO will specify the documentation or other supporting evidence that must be retained by the employer as proof that the additional recruitment requirements were met, as required in § 655.456.

#### 7. Section 655.446, Recruitment Report

This section establishes the requirements that all employers must meet in order for the CO to issue a final determination on the *CW-1 Application for Temporary Employment Certification*. Specifically, paragraph (a) requires the employer to submit to the NPC a signed and dated recruitment report, by the date specified in the NOA, which accounts for its recruitment efforts for U.S. workers in the CNMI. Where recruitment was conducted by a job contractor or its employer-client, then both joint employers named in the *CW-1 Application for Temporary Employment Certification* must sign the recruitment report, as specified under § 655.421(e)(1). To ensure all U.S. workers who apply for the job are fully considered, paragraph (a) specifies that the employer must not prepare, sign, and date the recruitment report until 2 calendar days after the last date on which the last advertisement appeared.

Except in circumstances where an employer may be required to do assisted recruitment under § 655.471, the last day on which the last advertisement appears will generally be the 21st consecutive calendar day of the recruitment period.

The minimum content recruitment report must contain, the name of each recruitment activity or source, confirmation that each recruitment step required by the CO in the NOA was completed and when, and the results of the recruitment effort. The employer must provide the name and contact information of each U.S. worker who applied or was referred to the job opportunity as well as the disposition of each worker's application. The employer must clearly indicate whether the job opportunity was offered to each U.S. worker applicant and whether each U.S. worker accepted or declined employment. This reporting allows the Department to ensure the employer has met its recruitment obligations whether there were insufficient U.S. workers who are able, qualified and available to perform the job for which the employer seeks TLC. In addition, the NPC may contact U.S. workers listed in the recruitment report, either prior to issuing a final determination or during the course of a post-certification audit examination, to verify the reasons given by the employer as to why they were not hired, where applicable.

To ensure all U.S. applicants are considered for the job opportunity and the outcome of each worker's application are recorded timely and accurately, paragraph (b) of this section requires employers to update the recruitment report throughout the recruitment period. In a joint employment situation, either the job contractor or the employer-client may update the recruitment report throughout the recruitment period.

#### F. Labor Certification Determinations

##### 1. Section 655.450, Determinations

This section generally authorizes the OFLC Administrator and NPC-based COs, by virtue of delegation from the OFLC Administrator, to make the determinations to certify or deny *CW-1 Applications for Temporary Employment Certification*. The CO will certify the *CW-1 Application for Temporary Employment Certification* only if the employer has met all requirements, including the criteria established at § 655.451, thus demonstrating that there is an insufficient number of U.S. workers in the Commonwealth who are able, willing, qualified, and available for the

job opportunity for which certification is sought and that the employment of the *CW-1* workers will not adversely affect the wages and working conditions of U.S. workers similarly employed in the Commonwealth.

##### 2. Section 655.451, Criteria for Temporary Labor Certification

This section requires, as a condition of certification, that the employer demonstrate full compliance with the requirements of this subpart. The CO will determine whether the employer has successfully established that there are insufficient U.S. workers in the Commonwealth to fill the employer's job opportunity. In making a determination about the availability of U.S. workers in the Commonwealth for the job opportunity, the CO will consider individuals whom the employer rejected for any reason that was not lawful or job-related to be willing, able, available, and qualified U.S. workers. Since the individuals will be considered willing, able, available, and qualified U.S. workers who were unlawfully rejected, if the application is certified, the number of certified *CW-1* workers will be reduced by the number of unlawfully rejected U.S. workers. If the number of unlawfully rejected U.S. workers exceeds the number of *CW-1* workers requested, the application will be denied. This new section furthers the explicit Congressional intent to require a TLC in connection with the *CW-1* visa program, as expressly mandated in Sec. (2)(A) of the Workforce Act, which seeks to protect U.S. workers by means of adding this requirement to the program, in addition to mandating a prevailing wage survey, and an alternate method for determining a prevailing wage, as well as requiring that a minimum wage is paid. See also 48 U.S.C. 1806 (d)(2)(A)-(C).

##### 3. Section 655.452, Approved Certification

In cases where the CO grants TLC, the CO will electronically transmit a Final Determination notice and certified *CW-1 Application for Temporary Employment Certification* to the employer and USCIS. In cases where an employer is permitted to file by mail, the CO will use the same electronic method to transmit the certification documentation directly to USCIS electronically, but will deliver certification documentation to the employer using first class mail.

Consistent with current practices in other TLC programs, the Department will send a copy of all certification documentation to the employer and, if applicable, to the employer's agent or

attorney. The Department has determined that that even when an employer is represented, the employer should directly receive notification from OFLC, and maintain the Final Determination notice, as well as the certified *CW-1 Application for Temporary Employment Certification*, because the employer attests to, and is primarily responsible for, meeting the obligations and requirements.

Due to the geographic location of the CNMI, the Department has concluded that the use of an electronic method to issue approved certification approvals will be most efficient. The Department anticipates these procedures will also promote program integrity and expedite the processing of *CW-1* petitions at USCIS, in part, by providing certification information directly from OFLC to USCIS electronically.

Finally, the employer is required to retain a copy of the certified *CW-1 Application for Temporary Employment Certification*, including the original signed Appendix C, as required under the record keeping provisions at § 655.456.

##### 4. Section 655.453, Denied Certification

In cases where the CO denies TLC, the CO issues a Final Determination notice to the employer and, if applicable, to the employer's agent or attorney. Consistent with the procedural requirements for issuing approved certifications, the CO is required to send the Final Determination notice to the employer using an electronic method authorized by the OFLC Administrator, except where the Department has permitted an employer to file by mail as set forth in § 655.420(c), in which case the CO will send the Final Determination notice using first class mail.

The Final Determination notice will state the reason(s) for denying the employer's request for TLC, and cite the relevant regulatory provisions governing the stated grounds for denial. The Final Determination notice will also advise the employer of its right to seek administrative review of the final determination. The Final Determination notice will notify the employer that failure to timely request administrative judicial review will result in the denial of the application for labor certification becoming final and the Department will not accept any appeal on such application.

##### 5. Section 655.454, Partial Certification

This section provides the CO with authority to issue a partial TLC reflecting either a shorter-than-requested period of employment or a lower-than-requested number of *CW-1*

workers, or both. A partial certification may be issued based upon information the CO receives during the course of processing the *CW-1 Application for Temporary Employment Certification*. For example, the period of employment will be reduced where the employer is unable to demonstrate that full-time employment will be available beginning on the date of need through the entire period of employment identified on the application. The number of workers requested for certification will be reduced by one for each able, willing, qualified, and available U.S. worker the CNMI Department of Labor refers or who applies directly with the employer, and who the employer has rejected for reasons that are unlawful or unrelated to the job. In other words, the CO can issue a full certification only where the employer has fully considered each U.S. worker who applied, whether directly or through referral from the CNMI Department of Labor, and has identified a lawful, job-related reason for each U.S. worker not hired.

If a partial labor certification is issued, the CO will send the Final Determination notice and certified *CW-1 Application for Temporary Employment Certification* electronically, except where the employer is permitted to file by mail as set forth in § 655.420(c). The Final Determination notice will state the reasons why either the period of need or the number of *CW-1* workers requested has been reduced. The Final Determination notice will also offer the employer an opportunity to request administrative judicial review using the procedures further explained under § 655.461. Where the employer does not timely request administrative judicial review, the partial certification determination will be final on the date the CO issued the certification, and the Department will not accept any appeal on that *CW-1 Application for Temporary Employment Certification*.

#### 6. Section 655.455, Validity of Temporary Labor Certification

This section provides that a TLC granted by the CO is valid only for the period of employment identified in the certified *CW-1 Application for Temporary Employment Certification* and for the number of *CW-1* positions, the places of employment, the job classification, the specific services or labor to be performed, and the employer(s), including any modifications approved by the CO. Finally, a TLC is prohibited from being transferred from one employer to another unless the employer to which the TLC is being transferred is a

successor in interest to the employer that received the TLC.

These limitations protect the integrity of the labor certification process and are consistent with the other labor certification programs administered by the Department.

#### 7. Section 655.456, Document Retention Requirements for *CW-1* Employers

*CW-1* employers filing an *CW-1 Application for Temporary Employment Certification* must retain the documents and records to demonstrate compliance for 3 years from the date on which the *CW-1 Application for Temporary Employment Certification* expires, or 3 years from the date of the final determination if the *CW-1 Application for Temporary Employment Certification* is denied, or 3 years from the date the Department receives the request for withdrawal of the *CW-1 Application for Temporary Employment Certification*. Employers may maintain these documents and records electronically.

The documents and records required to be retained include: Proof of efforts to recruit U.S. workers in the Commonwealth; documentation supporting the recruitment report, including justification for failure to contact former U.S. workers, and any supporting resumes and contact information; and records of each worker's earnings, hours offered and worked, location(s) where work is performed, if applicable, records of reimbursement of transportation and subsistence costs incurred by the workers during transportation; copies of written contracts with third parties demonstrating compliance with the prohibitions to seek or receive payments or other compensation of any kind from prospective workers; evidence of the employer's contact with U.S. workers who applied for the job opportunity, including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons; copies of written notices informing OFLC of each *CW-1* worker or worker in corresponding employment who separate from employment; and a copy of the *CW-1 Application for Temporary Employment Certification* (including the original signed Form ETA-9142C, Appendix C) and all accompanying appendices, including any modifications, amendments or extensions approved by the CO.

Based on the Department's experience administering other TLC programs, the documents and records to be retained by the employer are critical to ensuring an appropriate level of integrity and accountability in the *CW-1* program.

Thus, paragraph (d) of this section requires employers to make all documents and records required to be retained under this subpart available to the Department, DHS or to any Federal Government Official performing an investigation, inspection, audit, or law enforcement function for purposes of copying, transcribing, or inspecting them to verify employer compliance with program requirements.

#### G. Post Certification Activities

##### 1. Section 655.460, Extensions

This section establishes the standards and procedures for employers to request extensions of the period of employment on the certified *CW-1 Application for Temporary Employment Certification*. Extensions differ from amendments to the period of employment in that extensions are requested after certification, while amendments are requested before the CO issues a final determination. The Department's experience administering other TLC programs demonstrates that some employers, due to unforeseen circumstances, need some degree of flexibility in the authorized period of employment after the *CW-1 Application for Temporary Employment Certification* is granted.

Therefore, employers may request extensions to the period of employment related solely to weather conditions or other factors beyond their control (which may include unforeseen changes in market conditions). The employer must submit the request to the CO documenting that the extension is needed and that it could not have been reasonably foreseen by the employer. The CO will not grant an extension where the total period of employment with the extension would exceed the maximum applicable duration permitted under § 655.420(g). The Department has concluded that this requirement provides employers with important flexibility to address unforeseen circumstances while maintaining the integrity of the certification decision issued by the Department, including the labor market test to ensure U.S. worker access to the job opportunities.

Upon review of the employer's extension request, the CO will provide notification to the employer and, if applicable, to the employer's agent or attorney of the decision. Where the CO denies the extension request, the employer has the right to request administrative review using the procedures under § 655.461. Where the CO approves the employer's request for an extension, the written notification

the employer receives from the CO will constitute an amended Final Determination notice.

The employer must immediately provide to its CW-1 workers and workers in corresponding employment a copy of any approved extension, especially since the CO's determination may have an impact on the duration of the CW-1 visa status of the workers.

## 2. Section 655.461, Administrative Review

This section establishes the standards and procedures under which an employer may request administrative review of a determination issued by the CO, as well as the procedures BALCA must follow in conducting such a review. An employer may request administrative review of a determination issued by the CO with respect to a PWD under § 655.411; denial of a modified *CW-1 Application for Temporary Employment Certification* under § 655.432; denial of TLC under § 655.453; issuance of a partial certification under § 655.454; denial of a request for an extension under § 655.460; imposition of assisted recruitment under § 655.471. In addition, an employer may request administrative review of a revocation of an approved TLC by the OFLC Administrator under § 655.472.

An employer wishing review of a determination by the CO must request an administrative review before BALCA to exhaust its administrative remedies within 10 business days from the date of the CO's determination. This allows for prompt processing while providing employers with sufficient time to prepare their requests. Additionally, this paragraph sets forth the various requirements for requests for review. Such requests must clearly identify the particular determination for which review is sought and include a copy of that determination, and set forth the grounds for the request, including the specific factual issues the employer wishes BALCA to examine, but may contain only evidence that was actually before the CO at the time of the determination.

To facilitate the timely preparation of the Appeal File, the employer must also send a copy of its request for review to the CO. Upon the receipt of the request for review, paragraph (b) of this section requires the CO to assemble and submit the Appeal File to BALCA, the employer, and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor as soon as practicable by means normally assuring expedited delivery. If applicable, a copy

of the Appeal File will also be sent to the employer's agent or attorney. Pursuant to paragraph (c), once BALCA receives the Appeal File, the Chief ALJ will assign either a single ALJ or a panel of three ALJs to consider the case.

Paragraph (d)(1) explains the briefing schedules for appeals under this section. If the employer wishes to submit a brief, it must do so with its request for review. The CO may submit a brief within 7 business days of receipt of the Appeal File. Under this schedule, within the timeframe permitted for the submission of a request for review, the employer may develop a brief that sets forth the specific grounds for its request and corresponding legal arguments. In turn, the CO may respond to those arguments within a set timeframe. This procedure assists the ALJ's decision-making process by allowing for a complete set of arguments by the employer and responses by the CO while providing the parties a predictable, yet expedited, briefing schedule.

Paragraph (d)(2) sets forth the standard of review that applies to requests for administrative review. When reviewing such requests, the ALJ must uphold the CO's decision unless the employer shows that the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Including this standard in the IFR will make clear what employers must prove in order to receive a favorable decision. It will also ensure BALCA is conducting its administrative review in a consistent manner.

To ensure an administrative judicial decision is rendered as expeditiously as possible, paragraph (e) specifies that BALCA must review the CO's determination only on the basis of the documents in the Appeal File that were before the CO at the time of the CO's determination, the request for review, and any legal briefs submitted. Sometimes, the Appeal File contains new evidence submitted by the employer to the CO after the CO has issued his or her decision, such as when the employer submits a request for review with new evidence, or a corrected recruitment report with new information, after the CO has denied certification. Although such evidence is in the Appeal File, BALCA may not consider this new evidence because it was not before the CO at the time of the CO's determination. Similarly, BALCA may not consider evidence not before the CO by the time the CO's determination was issued, even if such evidence is in the request for review or legal briefs. This provision reflects

longstanding principles in the administrative review of H-2A and H-2B cases, and provides for fair determinations of these matters.

Finally, paragraphs (e) and (f) states that BALCA must notify all parties of its decision within 7 business days of the submission of the CO's brief or 10 business days after receipt of the Appeal File, whichever is later, of its decision to: (1) Affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case back to the CO for further action. This timeline provides BALCA with a reasonable timeframe in which to render a decision, while ensuring prompt resolution of employers' review requests.

## 3. Section 655.462, Withdrawal of an CW-1 Application for Temporary Employment Certification

Paragraph (a) permits an employer to submit a request to withdraw an *CW-1 Application for Temporary Employment Certification* at any time after the application is submitted to the NPC for processing, including after the CO grants TLC under § 655.450. However, the employer must continue to comply with the terms and conditions of employment contained in the *CW-1 Application for Temporary Employment Certification* and work contract for all workers recruited and hired in connection with that application. In accordance with paragraph (b), the employer must submit a withdrawal request in writing to the NPC, clearly identifying the *CW-1 Application for Temporary Employment Certification* to be withdrawn and stating the reasons for requesting withdrawal.

## 4. Section 655.463, Public Disclosure

This section provides that the Department will maintain a publicly accessible electronic file with information on all employers who voluntarily elect to request TLC under the CW-1 program. The database will include nonprivileged information extracted from the *CW-1 Applications for Temporary Employment Certification* including, but not limited to, the number of workers requested for TLC, the date an application is filed, the date an application is decided, and the final disposition of an application. Providing this information electronically will enhance transparency of the CW-1 program and of OFLC's processing of these applications. It will also make certain that such information is readily available to those who seek it from the Department.

## H. Integrity Measures

### 1. Section 655.470, Audits

This section outlines the process under which the CO will conduct audits of certified *CW-1 Applications for Temporary Employment Certification*. The statutory mandate to ensure that a sufficient number of qualified U.S. workers in the CNMI are not available and that employment of the foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers serves as the basis for the Department's authority to conduct audit examinations. There is real value in auditing certified *CW-1 Applications for Temporary Employment Certification* because they can establish a record of employer compliance or noncompliance with program requirements, and they contain information that assists the Department in determining whether it needs to refer findings to other Federal agencies for further investigation or, depending on the nature of the violations, initiate debarment proceedings to prohibit an employer, agent, or attorney, or their successors in interest, from participating in the *CW-1* program.

Paragraph (a) provides that the CO has sole discretion to choose the certified *CW-1 Applications for Temporary Employment Certification* that will be audited, which includes the selection of applications using a random assignment method. When a certified *CW-1 Application for Temporary Employment Certification* is selected for audit, paragraph (b) requires the CO to issue an audit letter to the employer and, if appropriate, a copy of such letter to the employer's attorney or agent, listing the documentation the employer must submit and the date (no more than 30 calendar days from the date the audit letter is issued) by which the documentation must be sent to the CO. Additionally, paragraph (b) requires that the audit letter issued by the CO advise the employer that failure to fully comply with the audit process may result in the revocation of its certification or in debarment, under §§ 655.472 and 655.473, respectively, or require the employer to undergo assisted recruitment in future filings of a *CW-1 Application for Temporary Employment Certification*, under § 655.471.

Paragraph (c) permits the CO to request additional information and/or documentation from the employer as needed in order to complete the audit. Paragraph (d) provides the CO with authority to provide the audit findings and underlying documentation to DHS

or other appropriate enforcement agencies. The CO may refer any findings that an employer discouraged a qualified U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against a qualified U.S. worker, to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

### 2. Section 655.471, Assisted Recruitment

This section protects the integrity of the *CW-1* program by requiring the employer to follow special requirements during its recruitment process where the CO determines the employer committed one or more violations that do not warrant program debarment. Specifically, paragraph (a) permits the CO to require an employer to participate in assisted recruitment for any future *CW-1 Application for Temporary Employment Certification*, if the CO determines as a result of an audit, or otherwise, that a violation not warranting debarment from the *CW-1* program has occurred. Assisted recruitment ordered by the CO can also be an effective tool to help employers that, due to either program inexperience or confusion, commit unintentional violations in their *CW-1 Application for Temporary Employment Certification* and indicate a need for further assistance from the Department.

Paragraph (b) of this section requires the CO to provide written notification to the employer and, if applicable, to the employer's agent or attorney, of the requirement to participate in assisted recruitment for any future filed *CW-1 Application for Temporary Employment Certification*. The CO may require the employer to follow special requirements during its recruitment process for a period of up to 2 years from the date the notice is issued. The nature of the assisted recruitment will be at the discretion of the CO, and such requirements will be based on the totality of the circumstances of the employer. The notification issued by the CO will state the reasons for the imposition of the additional requirements and explain that the employer's agreement to accept the conditions related to the assisted recruitment process will constitute their inclusion as *bona fide* conditions and terms of a *CW-1 Application for Temporary Employment Certification*. In the notice, the CO must also offer the employer an opportunity to request an administrative judicial review, in accordance with the procedures further explained under § 655.461.

As set forth in paragraph (c), the assisted recruitment process will be in

addition to any recruitment required of the employer under §§ 655.442 through 655.445 of this subpart. This paragraph also provides a nonexhaustive list of special requirements the CO may order the employer to undertake during its recruitment process, such as requiring submission to the CO of draft advertisements at the time of filing the *CW-1 Application for Temporary Employment Certification*, designating specific sources of recruitment for U.S. workers, extending the period of time advertisements are available to U.S. workers, requiring the employer to either notify the CO when advertisements are placed and/or provide proof of publication of all advertisements, or other requirements verifying the employer conducted the assisted recruitment ordered by the CO.

To ensure employers comply with these assisted recruitment requirements, paragraph (d) provides that, where the employer materially fails to comply with the requirements of this section, the CO will deny the *CW-1 Application for Temporary Employment Certification* and may initiate debarment proceedings against the employer, agent, or attorney, or their successors in interest, in accordance with the standard and procedures under § 655.473.

### 3. Section 655.472, Revocation

This section outlines the process by which the OFLC Administrator may revoke an approved *CW-1* TLC. The ability to revoke an approved labor certification is a critical tool for enabling the Department to protect the integrity of the *CW-1* program and stems from the agency's inherent authority to reconsider its decisions.

As set forth in paragraph (a) of this section, the OFLC Administrator will only revoke TLCs under certain circumstances: (1) When the OFLC Administrator finds that the issuance of the TLC was not justified due to fraud or willful misrepresentation of a material fact in the application process, as defined in at § 655.473(d); (2) when the OFLC Administrator finds that the employer substantially failed to comply with any of the terms and conditions of the TLC, as defined in § 655.473(d) and (e); or (3) when the OFLC Administrator determines that the employer is impeding the Department's audit examination authority under § 655.470, or impeding any Federal Government Official performing an investigation, inspection, audit, or law enforcement function under this subpart.

Paragraph (b) of this section outlines the procedures OFLC will use when the OFLC Administrator decides to revoke



an approved TLC for CW-1 workers. If the OFLC Administrator decides to revoke an approved TLC, paragraph (b)(1) provides that it will send a Notice of Revocation to the CW-1 employer, and a copy to its attorney or agent, if applicable. The notice will contain a detailed statement of the grounds for the revocation and inform the employer, and its agent or attorney if applicable, of the employer's rights. Upon receiving the Notice of Revocation, the CW-1 employer has two options if it wishes to challenge the revocation: (1) It may submit rebuttal evidence to the OFLC Administrator; or (2) it may request Administrator review of the Notice of Revocation by BALCA pursuant to the procedures detailed in § 655.461. As set forth in paragraph (b)(2) of this section, if the employer does not submit rebuttal evidence or file a request for Administrator review within 10 business days of the date of the Notice of Revocation, the notice will be deemed the final agency action and will take effect immediately at the end of the 10 business days. If the employer chooses to file rebuttal evidence, and the employer timely files that evidence, the OFLC Administrator will review it and provide the employer with a final determination on revocation within 10 business days of receiving the rebuttal evidence.

If the OFLC Administrator decides to uphold the revocation, it will inform the CW-1 employer of its right to request administrative review by BALCA according to the procedures set forth at § 655.461. The CW-1 employer must appeal OFLC's determination within 10 business days; otherwise, OFLC's decision becomes the final agency action by the Secretary and will take effect immediately at the end of the 10 business days.

If the CW-1 employer chooses to request administrative review, either in lieu of submitting rebuttal evidence, or after the OFLC Administrator makes a determination on the rebuttal evidence, paragraph (b)(3) of this section explains that such requests must be submitted according to the appeal procedures of § 655.461. Paragraph (b)(4) provides that the timely filing of either the rebuttal evidence or a request for administrative review stays the revocation pending the outcome of the applicable proceeding. If the TLC is ultimately revoked, paragraph (b)(5) provides that OFLC will notify DHS and the Department of State.

Finally, paragraph (c) of this section lists a CW-1 employer's continuing obligations to its CW-1 and corresponding workers if the employer's CW-1 certification is revoked. The

obligations include reimbursement of actual inbound transportation, visa, and other expenses (if they have not been paid), payment of the workers' outbound transportation expenses, payment to the workers of the amount due under the three-fourths guarantee; and payment of any other wages, benefits, and working conditions due or owing to workers under this subpart.

When an employer's certification is revoked, the revocation applies to that particular certification only; violations relating to a particular certification will not be imputed to other certifications issued to the same employer for which there has been no finding of employer culpability. In some situations, however, OFLC may revoke all of an employer's existing labor certifications where the underlying violation applies to all of the employer's certifications. For instance, if OFLC finds that the employer meets either the basis for revocation in paragraph (a)(3) of this section (*i.e.*, failure to cooperate with a Department's investigation or with a Department official performing an investigation, inspection, audit, or law enforcement function), this finding could provide a basis for revoking any and all of the employer's existing TLCs approved under this subpart. Additionally, where OFLC finds that violations of paragraph (a)(1) or (2) of this section affect all of the employer's certifications, such as where an employer misrepresents its legal status, OFLC also may revoke all of that employer's certifications. Lastly, where an employer's certification has been revoked, OFLC may take a more careful look at the employer's other certifications to determine if similar violations exist that would warrant revocation.

The Department recognizes the seriousness of revocation as an administrative remedy; accordingly, the grounds for revocation reflect violations that significantly undermine the integrity of the CW-1 program. OFLC intends to use the authority to revoke only when an employer's actions warrant such a severe consequence.

#### 4. Section 655.473, Debarment

This section outlines the process under which the OFLC Administrator may debar an employer, agent, attorney, or their successors in interest, from participation in the CW-1 program. The ability to suspend and debar entities from participating in the labor certification program is necessary to encourage compliance with program requirements and maintain the integrity of the program. Suspension and debarment authority is a critical tool for

enabling the Department to protect both U.S. and foreign workers, and to fulfill its statutory mandate to prevent adverse effects on U.S. workers due to the presence of temporary foreign labor.

The Department has repeatedly recognized its inherent suspension and debarment authority in the foreign labor certification context. As the Second Circuit found in *Janik Paving & Construction, Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987), the Department possesses an inherent authority to refuse to provide a benefit or lift a restriction for an employer that has acted contrary to the welfare of U.S. workers. In assessing the Department's authority to debar violators, the court found that "[t]he Secretary may . . . make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions . . . as he may find necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Government business." *Id.* at 89 n.6. In that case, the implied authority to debar existed even though the statute in question "specifically provided civil and criminal sanctions for violations of overtime work requirements but failed to mention debarment." *Id.* at 89. The court held that debarment may be necessary to "effective enforcement of a statute." *Id.* at 91.

The power to debar is also a function of a Federal agency's general authority to prescribe rules of procedure to determine who can practice and participate in administrative proceedings before it. *Koden v. DOJ*, 546 F.2d 228, 232-33 (7th Cir. 1977) (citing *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117 (1926)). Such power exists even if the agency does not have express statutory authority to prescribe the qualifications of those entities. *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979). An agency with the power to determine who may practice before it also has the authority to debar or discipline such individuals for unprofessional conduct. See *Koden*, 546 F.2d at 233. The Department has exercised such authority in the past in prescribing the qualifications, and procedures for denying the appearance, of attorneys and other representatives before the Department's OALJ under 29 CFR 18.34(g). See also *Smiley v. Director, OWCP*, 984 F.2d 278, 283 (9th Cir. 1993).

In order to encourage compliance, the regulations for the CW-1 program incorporate attestations, audits, and the remedial measure of debarment. Use of debarment as a mechanism to encourage compliance has been used by the

Department in its other foreign labor certification and attestation programs.<sup>46</sup> Ensuring the integrity of a statutory program enacted to protect U.S. workers is an important part of the Department's mission.

Paragraph (a) of this section provides that the OFLC Administrator may debar an employer, agent, attorney, or any successor in interest to that employer, agent, or attorney, from participating in any action under this subpart, if the OFLC Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the *Application for Prevailing Wage Determination* or *CW-1 Application for Temporary Employment Certification*. This section also notes that copies of final debarment decisions will be forwarded to DHS and DOS promptly. Paragraph (b) explains that the debarred employer, agent, attorney, or any successor in interest to any debarred employer, agent, or attorney, will be disqualified not only from filing under this subpart, but also from filing any labor certification applications<sup>47</sup> or labor condition applications<sup>48</sup> with the Department. If such an application is filed, it will be denied without review. The debarred party will be unable to file, or have filed on its behalf, labor certification applications in connection with not only the CW-1 program, but also applications under any other program managed by OFLC.

Paragraph (c) limits any period of debarment under paragraphs (a) and (b) to not more than 5 years for a single violation. This means that the total debarment period may exceed 5 years if more than one violation has occurred. For example, if the OFLC Administrator finds that an employer, agent, attorney, or any successor in interest to that employer, agent, or attorney, has committed two violations warranting debarment, the OFLC Administrator may impose two periods of debarment that will run consecutively, for a total of up to 10 years. The first period of

debarment would run from the date of the final agency decision, and the second period of debarment would run from the end of the first period of debarment.

Paragraph (d) of this section defines a violation for purposes of debarment. It explains that a violation includes one or more acts of commission or omission on the part of the employer, agent, or attorney, which involve: Failure to pay or provide the required wages, benefits, or working conditions to the employer's CW-1 workers and/or workers in corresponding employment; 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; failure to comply with the employer's obligations to recruit U.S. workers; improper layoff or displacement of U.S. workers or workers in corresponding employment; failure to comply with the NOD process, as set forth in § 655.431, or the assisted recruitment process, as set forth in § 655.471; impeding the audit process, as set forth in § 655.470, or impeding any Federal Government Official performing an investigation, inspection, audit, or law enforcement function; employing a CW-1 worker outside of the Commonwealth, in an activity/activities not listed in the work contract, or outside the validity period of employment of the work contract, including any approved extension thereof; a violation of the requirements of § 655.423(n) or (o); a violation of any of the provisions listed in § 655.423(q); or any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected. For debarment purposes, a violation also includes fraud involving the *Application for Prevailing Wage Determination* or the *CW-1 Application for Temporary Employment Certification*, or a material misrepresentation of fact during the course of processing the *CW-1 Application for Temporary Employment Certification*. It is important to emphasize that debarment in the context of the CW-1 program can be triggered by a single act or omission, as opposed to a pattern or practice of such actions or omissions.

Paragraph (e) provides the standard for determining whether a violation is so substantial as to merit debarment. This section provides a nonexhaustive list of factors that the OFLC Administrator may consider in determining whether a violation is substantial, including: A previous history of violations under the CW-1

program; the number of CW-1 workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violations; the gravity of the violations; and the extent to which the violator achieved a financial gain due to the violations, or the potential financial loss or potential injury to the workers. This list provides comprehensive, but not exhaustive, grounds or factors that may advise the OFLC Administrator when making a determination as to whether the substantiality standard has been met. In assessing whether debarment is appropriate, the OFLC Administrator may also consider any mitigating facts the employer, agent, or attorney wishes to provide, such as efforts made in good faith to comply with the CW-1 program, an explanation from the person charged with the violation or violations, or a commitment to future compliance, taking into account the public health, interest, or safety, and previous history of violations under the CW-1 program.

Paragraph (f) provides the procedures for debarment. The procedures for debarment are similar to the debarment procedures that are currently in place in other temporary employment programs, particularly the H-2B program. See 20 CFR 655.73. As provided in paragraph (f)(1), the debarment process begins when the OFLC Administrator makes a determination to debar an employer, agent, attorney, or any successor in interest to the employer, agent, or attorney, and issues the party a Notice of Debarment. The notice must state the reasons for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and must inform the party subject to the notice of its right to submit rebuttal evidence or to request administrative review of the debarment by BALCA. If the party does not file rebuttal evidence or a request for BALCA review within 30 calendar days, the Notice of Debarment will take effect on the date specified in the notice or, if no date is specified, at the end of the 30-day period. If the party timely files rebuttal evidence or a request for review, the debarment will be stayed pending the outcome of the appeal as provided in paragraphs (f)(2) through (6) of this section.

If the party who received the Notice of Debarment wishes to file rebuttal evidence, paragraph (f)(2) provides that the OFLC Administrator will review any timely filed rebuttal evidence and will inform the party of the Final Determination on debarment within 30 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the party must be

<sup>46</sup> 20 CFR 655.73; 20 CFR 655.182; and 20 CFR 656.31(f).

<sup>47</sup> See 20 CFR part 655, subpart A (governing H-2B temporary nonagricultural workers); 20 CFR part 655, subpart B (governing H-2A temporary agricultural workers); 20 CFR part 655, subpart F (governing the temporary employment of D-1 crewmembers on foreign vessels to perform longshore work at U.S. ports); and 20 CFR part 656 (permanent labor certification).

<sup>48</sup> 20 CFR 655, subpart H (governing labor condition applications for H-1B foreign nationals entering the U.S. on a temporary basis to work in specialty occupations or as fashion models, H-1b1 professionals entering under the U.S.-Chile or U.S.-Singapore Free Trade Agreements, and E-3 professionals entering under the U.S.-Australia Free Trade Agreement).

debarred, OFLC will inform the party of its right to request administrative review by BALCA. The party must request review within 30 calendar days after the date of the Final Determination, or the Final Determination becomes the final agency order and the debarment will take effect on the date specified in the Final Determination or, if no date is specified, at the end of that 30-day period.

Paragraph (f)(3) explains the process for requesting review of a Notice of Debarment or Final Determination. Paragraph (f)(3)(i) instructs the party requesting review of a debarment to file a written request with the Chief ALJ and simultaneously serve a copy on the OFLC Administrator. The request for review must clearly identify the particular debarment determination for which review is sought and must set forth the particular grounds for the request. If no request for review is filed, or if such a request is filed untimely, the debarment will take effect on the date specified in the Notice of Debarment or Final Determination or, if no date is specified, 30 calendar days from the date the Notice of Debarment or Final Determination is issued.

Paragraph (f)(3)(ii) explains that upon receipt of the request for review, the OFLC Administrator will promptly send a certified copy of the ETA case file to the Chief ALJ by means normally assuring expedited delivery. The Chief ALJ will immediately assign an ALJ to conduct the review. Paragraph (f)(3)(iii) states that the submissions of the parties must contain only legal argument and evidence that was within the record upon which the debarment was based. This ensures that all parties have fair notice of the facts potentially at issue during the review.

Paragraph (f)(4) explains the procedures for the ALJ's review. In considering requests for review, the ALJ must provide all parties with 30 calendar days to submit legal briefs. The ALJ must review the debarment determination on the basis of the record upon which the determination was made, the request for review, and any briefs submitted. The ALJ's decision must affirm, reverse, or modify the OFLC Administrator's determination, and provide the decision to the parties by means normally assuring expedited delivery. The ALJ's decision will become the final agency action, unless either party timely seeks review of the decision with the Administrative Review Board (ARB).

As set forth in paragraph (f)(5)(i), either party wishing review of the ALJ's decision must, within 30 calendar days of the decision, file a petition with the

ARB requesting review of the decision. Copies of the petition request must be served on all parties and on the ALJ. If the ARB declines to accept the petition or does not issue a notice accepting the petition for review within 30 calendar days after the receipt of a timely filed petition, the ALJ's decision becomes the final agency action. If the ARB accepts the petition for review, the ALJ's decision 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. Paragraphs (f)(5)(ii) and (iii) provide that, upon receipt of the ARB's notice to accept the petition, the OALJ will promptly forward a copy of the complete appeal record to the ARB. Where the ARB has determined to review the decision and order, the ARB will notify each party of the issues raised, the form in which submissions must be made (e.g., briefs or oral argument), and the time within which the presentation must be submitted. Paragraph (f)(6) requires the ARB's final decision to be issued within 90 calendar days from the notice granting the petition, and to be served upon all parties and the ALJ.

#### IV. Rulemaking Analyses and Notices

##### A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review; and Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

Under E.O. 12866, the OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. Section 3(f) of E.O. 12866 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 affects in a material way the economy, 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. Id. OMB has

determined that this IFR is significant regulatory action under section 3(f) of E.O. 12866.

E.O. 13563 directs agencies to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; (2) tailor the regulation to impose the least burden on society, consistent with achieving the regulatory objectives; and (3) in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

This IFR is an E.O. 13771 regulatory action.

##### 1. Summary of the Economic Analysis

The Department anticipates that the IFR will result in benefits, costs, and transfer payments, and will benefit U.S. workers and their wages, as described in more detail below. In particular, and as presented in Exhibit 1 below, U.S. workers are estimated to receive wage transfer payments of approximately \$102,042,965<sup>49</sup> from employers over the 11.25-year period that the IFR is in effect (from FY 2019 through FY 2030 Q1).

The benefits of the IFR are described qualitatively in section IV.A.2 (Benefits). The estimated costs and transfer payments are explained in sections IV.A.3 (Quantitative Analysis Considerations) and IV.A.4 (Subject-by-Subject Analysis).

The costs of the IFR are associated with rule familiarization and recordkeeping requirements for CW-1 employers, as well as the new processes by which employers will obtain a PWD and TLC from the Department. The estimated transfer payments reflect the requirement that employers pay for transportation, lodging, and subsistence for CW-1 workers traveling between the workers' country of origin and the CNMI. In addition, the estimated transfer payments include the anticipated impact on the wages of CW-1 workers and corresponding U.S. workers.

Exhibit 1 shows the total estimated costs and transfer payments of the IFR. The IFR is expected to have first-year costs of \$4,359,067 and first-year

<sup>49</sup>For purposes of this economic analysis the Department has conservatively estimated a constant number of U.S. workers and corresponding total wage transfer to those U.S. workers in the CNMI throughout the life of the program.

transfer payments of \$42,286,653 (= \$28,877,022 to CW-1 workers + \$13,409,631 to U.S. workers). Over the 11.25-year period that the IFR is in effect, the annualized costs are estimated at \$3,190,028 and the

annualized transfer payments are estimated at \$35,522,023 (= \$22,117,381 to CW-1 workers + \$13,404,642 to U.S. workers) at a discount rate of 7 percent. In total, the IFR is estimated to result in a cost of \$24,284,121 and transfer

payments of \$270,411,736 (= \$168,368,772 to CW-1 workers + \$102,042,965 to U.S. workers) at a discount rate of 7 percent.

EXHIBIT 1—ESTIMATED COSTS AND TRANSFER PAYMENTS  
[2018 dollars]

	Costs	Transfer payments		
		Total transfer payments	Transfer payments to CW-1 workers	Transfer payments to U.S. workers
First Year Total .....	\$4,359,067	\$42,286,653	\$28,877,022	\$13,409,631
Annualized, 3% discount rate, 11.25 years .....	3,086,620	34,794,484	21,387,623	12,406,860
Annualized, 7% discount rate, 11.25 years .....	3,190,028	35,522,023	22,118,381	13,404,642
Total, 3% discount rate, 11.25 years .....	29,106,568	328,109,108	201,683,522	126,425,586
Total, 7% discount rate, 11.25 years .....	24,284,121	270,411,736	168,368,772	102,042,965

## 2. Benefits

The purposes of the Workforce Act are (1) to increase the percentage of U.S. workers in the CNMI while maintaining the minimum number of foreign workers to meet the changing demands of the CNMI economy; (2) to encourage the hiring of U.S. workers; and (3) to ensure that no U.S. worker is at a competitive disadvantage for employment compared to a foreign worker or is displaced by a foreign worker. The Department anticipates that the provisions of this IFR will engender the benefits for U.S. workers that Congress intended in passing the Workforce Act. For example, the mandated payment of transportation and subsistence costs for CW-1 workers and corresponding U.S. workers will help ensure that U.S. workers are not placed at a competitive disadvantage compared to foreign workers. Additionally, the requirement to advertise the job opportunity on the CNMI Department of Labor's job listing system will improve the visibility of job openings to U.S. workers, thus expanding employment opportunities for U.S. workers. The requirement of a supervised labor market test and required submission of supporting documents by the employer will further provide that CW-1 workers are only hired if there are not sufficient U.S. workers in the Commonwealth who are able, willing, qualified, and available to perform the work for which CW-1 workers are sought. In addition, employers seeking to employ CW-1 workers must pay the highest of the prevailing wage, the Commonwealth minimum wage, or the Federal minimum wage; and corresponding U.S. workers must be offered at least the same wages, benefits, and working

conditions offered to foreign workers. These protections, and others in this regulation, will provide that the employment of nonimmigrant workers will not adversely affect the wages and working conditions of U.S. workers.

According to the BEA, the GDP of the CNMI increased 25.1 percent in 2017 after increasing 28.2 percent in 2016.<sup>50</sup> The most significant contributor to GDP growth was the accommodations and amusement industry, which includes tourism as well as the casino sector. The CNMI experienced substantial growth in visitor spending, particularly on casino gambling. The number of visitors to the CNMI grew 11 percent in 2016 and 24 percent in 2017.<sup>51</sup> CW-1 workers are heavily employed in these sectors. The CNMI's Bureau of Environmental and Coastal Quality estimates that at least 8,124 employees will be needed to operate new hotels and casinos.<sup>52</sup> The island of Tinian's labor demand alone is expected to be 6,359 workers for operation, more than twice the Tinian island population in 2016.<sup>53</sup> The 2017 "Report to the President on 902 Consultations" estimates that 11,613 workers will be needed to operate the new facilities by 2021.<sup>54</sup> This would be

<sup>50</sup> Source: U.S. Department of Commerce, Bureau of Economic Analysis, "CNMI GDP Increases in 2017: Growth Led by Tourism and Gaming Industry Revenue," [https://www.bea.gov/system/files/2018-10/cnmigdp\\_101718.pdf](https://www.bea.gov/system/files/2018-10/cnmigdp_101718.pdf).

<sup>51</sup> Id.

<sup>52</sup> Source: U.S. Government Accountability Office, "Commonwealth of the Northern Mariana Islands Implementation of Federal Minimum Wage and Immigration Laws" (May 2017), <https://www.gao.gov/assets/690/684778.pdf>.

<sup>53</sup> Ibid.

<sup>54</sup> Source: Special Representatives of the United States and the Commonwealth of the Northern Mariana Islands, "Report to the President on 902 Consultations" (January 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/902-consultations-report-january-2017.pdf>.

a substantial increase from the 3,226 workers in the accommodation and food services industry in 2014 (80 percent of whom were not U.S. citizens) and 928 workers in the arts, entertainment, and recreation industry (78 percent of whom were not U.S. citizens).<sup>55</sup>

Available CNMI labor could be recruited from recent graduates. CNMI high schools graduated 678 students in 2016, while the Northern Marianas College graduated 204 students, although this increase by new entrants may be somewhat offset by people who are retiring from the workforce.<sup>56</sup> Additionally, there were nearly 2,400 unemployed persons in the CNMI domestic workforce in 2016.<sup>57</sup> Workers could also be recruited from U.S. States, territories, and freely associated States. Higher prevailing wages and employer-provided transportation and subsistence costs may make relocation to the CNMI more attractive and feasible for workers in U.S. States, territories and freely associated States. Thus, the Department anticipates that the IFR will increase the percentage of U.S. workers employed in the CNMI.

## 3. Quantitative Analysis Considerations

The Department estimated the costs and transfer payments of the IFR relative to the existing baseline (*i.e.*, the current practices for complying with the CW-1 program as currently codified at 8 CFR 214.2(w)). In accordance with the regulatory analysis guidance articulated in OMB's Circular A-4 and consistent with the Department's practices in

<sup>55</sup> Source: U.S. Government Accountability Office, "Commonwealth of the Northern Mariana Islands Implementation of Federal Minimum Wage and Immigration Laws" (May 2017), <https://www.gao.gov/assets/690/684778.pdf>.

<sup>56</sup> Id.

<sup>57</sup> Id.

previous rulemakings, this regulatory analysis focuses on the likely consequences of the IFR (*i.e.*, the costs and transfer payments that are expected to accrue to the affected entities). The analysis covers 11.25 years (from FY 2019 through FY 2030 Q1) to ensure it captures the major costs and transfer payments that are likely to accrue over time. The Department expresses all quantifiable impacts in 2018 dollars and uses discount rates of three and seven percent, pursuant to Circular A-4.

a. Estimated Number of CW-1 Employers, Applications, and Workers

To calculate the annual costs and transfer payments, the Department first needed to estimate the number of CW-1 employers, CW-1 TLC applications, and CW-1 workers (beneficiaries) in the 11.25-year period from FY 2019 through the first quarter of FY 2030. Both the

projected number of CW-1 employers and the projected number of CW-1 TLC applications are based on the projected number of CW-1 workers. The projected number of CW-1 workers is equivalent to the annual statutory limit (numerical cap) on the number of CW-1 beneficiaries.

To estimate the number of CW-1 employers, the Department identified the total number of unique employers in the USCIS beneficiary data over the FY 2012-2018 period, which was 2,404 employers.<sup>58</sup> Then, the Department calculated the ratio of projected CW-1 workers to employers for FY 2019, which is 5.4 (= 13,000 ÷ 2,404). Next, the Department divided the numerical cap of CW-1 workers for each fiscal year by 5.4 to project the number of CW-1 employers for each year in the analysis period. For example, the numerical cap

for FY 2020 is 12,500, so the projected number of CW-1 employers in FY 2020 is 2,315 (= 12,500 ÷ 5.4).

To estimate the number of CW-1 TLC applications, the Department calculated the average annual ratio of CW-1 beneficiaries to CW-1 petitions filed with DHS over the FY 2012-2018 period, which was 1.5 (rounded).<sup>59</sup> Then, the Department divided the numerical cap of CW-1 workers for each fiscal year by 1.5 to project the number of CW-1 applications for each year in the analysis period. For example, the numerical cap for FY 2019 is 13,000, so the projected number of CW-1 labor certification applications for FY 2019 is 8,636 (= 13,000 ÷ 1.5054).

Exhibit 2 presents the projected number of CW-1 employers, applications, and workers for each year in the analysis period.

EXHIBIT 2: PROJECTED NUMBER OF CW-1 EMPLOYERS, APPLICATIONS, AND WORKERS [FY 2019-FY 2030 Q1]

Fiscal year	Projected CW-1 employers	Projected CW-1 applications	Projected CW-1 workers (equivalent to numerical cap)
2019	2,404	8,636	13,000
2020	2,315	8,303	12,500
2021	2,222	7,971	12,000
2022	2,130	7,639	11,500
2023	2,037	7,307	11,000
2024	1,852	6,643	10,000
2025	1,667	5,979	9,000
2026	1,481	5,314	8,000
2027	1,296	4,650	7,000
2028	1,111	3,986	6,000
2029	926	3,321	5,000
2030 Q1	185	664	1,000

To estimate the number of CW-1 workers who will need to be provided with transportation, lodging, and subsistence payments, the Department used petition renewal data from USCIS.<sup>60</sup> The data reveal that employers filed extension-of-stay petitions for 63 percent of CW-1 workers in FYs 2016-18, indicating that those CW-1 workers were already living in the CNMI. Therefore, the DOL projects that 37 percent of CW-1 workers will travel to the CNMI from their country of origin in FY 2019 through the first quarter of FY 2030.

b. Estimated Number of Corresponding U.S. Workers

To estimate the number of corresponding U.S. workers in the CNMI in FY 2019 through the first quarter of FY 2030, the Department used 2016 data from the CNMI Department of Commerce on the number of U.S. citizens and non-U.S. citizens by major occupation.<sup>61</sup> The Department calculated the ratios of the number of U.S. citizens to non-U.S. citizens by major occupation, and then applied those ratios to the pertinent number of CW-1 workers in each detailed occupation in FY 2018. Totaling these

results, the Department estimates that there were 8,353 corresponding U.S. workers in FY 2018.<sup>62</sup> This estimate remains constant throughout the analysis because the Department does not expect the number of corresponding U.S. workers to decrease; in fact, the number may increase.

c. Compensation Rates

Exhibit 3 presents the hourly compensation rates for the occupational categories that are expected to experience an increase in workload due to the provisions of the IFR. The Department used the mean hourly wage rate for private sector Human Resources

<sup>58</sup> Source: U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, unpublished table. In accordance with 8 CFR 214.2(w)(9), a petitioning employer may include more than one beneficiary in a CW-1 petition if the beneficiaries will be working in the same occupational category, for the same period of time, and in the same location.

<sup>59</sup> Source: U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, unpublished table.

<sup>60</sup> Source: U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, unpublished table.

<sup>61</sup> CNMI Department of Commerce, Statistical Yearbook 2017, Table 5.24 "Average Hourly Wages

by Occupation and Citizenship, CNMI: 2016," <http://ver1.cnmicommerce.com/sy-2017-table-5-17-31-wage-survey/>.

<sup>62</sup> Source: U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, unpublished table.

Managers and Translators in the CNMI.<sup>63</sup> These hourly wage rates include benefits. The Department adjusted the 2016 CNMI wages to 2018 dollars, and then increased them by 17 percent to account for overhead costs

such as rent, utilities, and office equipment.<sup>64</sup>

The wage rates of Federal employees at NPWC and NPC in Chicago were estimated using the midpoint (Step 5) for Grade 12 of the General Schedule in the Chicago locality area.<sup>65</sup> The Department multiplied the hourly wage

rate by 2 to account for a fringe benefits rate of 69 percent<sup>66</sup> and an overhead rate of 31 percent.<sup>67</sup>

The Department used the hourly compensation rates presented in Exhibit 3 throughout this analysis to estimate the labor costs for each provision.

EXHIBIT 3—COMPENSATION RATES  
[2018 dollars]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Hourly compensation rate a × b
<i>CNMI Private Sector Employees:</i>				
Human Resources Manager .....	N/A	\$20.08	1.17	\$23.49
Translator .....	N/A	\$16.01	1.17	18.73
<i>Federal Government Employees:</i>				
NPWC Staff .....	12	44.02	2	88.04
NPC Staff .....	12	44.02	2	88.04

#### 4. Subject-by-Subject Analysis

The Department's subject-by-subject analysis covers the estimated costs and transfer payments of the IFR. In accordance with Circular A-4, the Department considers transfer payments to be payments from one group to another that do not affect the total resources available to society.

##### a. Costs

The following sections describe the costs of the IFR. The costs of the IFR may vary with the size of the CW-1 employers in the CNMI. As such, the Department requests comments from the public on the distribution of participating CW-1 firms by size.

##### (1) Rule Familiarization

When the IFR takes effect, employers of CW-1 workers will need to familiarize themselves with the new regulations, thereby incurring a one-time cost in the first year. To estimate the first-year cost of rule familiarization, the Department multiplied the estimated number of unique CW-1 employers in FY 2019 (2,404) by the estimated amount of time required to review the rule based on the

Department's experience with other TLC programs (1 hour) and by the hourly compensation rate of Human Resources Managers (\$23.49 per hour). This calculation results in a one-time undiscounted cost of \$56,470 (= 2,404 employers × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$5,814 at a discount rate of 3 percent and \$6,933 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$54,825 at a discount rate of 3 percent and \$52,776 at a discount rate of 7 percent.

##### (2) Recordkeeping

The IFR requires that all CW-1 employers filing a *CW-1 Application for Temporary Employment Certification* retain documents and records for a period of 3 years from the date of certification. Employers may keep these documents and records electronically. Based on the Department's experience administering other TLC programs, the documents and records to be retained by the employer are critical to ensuring an appropriate level of integrity and accountability in the CW-1 program, and to protecting the wages, benefits,

and other guarantees afforded to CW-1 workers and workers in corresponding employment. For purposes of this analysis, the Department assumes that employers will not retain these documents and records electronically, although they are permitted to do so. Therefore, the following recordkeeping costs may be an overestimation.

To calculate the estimated recordkeeping costs associated with purchasing a filing cabinet for document retention, the Department multiplied the number of unique CW-1 employers in FY 2019 (2,404) by the estimated cost of a filing cabinet (\$89.99),<sup>68</sup> which equals \$216,336. This cost is assumed to be a one-time cost in the first year. The annualized cost over the 11.25-year period is estimated at \$22,273 at a discount rate of 3 percent and \$26,559 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$210,035 at a discount rate of 3 percent and \$202,183 at a discount rate of 7 percent.

To estimate the recordkeeping costs associated with printing CW-1 applications, the Department multiplied the number of projected CW-1 applications in each year by the

<sup>63</sup> Source: CNMI Department of Commerce, "2016 CNMI Prevailing Wage and Workforce Assessment Study," <http://i2io42u7ucg3bwn5b3l0fquc.wpengine.netdna-cdn.com/wp-content/uploads/2017/09/2016-PWWAS-Report-One-Full-Report-v1.1-1.pdf>. The wage rates used here "include all applicable fringe benefits."

<sup>64</sup> Source: Cody Rice, U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program" (June 10, 2002), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005>.

<sup>65</sup> Source: Office of Personnel Management, "2018 General Schedule (GS) Locality Pay Tables," <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2018/general-schedule/>.

<sup>66</sup> Source: Congressional Budget Office, "Comparing the Compensation of Federal and Private-Sector Employees, 2011 to 2015" (April 2017), <https://www.cbo.gov/publication/52637>. The wages of Federal workers averaged \$38.30 per hour over the study period, while the benefits averaged \$26.50 per hour, which is a benefits rate of 69 percent.

<sup>67</sup> Source: U.S. Department of Health and Human Services, "Guidelines for Regulatory Impact

Analysis" (2016), [https://aspe.hhs.gov/system/files/pdf/242926/HHS\\_RIAGuidance.pdf](https://aspe.hhs.gov/system/files/pdf/242926/HHS_RIAGuidance.pdf). On page 30, HHS states, "As an interim default, while HHS conducts more research, analysts should assume overhead costs (including benefits) are equal to 100 percent of pretax wages. . . ." To isolate the overhead rate, the Department subtracted the benefits rate of 69 percent from the recommended rate of 100 percent.

<sup>68</sup> Source: [https://www.staples.com/staples-2-drawer-vertical-file-cabinet-charcoal-letter-18-d-52143/product\\_2806760](https://www.staples.com/staples-2-drawer-vertical-file-cabinet-charcoal-letter-18-d-52143/product_2806760).

estimated number of pages in a CW-1 application (30 pages) and by the estimated paper and printing cost (\$0.09 per page) to estimate the total cost of printing applications. For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$23,317 (= 8,636 applications × 30 pages × \$0.09 per page). The annualized cost over the 11.25-year period is estimated at \$17,354 at a discount rate of 3 percent and \$17,925 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$163,647 at a discount rate of 3 percent and \$136,454 at a discount rate of 7 percent.

To calculate the estimated recordkeeping costs associated with a Human Resources Manager printing and filing documents, the Department multiplied the projected number of CW-1 applications in each year by the estimated time required to print and file documents (20 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$66,944 (= 8,636 applications × 20 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$49,824 at a discount rate of 3 percent and \$51,462 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$469,832 at a discount rate of 3 percent and \$391,758 at a discount rate of 7 percent.

### (3) Applications

#### (a) Electronic Filing of Request for Prevailing Wage Determination

The IFR establishes the process by which employers obtain a TLC from the Department for use in petitioning DHS to employ a nonimmigrant worker in CW-1 status, which involves four basic steps. First, the employer must request and obtain a PWD from the Department's OFLC NPWC before filing a *CW-1 Application for Temporary Employment Certification*. To make this request, the employer will submit a completed *Application for Prevailing Wage Determination* to the NPWC containing information about the job opportunity in which the nonimmigrant workers will be employed. Based on a review of the information provided by the employer, the NPWC will issue a PWD, indicate the source and validity period for its use, and return the application with its endorsement to the employer.

To estimate the labor costs to employers associated with electronically filing a PWD request, the

Department multiplied the number of projected CW-1 applications in each year by the estimated time required to file the request based on the Department's experience with other TLC programs (46 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$156,202 (= 8,636 applications × 46 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$116,255 at a discount rate of 3 percent and \$120,079 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$1,096,274 at a discount rate of 3 percent and \$914,102 at a discount rate of 7 percent.

To estimate the labor costs to the Federal Government associated with reviewing PWD requests and issuing PWDs, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to review a PWD request and issue a PWD (1 hour) and by the hourly compensation rate for NPWC staff (\$88.04 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$760,313 (= 8,636 applications × 1 hour × \$88.04 per hour). The annualized cost over the 11.25-year period is estimated at \$565,871 at a discount rate of 3 percent and \$584,485 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$5,336,117 at a discount rate of 3 percent and \$4,449,397 at a discount rate of 7 percent.

#### (b) Appealing a Prevailing Wage Determination

An employer that does not agree with a PWD may appeal under 20 CFR 655.411. The employer must make a written request to the NPWC Director within 7 business days from the date the PWD was issued.

To estimate the labor costs associated with filing an appeal of a PWD, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will involve an appeal based on the Department's experience with other TLC programs (5 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (1 hour) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so

the estimated FY 2019 cost is \$10,143 (= 8,636 applications × 5 percent × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$7,549 at a discount rate of 3 percent and \$7,797 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$71,187 at a discount rate of 3 percent and \$59,357 at a discount rate of 7 percent.

#### (c) Electronic Filing of CW-1 Application

Next, the IFR requires the employer to file a completed *CW-1 Application for Temporary Employment Certification* with the OFLC NPC no more than 120 calendar days before the date of need or, for employers seeking to extend the employment of a CW-1 worker, no more than 180 calendar days before the date on which the CW-1 status expires. The NPC CO will review the employer's application for compliance with all applicable program requirements and issue either a NOD or NOA. Where deficiencies in the application are discovered, the NOD will provide the employer with 10 business days to correct the deficiencies.

To calculate the estimated labor costs associated with electronically filing a CW-1 application, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to file the application (45 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$152,145 (= 8,636 applications × 45 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$113,235 at a discount rate of 3 percent and \$116,960 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$1,067,799 at a discount rate of 3 percent and \$890,359 at a discount rate of 7 percent.

To estimate the labor costs to the Federal Government associated with reviewing applications and issuing initial determinations, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to review an application and issue an initial determination (1 hour) and by the hourly compensation rate for OFLC NPC staff (\$88.04 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$760,313 (= 8,636 applications × 1 hour × \$88.04 per hour). The annualized cost over the 11.25-year period is estimated at

\$565,871 at a discount rate of 3 percent and \$584,485 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$5,336,117 at a discount rate of 3 percent and \$4,449,397 at a discount rate of 7 percent.

(d) Proof of Agent Relationship

The IFR requires all agents who file CW-1 applications on behalf of employers to demonstrate that a bona fide relationship exists between them and the employer. The Department will accept a copy of the agent agreement or any other document demonstrating the agent's authority to act on behalf of the employer.

To estimate the labor costs associated with creating, printing, signing, and delivering a document confirming the agent relationship, the Department multiplied the number of projected CW-1 employers in each year by the estimated percentage of employers that will be represented based on the Department's experience with other TLC programs (25 percent of employers). Then, the Department multiplied this number by the estimated time required to comply with this provision (30 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 employers in FY 2019 is 2,404, so the estimated FY 2019 cost is \$7,059 (= 2,404 employers × 25 percent × 30 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$5,260 at a discount rate of 3 percent and \$5,433 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$49,603 at a discount rate of 3 percent and \$41,359 at a discount rate of 7 percent.

(e) Contracts With Third Parties To Comply With Prohibitions

The IFR requires employers to prohibit in a written contract any agent or recruiter whom the employer engages in recruitment of CW-1 workers, from seeking or receiving payments or other compensation from prospective workers. The required contractual prohibition applies to the agents and employees of the recruiting agent, and encompasses both direct and indirect fees.

To estimate the labor costs associated with creating, printing, signing, and delivering the written contract, the Department multiplied the number of projected CW-1 employers in each year by the estimated percentage of employers that will use an agent or recruiter based on the Department's

experience with other TLC programs (55 percent of employers). Then, the Department multiplied this number by the estimated time required to comply with this provision (15 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 employers in FY 2019 is 2,404, so the estimated FY 2019 cost is \$7,765 (= 2,404 employers × 55 percent × 15 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$5,786 at a discount rate of 3 percent and \$5,976 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$54,564 at a discount rate of 3 percent and \$45,495 at a discount rate of 7 percent.

(f) Appendix A of Form ETA-9142C, Employer-Client Information of Job Contractor

The IFR requires an employer filing as a job contractor and acting as a joint employer with its employer-client to submit a single application. In filing the application, the job contractor must disclose the identity and contact information of its employer-client by completing Appendix A.

To estimate the labor costs associated with completing Appendix A, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will include Appendix A based on the Department's experience with other TLC programs (35 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (15 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$17,750 (= 8,636 applications × 35 percent × 15 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$13,211 at a discount rate of 3 percent and \$13,645 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$124,577 at a discount rate of 3 percent and \$103,875 at a discount rate of 7 percent.

(g) Appendix B of Form ETA-9142C, Additional Place(s) of Employment and Wage Information

If work needs to be performed at worksite locations other than the primary one identified on Form ETA-9142C, the employer must complete Appendix B identifying all places of employment and details about the wage

offers for each of those places of employment. OFLC will use this information to ensure all places of employment are located within the CNMI and that the employer is offering wages that are at least equal to the prevailing wage covering each place of employment.

To estimate the labor costs associated with completing Appendix B, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will include Appendix B based on the Department's experience with other TLC programs (70 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (20 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$46,861 (= 8,636 applications × 70 percent × 20 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$34,876 at a discount rate of 3 percent and \$36,024 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$328,882 at a discount rate of 3 percent and \$274,231 at a discount rate of 7 percent.

(h) Appendix C of Form ETA-9142C, Attorney/Agent/Employer Declarations

The IFR requires an employer to complete Appendix C to attest to compliance with all of the terms, assurances, and obligations of the CW-1 program. The agent or attorney identified in the *CW-1 Application for Temporary Employment Certification* must also sign and date Appendix C, declaring that it has been designated by the employer to act on the employer's behalf.

To estimate the labor costs associated with completing Appendix C, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to comply with this provision (20 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$66,944 (= 8,636 applications × 20 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$49,824 at a discount rate of 3 percent and \$51,462 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$469,832 at a discount rate



of 3 percent and \$391,758 at a discount rate of 7 percent.

(i) Request for Waiver of Obtaining PWD Due to Emergency Situation

The IFR permits an employer that is unable to obtain a PWD prior to filing an application to request a waiver by submitting a letter of explanation along with the completed application. The employer must provide a detailed statement describing the good and substantial cause that necessitated the waiver request. This provision provides an employer experiencing a qualifying emergency situation with some degree of flexibility to participate in the CW-1 program without first obtaining a PWD from the NPWC.

To estimate the labor costs associated with composing and submitting a waiver request, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will include a waiver request based on the Department's experience with other TLC programs (10 percent of applications). (10 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (30 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$10,143 (= 8,636 applications × 10 percent × 30 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$7,549 at a discount rate of 3 percent and \$7,797 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$71,187 at a discount rate of 3 percent and \$59,357 at a discount rate of 7 percent.

(j) Submission of a Modified Application

The IFR permits an employer to modify and resubmit its application to address insufficiencies listed in the NOD. The employer must respond to the NOD and correct any deficiencies within 10 business days of issuance.

To estimate the labor costs associated with modifying an application, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will be modified based on the Department's experience with other TLC programs (one-third of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (1 hour) and by the hourly

compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$67,620 (= 8,636 applications × 33.3 percent × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$50,327 at a discount rate of 3 percent and \$51,982 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$474,577 at a discount rate of 3 percent and \$395,715 at a discount rate of 7 percent.

(k) Amending the Application

The IFR permits an employer to request to amend its application at any time before the Department makes a final determination to grant or deny the application. The employer may request to increase the number of workers requested, modify the period of employment, or request other minor changes to the application.

To estimate the labor costs associated with amending an application, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will be amended based on the Department's experience with other TLC programs (15 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (30 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$15,214 (= 8,636 applications × 15 percent × 30 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$11,324 at a discount rate of 3 percent and \$11,696 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$106,780 at a discount rate of 3 percent and \$89,036 at a discount rate of 7 percent.

(l) Posting the Job With the CNMI Department of Labor

If all program requirements are met, the employer will receive a NOA from the CO directing the recruitment of U.S. workers for the job opportunity and requesting a written report of the employer's recruitment efforts. To encourage the hiring of U.S. workers for employment in the CNMI, the employer will be required to advertise the job opportunity on the CNMI Department of Labor's job listing system.

To calculate the estimated labor costs associated with posting a job

opportunity with the CNMI Department of Labor, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to post the job ad (1 hour) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$202,860 (= 8,636 applications × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$150,980 at a discount rate of 3 percent and \$155,947 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$1,423,732 at a discount rate of 3 percent and \$1,187,146 at a discount rate of 7 percent.

(m) Contacting Former U.S. Employees

As part of an employer's recruitment efforts and to encourage the hiring of U.S. workers, the IFR requires employers to contact former U.S. employees and solicit their return to the job.

To estimate the labor costs associated with contacting former U.S. employees regarding the job opportunity, the Department multiplied the number of projected CW-1 applications in each year by the estimated number of former U.S. employees that will be contacted based on the Department's experience with other TLC programs (an average of 1.5 former U.S. employees per application). Then, the Department multiplied this number by the estimated time required to comply with this provision (1 hour) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$304,289 (= 8,636 applications times; 1.5 former U.S. employees × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$226,471 at a discount rate of 3 percent and \$233,920 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$2,135,598 at a discount rate of 3 percent and \$1,780,719 at a discount rate of 7 percent.

(n) Posting a Job Notice

As part of an employer's recruitment efforts and to encourage the hiring of U.S. workers, the IFR requires employers to post a copy of the *CW-1 Application for Temporary Employment Certification* in at least two conspicuous locations at the place(s) of employment or in some other manner that provides reasonable notification to all employees

in the area in which the work will be performed by the CW-1 workers.

To estimate the labor costs associated with posting a notice of the job, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to post the notice (30 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$101,430 (= 8,636 applications × 30 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$75,490 at a discount rate of 3 percent and \$77,973 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$711,866 at a discount rate of 3 percent and \$593,573 at a discount rate of 7 percent.

(o) Additional Recruitment

As part of an employer's recruitment efforts and to encourage the hiring of U.S. workers, the IFR requires employers to conduct other recruitment activities such as contacting community-based organization or trade unions when required by the CO.

To estimate the labor costs associated with conducting additional recruiting if ordered by the CO, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will require additional recruitment based on the Department's experience with other TLC programs (35 percent of applications). Then, the Department multiplied this number by the estimated time required to make the additional outreach based on the Department's experience with other TLC programs (15 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$17,750 (= 8,636 applications × 35 percent × 15 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$13,211 at a discount rate of 3 percent and \$13,645 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$124,577 at a discount rate of 3 percent and \$103,875 at a discount rate of 7 percent.

(p) Electronic Submission of Recruitment Report

The recruitment period will last approximately 21 calendar days and all employer-conducted recruitment must be completed before the written

recruitment report can be prepared, signed, and submitted to the NPC for review. Upon review of the recruitment report, the CO will make a determination either to certify or to deny the *CW-1 Application for Temporary Employment Certification*. The employer will use the Final Determination notice and any other required documentation to support the filing of a CW-1 petition with USCIS.

To estimate the labor costs associated with electronically submitting a recruitment report, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to file the report (1 hour) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$202,860 (= 8,636 applications × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$150,980 at a discount rate of 3 percent and \$155,947 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$1,423,732 at a discount rate of 3 percent and \$1,187,146 at a discount rate of 7 percent.

To estimate the labor costs to the Federal Government associated with reviewing recruitment reports and issuing final determinations, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to review a recruitment report and issue a final determination (1 hour) and by the hourly compensation rate for OFLC NPC staff (\$88.04 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$760,313 (= 8,636 applications × 1 hour × \$88.04 per hour). The annualized cost over the 11.25-year period is estimated at \$565,871 at a discount rate of 3 percent and \$584,485 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$5,336,117 at a discount rate of 3 percent and \$4,449,397 at a discount rate of 7 percent.

(q) Translating the Work Contract

The IFR contains provisions related to the disclosure of the work contract. The employer is required to provide a copy of the work contract to a CW-1 worker outside of the United States no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day the work commences. For a CW-1 worker changing to another

CW-1 employer, the work contract must be provided no later than the time the subsequent offer of employment is made. The work contract must be provided in a language understood by the worker. The costs associated with the disclosure requirements include translating costs, time and materials costs, and postage costs.

To estimate the labor costs associated with translating the work contract, the Department multiplied the number of projected CW-1 applications in each year by the estimated time required to translate the work contract (1 hour) and by the hourly compensation rate for Translators (\$18.73 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$161,752 (= 8,636 applications × 1 hour × \$18.73 per hour). The annualized cost over the 11.25-year period is estimated at \$120,386 at a discount rate of 3 percent and \$124,346 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$1,135,228 at a discount rate of 3 percent and \$946,583 at a discount rate of 7 percent.

(r) Reproducing the Work Contract

To estimate the labor costs associated with reproducing the work contract, the Department added the projected number of CW-1 workers in each year to the estimated number of corresponding U.S. workers (8,353 U.S. workers). The Department then multiplied the estimated total number of workers in each year by the amount of time required to reproduce each work contract (5 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 workers in FY 2019 is 13,000 and the projected number of U.S. workers is 8,353, which totals 21,353 workers. So, the estimated FY 2019 labor cost is \$41,631 (= 21,353 workers × 5 minutes × \$23.49 per hour).

To estimate the materials costs associated with reproducing the work contract, the Department again added the projected number of CW-1 workers in each year to the estimated number of corresponding U.S. workers (8,353 U.S. workers). The Department then multiplied the estimated total number of workers in each year by the estimated length of a work contract (3 pages) and by the estimated per-page printing cost (\$0.09). For example, the projected number of CW-1 and U.S. workers in FY 2019 is 21,353, so the estimated FY 2019 materials cost is \$5,765 (= 21,353 workers × 3 pages × \$0.09 per page).

Combining the labor and materials costs for reproducing the work contract,

the first-year cost is estimated at \$47,397 (= \$41,631 + \$5,765). The annualized cost over the 11.25-year period is estimated at \$41,049 at a discount rate of 3 percent and \$41,529 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$387,085 at a discount rate of 3 percent and \$316,138 at a discount rate of 7 percent.

(s) Mailing the Work Contracts

To estimate the labor costs associated with mailing work contracts to workers, the Department first added the projected number of CW-1 workers in each year to the estimated number of corresponding U.S. workers (8,353 U.S. workers). The Department then multiplied the estimated total number of workers in each year by the amount of time required to mail each work contract (10 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 workers in FY 2019 is 13,000 and the projected number of U.S. workers is 8,353, which totals 21,353 workers. So, the estimated FY 2019 labor cost is \$83,764 (= 21,353 workers × 10 minutes × \$23.49 per hour).

To estimate the postage costs associated with mailing work contracts to CW-1 workers not living in the CNMI, the Department multiplied the projected number of CW-1 workers in each year by the estimated percentage of CW-1 workers not currently living in the CNMI (37 percent) and by the estimated international postage cost (\$1.15). For example, the projected number of CW-1 workers in FY 2019 is 13,000, so the estimated FY 2019 cost to employers for mailing work contracts to CW-1 workers not living in the CNMI is \$5,532 (= 13,000 CW-1 workers × 37 percent × \$1.15 per work contract).

To estimate the postage costs associated with mailing work contracts to workers currently in the CNMI, the Department multiplied the projected number of CW-1 workers by the estimated percentage of CW-1 workers currently in the CNMI (63 percent) and then added the estimated number of corresponding U.S. workers (8,353 U.S. workers) to obtain the total number of work contracts to be mailed within the CNMI. The Department multiplied this estimate by the current cost of a U.S. postage stamp (\$0.50). For example, the projected number of CW-1 workers in FY 2019 is 13,000, so the estimated number of CW-1 workers currently in the CNMI is 8,190 (= 13,000 × 63 percent). Combined with 8,353 U.S. workers, the total number of workers in the CNMI who would be mailed a work

contract in FY 2019 is estimated to be 16,543. Accordingly, the estimated FY 2019 cost to employers for mailing work contracts within the CNMI is \$8,272 (= 16,543 workers × \$0.50 per work contract).

Combining the labor and materials costs for mailing the work contract, the first-year cost is estimated at \$97,568 (= \$83,764 + \$5,532 + \$8,272). The annualized cost over the 11.25-year period is estimated at \$84,119 at a discount rate of 3 percent and \$85,152 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$793,235 at a discount rate of 3 percent and \$648,223 at a discount rate of 7 percent.

(t) Notification of Abandonment or Termination

The IFR requires employers to notify the Department when any of their CW-1 workers voluntarily abandons the job or is terminated before the certified end date of employment. This task involves writing an email message to the Department to meet this requirement.

To estimate the labor costs associated with notifying the Department of abandonment or termination of employment, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will be affected by this requirement based on the Department's experience with other TLC programs (5 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (10 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$1,694 (= 8,636 applications × 5 percent × 10 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$1,261 at a discount rate of 3 percent and \$1,302 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$11,888 at a discount rate of 3 percent and \$9,913 at a discount rate of 7 percent.

(u) Extension of the Certified Period of Employment

The IFR permits employers, under certain circumstances involving weather conditions or other factors beyond the control of the employer, to request in writing an extension of the certified period of employment. The employer must submit the written request to the CO with documentation showing that the extension is needed and that the

need could not have been reasonably foreseen by the employer.

To estimate the labor costs associated with requesting an extension of the certified period of employment, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications for which an extension will be requested based on the Department's experience with other TLC programs (5 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (30 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$5,071 (= 8,636 applications × 5 percent × 30 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$3,775 at a discount rate of 3 percent and \$3,899 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$35,593 at a discount rate of 3 percent and \$29,679 at a discount rate of 7 percent.

(v) Administrative Appeals

The IFR permits an employer that has certification denied to request administrative review of the decision by BALCA. To do so, an employer must submit a written request for review within 10 business days from the date of determination.

To estimate the labor costs associated with seeking administrative review, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications for which administrative review will be requested based on the Department's experience with other TLC programs (5 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (1 hour) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$10,143 (= 8,636 applications × 5 percent × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$7,549 at a discount rate of 3 percent and \$7,797 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$71,187 at a discount rate of 3 percent and \$59,357 at a discount rate of 7 percent.

## (w) Request for Withdrawal

The IFR permits employers to request withdrawal of an application any time after it has been accepted for processing, as long as the employer complies with the terms and conditions of employment in the application and work contract with respect to all workers recruited and hired in connection with that application. The employer must submit a request in writing to the NPC stating the reason(s) for withdrawal.

To estimate the labor costs associated with requesting withdrawal of an application, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will be withdrawn based on the Department's experience with other TLC programs (10 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (10 minutes) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$3,388 (= 8,636 applications × 10 percent × 10 minutes × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$2,521 at a discount rate of 3 percent and \$2,604 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$23,776 at a discount rate of 3 percent and \$19,825 at a discount rate of 7 percent.

## (x) Certifying Officer-Ordered Assisted Recruitment

If an employer violates the terms of the CW-1 program and the Department

determines that the violation does not warrant debarment, the CO may require the employer to undergo assisted recruitment for future applications. This requirement not only protects the integrity of the CW-1 program but can also be an effective tool to help an employer that, due to either program inexperience or confusion, commits an unintentional violation in its application and indicates a need for assistance from the Department.

To estimate the labor costs associated with conducting assisted recruitment, the Department multiplied the number of projected CW-1 applications in each year by the estimated percentage of applications that will be affected by this requirement based on the Department's experience with other TLC programs (0.5 percent of applications). Then, the Department multiplied this number by the estimated time required to comply with this provision (1 hour) and by the hourly compensation rate for Human Resources Managers (\$23.49 per hour). For example, the projected number of CW-1 applications in FY 2019 is 8,636, so the estimated FY 2019 cost is \$1,014 (= 8,636 applications × 0.5 percent × 1 hour × \$23.49 per hour). The annualized cost over the 11.25-year period is estimated at \$755 at a discount rate of 3 percent and \$780 at a discount rate of 7 percent. The total cost over the 11.25-year period is estimated at \$7,119 at a discount rate of 3 percent and \$5,936 at a discount rate of 7 percent.

## b. Transfer Payments

This section discusses the quantifiable transfer payments related to transportation and subsistence costs, as well as the impact on the wages of CW-

1 workers and corresponding U.S. workers.

## (1) Transportation and Subsistence Costs

The IFR requires CW-1 employers to pay the inbound transportation and daily subsistence costs of workers who complete 50 percent of the job order period and the outbound transportation and subsistence costs of workers who complete the entire job order period. Reasonable expenses incurred between a worker's hometown and the consular city are within the scope of inbound transportation and subsistence costs, including lodging costs while CW-1 workers travel from their hometown to the consular city to wait to obtain a visa and from the consular city to the place of employment. The impacts of requiring CW-1 employers to pay for workers' transportation and subsistence represent transfers from CW-1 employers to workers because the impacts are distributional effects, not a change in society's resources.<sup>69</sup>

To estimate the transfer payments related to transportation and subsistence, the Department first calculated the proportion of CW-1 workers from each of the 10 most common countries of origin in FY 2016–2018. The Department then averaged these proportions and normalized them to account for the small portion of CW-1 workers in each year originating from countries other than the 10 most common countries of origin. These normalized proportions, presented in Exhibit 4, were used to create weighted averages of travel costs in the analysis below.

EXHIBIT 4—AVERAGE PROPORTION OF WORKERS BY COUNTRY OF ORIGIN  
[FY 2016–2018]

Country	FY 2016	Proportion (percent)	FY 2017	Proportion (percent)	FY 2018	Proportion (percent)	Average proportion (percent)	Normalized proportion (percent)
Philippines .....	7,086	53.28	6,497	47.90	6,043	65.02	55.40	56.34
China .....	4,844	36.42	5,298	39.06	1,703	18.32	31.27	31.80
South Korea .....	433	3.26	380	2.80	374	4.02	3.36	3.42
Bangladesh .....	473	3.56	352	2.60	210	2.26	2.80	2.85
Japan .....	142	1.07	200	1.47	92	0.99	1.18	1.20
Taiwan .....	35	0.26	240	1.77	276	2.97	1.67	1.70
Malaysia .....	26	0.20	200	1.47	202	2.17	1.28	1.30
Vietnam .....	4	0.03	116	0.86	95	1.02	0.64	0.65
Thailand .....	56	0.42	58	0.43	54	0.58	0.48	0.48
India .....	14	0.11	24	0.18	44	0.47	0.25	0.26
Top 10 Total .....	13,113	98.60	13,365	98.54	9,093	97.84	98.33	100.00

<sup>69</sup>For the purpose of this analysis, CW-1 workers are considered temporary residents of the United States.

EXHIBIT 4—AVERAGE PROPORTION OF WORKERS BY COUNTRY OF ORIGIN—Continued  
[FY 2016–2018]

Country	FY 2016	Proportion (percent)	FY 2017	Proportion (percent)	FY 2018	Proportion (percent)	Average proportion (percent)	Normalized proportion (percent)
Total .....	13,299	100.00	13,563	100.00	9,294	100.00	.....	.....

The Department estimated total transportation, lodging, and subsistence costs to and from the CNMI based on four components: (1) The average estimated cost of a one-way bus or train trip from three major regional cities to the consular city; (2) the estimated cost of lodging in the consular city for 1 night; (3) the minimum daily

subsistence amount for workers traveling to their place of employment; and (4) the estimated cost of a one-way flight from the consular city to Saipan. The Department estimated the total one-way cost from each country of origin by adding these four components and then estimating a weighted average total one-way travel cost by multiplying the total

one-way travel cost from each country of origin with the appropriate normalized weight from Exhibit 4 and summing the resulting weighted costs. The Department estimated the total round-trip travel costs by multiplying the weighted average total one-way travel cost by two. These figures are presented in Exhibit 5.

EXHIBIT 5—ESTIMATED COST OF TRAVEL FOR CW-1 WORKERS

Item	Cost (2018 dollars)
<b>Philippines</b>	
One-way travel—within Manila .....	\$0.00
One-way travel—Quezon City to Manila .....	1.00
One-way travel—Caloocan to Manila .....	1.00
Average—Home city to Manila .....	0.67
Lodging Cost—Manila .....	1.47
Meals .....	12.26
One-way travel—Manila to Saipan .....	397.00
Total one-way travel .....	411.40
<b>China</b>	
One-way travel—within Beijing .....	0.00
One-way travel—Chongqing to Beijing .....	77.00
One-way travel—Shanghai to Beijing .....	87.50
Average—Home city to Beijing .....	54.83
Lodging cost—Beijing .....	8.74
Meals .....	12.26
One-way travel—Beijing to Saipan .....	410.20
Total one-way travel .....	486.03
<b>South Korea</b>	
One-way travel—within Seoul .....	0.00
One-way travel—Busan to Seoul .....	27.00
One-way travel—Incheon to Seoul .....	1.50
Average—Home city to Seoul .....	9.50
Lodging cost—Seoul .....	9.01
Meals .....	12.26
One-way travel—Seoul to Saipan .....	206.00
Total one-way travel .....	236.77
<b>Bangladesh</b>	
One-way travel—within Dhaka .....	0.00
One-way travel—Sylhet to Dhaka .....	6.00
One-way travel—Chittagong to Dhaka .....	12.00
Average—Home city to Dhaka .....	6.00
Lodging cost—Dhaka .....	15.00
Meals .....	12.26
One-way travel—Dhaka to Saipan .....	970.00

## EXHIBIT 5—ESTIMATED COST OF TRAVEL FOR CW-1 WORKERS—Continued

Item	Cost (2018 dollars)
Total one-way travel .....	1,003.26
<b>Japan</b>	
One-way travel—within Tokyo .....	0.00
One-way travel—Yokohama to Tokyo .....	5.50
One-way travel—Osaka to Tokyo .....	60.00
Average—Home city to Tokyo .....	21.83
Lodging cost—Tokyo .....	12.26
Meals .....	12.26
One-way travel—Tokyo to Saipan .....	336.00
Total one-way travel .....	382.35
<b>Taiwan</b>	
One-way travel—New Taipei City to Taipei City .....	1.00
One-way travel—Taichung to Taipei City .....	6.50
One-way travel—Kaohsiung to Taipei City .....	21.00
Average—Home city to Taipei City .....	9.50
Lodging cost—Taipei City .....	.79
Meals .....	12.26
One-way travel—Taipei City to Saipan .....	308.00
Total one-way travel .....	339.55
<b>Malaysia</b>	
One-way travel—within Kuala Lumpur .....	0.00
One-way travel—Ipoh to Kuala Lumpur .....	5.00
One-way travel—Iskander Puteri to Kuala Lumpur .....	21.50
Average—Home city to Kuala Lumpur .....	8.83
Lodging cost—Kuala Lumpur .....	5.08
Meals .....	12.26
One-way travel—Kuala Lumpur to Saipan .....	445.00
Total one-way travel .....	471.17
<b>Vietnam</b>	
One-way travel—within Hanoi .....	0.00
One-way travel—Ho Chi Minh City to Hanoi .....	30.00
One-way travel—Da Nang to Hanoi .....	14.00
Average—Home city to Hanoi .....	14.67
Lodging cost—Hanoi .....	5.08
Meals .....	12.26
One-way travel—Hanoi to Saipan .....	419.00
Total one-way travel .....	448.63
<b>Thailand</b>	
One-way travel—within Bangkok .....	0.00
One-way travel—Pattaya to Bangkok .....	5.00
One-way travel—Nonthaburi to Bangkok .....	1.00
Average—Home city to Bangkok .....	2.00
Lodging cost—Bangkok .....	3.68
Meals .....	12.26
One-way travel—Bangkok to Saipan .....	447.00
Total one-way travel .....	464.94
<b>India</b>	
One-way travel—within New Delhi .....	0.00
One-way travel—Mumbai to New Delhi .....	16.00

EXHIBIT 5—ESTIMATED COST OF TRAVEL FOR CW-1 WORKERS—Continued

Item	Cost (2018 dollars)
One-way travel—Bengaluru to New Delhi .....	30.00
Average—Home city to New Delhi .....	15.33
Lodging cost—New Delhi .....	3.27
Meals .....	12.26
One-way travel—New Delhi to Saipan .....	592.00
Total one-way travel .....	622.86
<b>All</b>	
One-way travel—Weighted average .....	446.27
Round-trip travel—Weighted average .....	892.54

To calculate the total transfers associated with workers traveling to the CNMI, the Department first multiplied the projected number of CW-1 workers in each year by the estimated percentage of CW-1 workers not currently living in CNMI (37 percent) to obtain an estimate for the number of workers that will require transportation, lodging, and subsistence. The Department then multiplied this estimate by the country-of-origin weighted average total round-trip travel cost (\$892.54). For example, the projected number of CW-1 workers in FY 2019 is 13,000, so the estimated FY 2019 transfer is \$4,293,109 (= 13,000 workers × 37 percent × \$892.54). The annualized transfer over the 11.25-year period is estimated at \$3,195,353 at a discount rate of 3 percent and \$3,300,461 at a discount rate of 7 percent. The total transfer over the 11.25-year period is estimated at \$30,131,920 at a discount rate of 3 percent and \$25,124,791 at a discount rate of 7 percent.

(2) Wage Impact Analysis

The IFR, at § 655.410(b)(1), provides that if the mean hourly wage for an occupational classification in the CNMI is reported by the Governor, annually,

and meets the Department’s statistical requirements set forth in § 655.410(e), the wage reported by the Governor must be the prevailing wage for the occupational classification. When the Department has not approved a survey for the occupation—either because the Governor has not conducted a survey or because the Governor’s survey fails to meet the statistical standards for the occupation—the prevailing wage must be the mean wage estimate for Guam for the appropriate occupation, as reported by BLS in the OES. If Guam OES wage data are unavailable for an occupation, the prevailing wage must be the mean wage paid to workers in the SOC in the United States from the BLS OES Survey, adjusted based on the ratio of the mean wage paid to workers in all SOCs in Guam compared to the mean wage paid to workers in all SOCs in the United States from the BLS OES survey. For this analysis, the Department used the May 2017 ratio of 0.71, which is the ratio of the Guam mean wage rate of \$17.30<sup>70</sup> to the national mean wage rate of \$24.34.<sup>71</sup> First, the Department matched each CW-1 occupation from the USCIS CW-1 beneficiary data to the most appropriate SOC code. Then, the Department established a baseline wage

for each occupation using the hourly wage for the appropriate SOC code in the 2016 CNMI Prevailing Wage and Workforce Assessment Study (inflated to 2018 dollars). In contrast to the statistical requirements for the prevailing wage—namely, 3 or more employers surveyed with a total of 30 or more employees—the baseline wage for this analysis was established using a statistical standard of 3 or more employers surveyed with a total of just 6 or more employees. If the occupation met the statistical standard but the survey wage was lower than \$7.25 per hour, the Department assigned \$7.25 per hour as the baseline because the CNMI minimum wage increased to \$7.25 after the reference period for the 2016 CNMI Prevailing Wage and Workforce Assessment Study (November 1–16, 2016). Similarly, if the survey wage failed to meet the statistical standard, the Department assigned \$7.25 per hour. For each occupation, the Department calculated the hourly wage difference by subtracting the baseline wage estimate from the chosen prevailing wage. Exhibit 6 provides four examples to illustrate how the baseline and prevailing wages were chosen for each occupation.

EXHIBIT 6—CNMI PREVAILING HOURLY WAGE UNDER THE IFR

[Example cases]

CW-1 occupation title	SOC code	Baseline wage <sup>a</sup>	CNMI survey wage	Guam OES wage	National OES wage × 0.71	Assigned wage	Wage difference
Accountant .....	132011	\$12.86	\$12.86	\$22.23	\$26.60	\$12.86	\$0.00
Civil Engineer .....	172051	23.52	N/A	29.06	31.33	29.06	5.54
Architect/Surveyor .....	173031	8.06	N/A	N/A	15.82	15.82	7.76
Fisher/Hunter/Trapper ..	453011	7.25	N/A	N/A	10.65	10.65	3.40

<sup>a</sup> The baseline wage is the wage in the 2016 CNMI Prevailing Wage and Workforce Assessment Study (inflated to 2018 dollars) if the number of employers surveyed is three or more and the total number of employees is six or more. Otherwise, the baseline is \$7.25 per hour.

<sup>70</sup> U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics program, “State Occupational Employment and

Wage Estimates, Guam” (May 2017), [https://www.bls.gov/oes/current/oes\\_gu.htm](https://www.bls.gov/oes/current/oes_gu.htm).

<sup>71</sup> U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics

program, “National Occupational Employment and Wage Estimates, United States” (May 2017), [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm).

For accountants, the 2016 CNMI Prevailing Wage and Workforce Assessment Study provided an hourly wage of \$12.86 (inflated to 2018 dollars) based on survey responses from 165 employers with a total of 332 employees, meeting the Department’s baseline wage criteria of 3 employers and 6 employees. The survey sample size also met the Department’s prevailing wage criteria of 3 employers and 30 employees, so \$12.86 per hour was assigned. This results in zero wage difference between the baseline and the chosen prevailing wage for accountants in the CNMI.

For civil engineers, the 2016 CNMI Prevailing Wage and Workforce Assessment Study provided an hourly wage of \$23.52 (inflated to 2018 dollars) based on survey responses from 12 employers with a total of 26 employees, meeting the Department’s baseline criteria. However, this survey sample size falls short of the Department’s prevailing wage criteria of 3 employers with a total of 30 employees. Therefore, the 2016 CNMI Prevailing Wage and Workforce Assessment Study hourly wage for civil engineers was not chosen as the prevailing wage. Instead, the May 2017 OES wage for Guam of \$29.06 per hour was assigned as the prevailing

wage, resulting in an hourly wage difference of \$5.54 for civil engineers.

The CW–1 occupation labeled as architect/surveyor was assigned the SOC code for Surveying and Mapping Technicians. The 2016 CNMI Prevailing Wage and Workforce Assessment Study provided an hourly wage of \$8.06 (inflated to 2018 dollars) for Surveying and Mapping Technicians. The survey wage was based on responses from three employers with a total of eight employees, making it sufficient for the baseline estimate but not for the prevailing wage. The May 2017 OES hourly wage for Guam was also unavailable. Therefore, the scaled down May 2017 national OES wage of \$15.82 per hour was assigned as the prevailing wage, resulting in a wage difference of \$7.76.

Lastly, the CW–1 occupation labeled as fishers, hunters, and trappers was assigned the SOC code for Fishers and Related Fishing Workers. The 2016 CNMI Prevailing Wage and Workforce Assessment Study provided an hourly wage of \$6.60 for this SOC code, so the Department assigned \$7.25 per hour as the baseline. The hourly wage from the 2016 CNMI Prevailing Wage and Workforce Assessment Study was based on responses from 8 employers with a total of 19 employees, so the survey

sample size was not large enough to use as the prevailing wage. The May 2017 OES hourly wage for Guam was also unavailable. Therefore, the scaled down May 2017 national OES wage of \$10.65 was assigned as the prevailing wage, resulting in a wage difference of \$3.40. This process was repeated for all CW–1 occupation titles provided by USCIS.

Next, the Department used FY 2018 USCIS CW–1 beneficiary approvals data to calculate the percentage of the CW–1 workers in each occupation relative to the total number of CW–1 workers. The Department then multiplied the percentage for each occupation by the statutory limit of workers to estimate the total number of CW–1 workers in each occupation for each year of the analysis. The Department then calculated the number of U.S. workers in corresponding employment by multiplying the number of CW–1 beneficiaries in each occupation in FY 2018 by a ratio of citizen to noncitizen workers derived from CNMI Department of Commerce data on the number of citizen and noncitizen workers in highly aggregated occupational groups.<sup>72</sup> Exhibit 7 provides examples for the same CW–1 occupations as in Exhibit 6 to illustrate how the number of CW–1 workers and corresponding U.S. workers were estimated.

EXHIBIT 7—FY 2019 CORRESPONDING U.S. WORKERS IN CW–1 OCCUPATIONS  
[Example cases]

CW–1 occupation title	SOC code	FY 2018 CW–1 approvals	Percentage of FY 2018 approvals	Projected FY 2019 CW–1 workers	CNMI Department of Commerce category	Ratio of U.S. workers to CW–1 workers	Corresponding U.S. workers	Total affected workers
		(a)	(b)	(c) = 13,000 × (b)		(d)	(e) = (a) × (d)	(c) + (e)
Accountant .....	132011	287	3.09	401	Business and Financial Operations	1.35	387	788
Civil Engineer .....	172051	10	0.11	14	Architecture and Engineering .....	0.84	8	22
Architect/Surveyor .....	173031	6	0.06	8	Architecture and Engineering .....	0.84	5	13
Fisher/Hunter/Trapper ..	453011	19	0.20	27	Farming, Fishing, and Forestry .....	0.77	15	42

The Department estimated wage impacts for each occupation by multiplying the sum of the estimated number of CW–1 workers and corresponding U.S. workers in each occupation by the difference between the chosen prevailing hourly wage and the baseline wage, multiplied by 2,080 hours per year. For example, in the case of civil engineers, the Department estimated a wage increase of \$5.54 per hour, as shown in Exhibit 6. Exhibit 7 projects 14 CW–1 workers and 8 corresponding U.S. workers in FY 2019. To calculate the wage impacts for CW–1 workers resulting from the increase in

the prevailing wage for civil engineers, the Department multiplied the number of affected CW–1 workers (14) by the number of hours worked in 1 year (2,080) and by the change in the hourly wage (\$5.54). The result is an estimated increase in wages of \$161,257 in FY 2019 (= 14 workers × 2,080 hours × \$5.54).<sup>73</sup> For U.S. workers, the result is an estimated increase in wages of \$96,223 in FY 2019 (= 8 workers × 2,080 hours × \$5.54).

This calculation was performed for each CW–1 occupation in each year, and the total impacts were estimated by summing across all occupations in each

year. The annualized wage transfer over the 11.25-year period is estimated at \$31,599,130 (= \$18,192,270 to CW–1 workers + \$13,406,860 to U.S. workers) at a discount rate of 3 percent and \$32,221,562 (= \$18,816,920 to CW–1 workers + \$13,404,642 to U.S. workers) at a discount rate of 7 percent. The total wage transfer over the 11.25-year period is estimated at \$297,977,189 (= \$171,551,603 to CW–1 workers + \$126,425,586 to U.S. workers) at a discount rate of 3 percent and \$245,286,945 (= \$143,243,981 to CW–1 workers + \$102,042,965 to U.S. workers) at a discount rate of 7 percent.

<sup>72</sup> CNMI Department of Commerce, Statistical Yearbook 2017, Table 5.24 “Average Hourly Wages by Occupation and Citizenship, CNMI: 2016” at

<http://ver1.cnmicommerce.com/sy-2017-table-5-17-31-wage-survey/>.

<sup>73</sup> Calculations may not match due to rounding.



The wage impact estimates of this IFR are driven, in large part, by the statutory requirement that employers offer a wage that equals or exceeds the highest of the prevailing wage, or the Federal minimum wage, or the Commonwealth minimum wage. In the absence of a valid wage based on the 2016 CNMI Prevailing Wage and Workforce Assessment Study conducted by the CNMI Governor, the Department's estimates predominantly use the mean wage of workers similarly employed in Guam from the BLS OES survey, as

required by the statute, which are significantly higher than what employers in the CNMI are currently paying workers in the occupational classification. Additionally, beginning September 30, 2018, the minimum wage in the Commonwealth reached the Federal minimum wage of \$7.25 per hour, representing a \$0.20-cent increase over the Commonwealth's prior minimum wage of \$7.05 per hour. Thus, where the wage for any occupation based on the 2016 CNMI Prevailing Wage and Workforce Assessment Study

conducted by the CNMI Governor fell below \$7.25 per hour, the Department's estimates assume these employers would increase the rate of pay for workers to match current minimum wage requirements in the Commonwealth.

5. Summary of Costs and Transfer Payments

Exhibit 8 presents a summary of the costs and transfer payments associated with this IFR.<sup>74</sup>

EXHIBIT 8—ESTIMATED COSTS AND TRANSFER PAYMENTS  
[2018 dollars]

Fiscal year	Costs	Transfer payments		
		Total transfer payments	Transfer payments to CW-1 workers	Transfer payments to U.S. workers
2019 .....	\$4,359,067	\$42,286,653	\$28,877,022	\$13,409,631
2020 .....	3,930,868	41,175,998	27,766,367	13,409,631
2021 .....	3,775,905	40,065,343	26,655,712	13,409,631
2022 .....	3,620,948	38,954,589	25,545,058	13,409,631
2023 .....	3,465,984	37,844,034	24,434,403	13,409,631
2024 .....	3,156,064	35,622,725	22,213,094	13,409,631
2025 .....	2,846,144	33,401,415	19,991,784	13,409,631
2026 .....	2,535,763	31,180,106	17,770,475	13,409,631
2027 .....	2,225,842	28,958,796	15,549,165	13,409,631
2028 .....	1,915,922	26,737,487	13,327,856	13,409,631
2029 .....	1,605,547	24,516,178	11,106,547	13,409,631
2030,Q1 .....	365,405	4,155,414	903,007	3,352,408
Annualized, 3% discount rate, 11.25 years .....	3,086,620	34,794,484	21,387,623	13,406,860
Annualized, 7% discount rate, 11.25 years .....	3,190,028	35,522,023	22,117,381	13,404,642
Total, 3% discount rate, 11.25 years .....	29,106,568	328,109,108	201,683,522	126,425,586
Total, 7% discount rate, 11.25 years .....	24,284,121	270,411,736	168,638,772	102,042,965

6. Regulatory Alternatives

The Department considered two regulatory alternatives to the provisions in the IFR. The two alternatives differ from the IFR in one respect: The third option used to set the prevailing wage.

Under the IFR, if wage data are not available from the Governor's survey or the OES survey for Guam, the Department will base the prevailing wage on an adjusted national OES wage. Under the first regulatory alternative,

the third option would be the national OES wage without adjustment. To illustrate how prevailing wages would be determined under this regulatory alternative, Exhibit 9 presents the PWD for four occupations.

EXHIBIT 9—CNMI PREVAILING HOURLY WAGE UNDER REGULATORY ALTERNATIVE 1  
[Example cases]

CW-1 occupation title	SOC code	Baseline wage	CNMI survey wage	Guam OES wage	National OES wage	Assigned wage	Wage difference
Accountant .....	132011	\$12.86	\$12.86	\$22.23	\$37.46	\$12.86	\$0.00
Civil Engineer .....	172051	23.52	N/A	29.06	44.13	29.06	5.54
Architect/Surveyor .....	173031	8.06	N/A	N/A	22.28	22.28	14.22
Fisher/Hunter/Trapper ..	453011	7.25	N/A	N/A	15.00	15.00	7.75

The PWDs for accountants and civil engineers under this regulatory alternative are identical to those of the

IFR methodology. In contrast, the PWDs for architects/surveyors and fishers/hunters/trappers are higher due to the

fact that they are not scaled down to reflect the ratio of the mean wage in

<sup>74</sup>In addition to the costs and transfers estimated by the Department, the IFR is expected to cause deadweight loss (DWL). DWL occurs when a market operates at less than optimal equilibrium output, which happens anytime the conditions for a perfectly competitive market are not met. Causes of DWL include taxes, subsidies, externalities, labor

market interventions, price ceilings, and price floors. This IFR establishes a wage floor, which will increase compensation rates above the equilibrium level for some occupations. The higher cost of labor may lead to a decrease in the total number of labor hours that are purchased on the market. DWL is a function of the difference between the

compensation employers were willing to pay for the hours lost and the compensation employees were willing to accept for those hours. The extent of the DWL will largely depend on the elasticities of labor demand and labor supply in the CNMI.

Guam compared to the mean national wage.

The total impact of this regulatory alternative was calculated in the same manner as the calculations for the IFR. The annualized transfer over the 11.25-year period is estimated at \$37,945,227 (= \$21,376,630 to CW–1 workers + \$16,568,597 to U.S. workers) at a discount rate of 3 percent and \$38,676,475 (= \$22,110,619 to CW–1 workers + \$16,565,856 to U.S. workers) at a discount rate of 7 percent. The total

transfer over the 11.25-year period is estimated at \$357,820,363 (= \$201,579,856 to CW–1 workers + \$156,240,507 to U.S. workers) at a discount rate of 3 percent and \$294,425,028 (= \$168,317,291 to CW–1 workers + \$126,107,737 to U.S. workers) at a discount rate of 7 percent. As explained earlier in the preamble, the Department did not select this regulatory option because the Department concluded it would be inappropriate to require an employer to

pay a prevailing wage that is based only on the national wage for the SOC from the OES survey, without adjustment.

Under the second regulatory alternative considered by the Department, the third option used to set the prevailing wage would be the Federal minimum wage of \$7.25. To illustrate how prevailing wages would be determined under this regulatory alternative, Exhibit 10 presents the PWD for four occupations.

EXHIBIT 10—CNMI PREVAILING HOURLY WAGE UNDER REGULATORY ALTERNATIVE 2  
[Example cases]

CW–1 occupation title	SOC code	Baseline wage	CNMI survey wage	Guam OES wage	Federal minimum wage	Assigned wage	Wage difference
Accountant .....	132011	\$12.86	\$12.86	\$22.23	\$7.25	\$12.86	\$0.00
Civil Engineer .....	172051	23.52	N/A	29.06	7.25	29.06	5.54
Architect/Surveyor .....	173031	8.06	N/A	N/A	7.25	7.25	–0.81
Fisher/Hunter/Trapper ..	453011	7.25	N/A	N/A	7.25	7.25	0.00

The PWDs for accountants and civil engineers under this regulatory alternative are identical to those of the IFR methodology. In contrast, the PWDs for architects/surveyors and fishers/hunters/trappers are lower due to the fact that they are based on the Federal minimum wage rather than an adjusted national wage.

The total impact of this regulatory alternative was calculated in the same manner as the calculations for the IFR. The annualized transfer over the 11.25-year period is estimated at \$21,206,225 (= \$13,260,759 to CW–1 workers + \$7,945,466 to U.S. workers) at a discount rate of 3 percent and \$21,660,232 (= \$13,716,081 to CW–1 workers + \$7,944,151 to U.S. workers) at a discount rate of 7 percent. The total transfer over the 11.25-year period is estimated at \$199,972,952 (= \$125,047,868 to CW–1 workers + \$74,925,085 to U.S. workers) at a discount rate of 3 percent and \$164,888,722 (= \$104,413,798 to CW–1 workers + \$60,474,924 to U.S. workers) at a discount rate of 7 percent. The Department did not select this regulatory option because the Department concluded it would not prevent the employment of CW–1 workers from causing an adverse effect on the wages and working conditions of similarly employed U.S. workers.

*B. Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA) imposes certain requirements on Federal agency rules that are subject to the notice-and-comment requirements of the APA, 5

U.S.C. 553(b),<sup>75</sup> and that are likely to have a significant economic impact on a substantial number of small entities. This IFR is exempt from the notice-and-comment requirements of the APA because, as described earlier, the Workforce Act directs the Secretary to publish an IFR “[n]otwithstanding the requirements under sec. 553(b) of [the Administrative Procedure Act].” Public Law 115–218, sec. 3(b). Therefore, the requirements of the RFA applicable to notices of proposed rulemaking, 5 U.S.C. 603 (providing for an initial regulatory flexibility analysis), do not apply to this IFR. Accordingly, the Department is not required to either certify that the IFR would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis.

*C. Paperwork Reduction Act*

As part of its effort to streamline information collection, clarify statutory and regulatory requirements, and provide greater transparency and oversight of PWDs and TLCs in the context of the CW–1 program, the Department engages with the public and Federal agencies to provide them with an opportunity to comment on collections of information tools in accordance with the PRA (44 U.S.C. 3506(c)(2)(A)). In January 2019, the Department submitted an Information

Collection Requests (ICR) in connection with this IFR to the Office of Management and Budget (OMB) for which it obtained approval using emergency clearance procedures outlined at 5 CFR 1320.13, to create new information collection tools on which it will rely to administer the issuance of PWDs and TLCs in connection with the CW–1 program. OMB assigned a new OMB Control Number for this information collection, 1205–053X.

This process of engaging the public and other Federal agencies helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. See 44 U.S.C. 3501 *et seq.* In addition, notwithstanding any other provisions of law, no person must generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

In accordance with the PRA, the Department, is affording the public with notice and an opportunity to comment on these new information collection tools that are related to the CW–1 Program, and that are necessary to

<sup>75</sup> The Regulatory Flexibility Act, as amended, governs “any rule for which [a Federal] agency publishes a general notice of proposed rulemaking pursuant to sec. 553(b) of [the Administrative Procedure Act] or any other law.” 5 U.S.C. 601(2) (defining “rule,” for purposes of the RFA).

implement the requirements of this IFR. The information collection activities covered by this new OMB Control Number 1205–053X is required by 48 U.S.C. 1806 of the Workforce Act, and 20 CFR 655, subpart E. The Workforce Act provides that a petition to import a nonimmigrant worker under the CW–1 visa classification may not be approved by DHS unless the employer has received a TLC from the Department confirming that: (1) There are not sufficient U.S. workers in the CNMI who are able, willing, qualified, and available at the time and place needed to perform the services or labor involved in the petition; and (2) the employment of a nonimmigrant worker who is the subject of a petition will not adversely affect the wages and working conditions of similarly employed U.S. workers.

As mentioned above, the new OMB Control No. 1205–053X, includes the collection of information to be conducted through information collection tools, that include forms and record keeping requirements, on which the Department relies for determining prevailing wages and issuing TLCs in connection with the CW–1 program. Additionally, the new information collection tools permit employers to assure compliance with respect to the minimum terms and conditions associated with the PWD and TLC processes, which include the rights and obligations of CW–1 workers and workers in corresponding employment, in addition to information regarding record keeping requirements associated with the CW–1 program. Specifically, ETA has created new Form ETA–9141C, *Application for Prevailing Wage Determination* and new Form ETA–9142C, *CW–1 Application for Temporary Employment Certification*.

The information contained in the new Form ETA–9141C is the basis for the Secretary's determination of the appropriate prevailing wage that employers in the CNMI must pay in the hiring of a foreign worker, to make sure there is no adverse effect on U.S. workers' wages. Prior to submitting a requests to OFLC for a TLCs and, as needed, labor condition applications, employers must obtain a prevailing wage for the job opportunity based on the place of employment. In order to carry out the provisions of this IFR, the Department created under this ICR the collection of information on the Form ETA–9141C, to collect information from employers under the CW–1 program to establish a prevailing wage in the occupational classification and places of employment within the Commonwealth. This request must be electronically submitted unless the regulatory

exemptions, specified in the rule, apply, in which case the employer will be allowed to submit a PW via mail.

In addition, the Department has created the Form ETA–9142C, *CW–1 Application for Temporary Employment Certification*, and corresponding appendices which serve as the basis for the Secretary's certification that qualified U.S. workers are not available to perform the services or labor needed by the employer, and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of CW–1 workers. This certification is required before a petition for a CW–1 worker can be filed with and approved by DHS. This request must be filed electronically through the newly created OFLC FLAG system, unless the employer establishes inadequate access to the internet or requests that a special accommodation be made; under these exemptions, employers will be allowed to file the request by mail, and when necessary, with the assistance of the Department.

The Form ETA–9142C collects basic information related to the employer in the CNMI and the job opportunity in which it seeks to employ CW–1 workers, including, but not limited to, the job title and occupational classification, number of workers, period of employment, job duties and minimum requirements, and other material terms and conditions of the job offer. To ensure no adverse effect on the wages of similarly employed U.S. workers and that all work expected to be performed by CW–1 workers will be located within the Commonwealth, an employer must disclose on the Form ETA–9142C—and on Appendix B, if appropriate<sup>76</sup>—all places of employment (*i.e.*, worksites) and the wage rates to be paid to CW–1 workers at those worksites. The latter allows OFLC to compare the reported wage rates with the PWDs obtained by the employer for each of those places of employment. Where it is not practical to collect supporting documentation using one of the standard OMB-approved appendices, the newly created FLAG System will permit an employer to upload documentation in support of the application, required by this subpart at the time of filing, in an acceptable digitized format (*e.g.*, Adobe PDF, Microsoft Word, .TXT) to minimize employer reporting burden.

The Form ETA–9142C must also be filed electronically through the newly created OFLC FLAG system, unless the employer establishes inadequate access to the internet or requests that a special accommodation be made; under these

exemptions, employers will be allowed to file the request by mail, and when necessary, with the assistance of the Department. In preparing the Form ETA–9142C in the FLAG System, the employer will be provided with a series of electronic data validation checks and prompts to ensure each required field is completed and values entered on the form are valid and consistent with regulatory requirements. OFLC's website and the FLAG System's e-filing capability will include detailed instructions designed to help employers understand what each form collection item means, what kind of entries are required, and what other documentation or information is required to be attached in order for a complete Application for Temporary Employment Certification for the CW–1 Program to be submitted for processing by the NPC.

In addition to its requests for comments in connection with this IFR, the Department is seeking comments on the recordkeeping costs associated with this IFR and its implementation of Form ETA–9142C and its three appendices and accompanying general instructions. The Appendix A provides a standard format for an employer filing as a job contractor to disclose the name and contact information of its employer-client, as required by this IFR. The Appendix B requires an employer to use a standard format to disclose multiple places of employment and, if applicable, multiple wage offers for the job opportunity within the Commonwealth. And finally, employers and, if applicable, their authorized agents or attorneys, use Appendix C to attest to their compliance with all of the terms, conditions, and obligations of the CW–1 program.

To promote greater efficiency in issuing TLC decisions and minimize delays associated with employers filing CW–1 petitions with DHS, the Form ETA–9142C, Final Determination: CW–1 Temporary Labor Certification Approval, will be issued electronically to employers granted TLC by ETA. In circumstances where the employer or, if applicable, its authorized attorney or agent, is not able to receive the TLC documents electronically, ETA will send the certification documents printed on standard paper in a manner that ensures expedited delivery.

The information collection requirements associated with this rule are summarized as follows:

*Agency:* DOL–ETA.

*Type of Information Collection:* New.

*Title of the Collection:* CW–1 Temporary Labor Certification.

*Agency Form Number:* Form ETA-9142C; Form ETA-9141C; recordkeeping requirements.

*Affected Public:* Private Sector—businesses or other for-profits; non-profits.

*Total Estimated Number of Respondents:* Approximately 2,314.

*Form ETA-9142C:*

Estimated Number of Respondents filing electronically: Approximately 2,198

Estimated Number of Respondents filing by mail: Approximately 166

*Form ETA-9141C:*

Estimated Number of Respondents filing electronically: Approximately 2,198

Estimated Number of Respondents filing by mail: Approximately 116

*Record keeping:*

Estimated Number of Respondents that must comply with record keeping requirements: Approximately 2,314.

*Total Estimated Number of Responses:* Approximately 149,739 responses.

*Average Time per Response:* 46 minutes per Form ETA 9141 application and 1 hour and 50 minutes per Form ETA 9142C application materials; 20 minutes to comply with recordkeeping requirements.

*Total Estimated Annual Time Burden:* 73,987 hours.

*Total Estimated Other Costs Burden:* \$155,155.00.

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

This IFR has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA). 2 U.S.C. 1501 *et seq.* For the purposes of the UMRA, this IFR does not impose any federal mandate that may result in increased expenditures by State, local, or Tribal governments, or increased expenditures by the private sector, of more than \$100 million in any year.

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

This IFR would not be a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996, Public Law 104-121, 804, 110 Stat. 847, 872 (1996), 5 U.S.C. 804(2). OIRA has found that this rule is not likely to result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic or export markets.

#### *F. Executive Order 13132, Federalism*

This IFR does not have federalism implications because it would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, E.O. 13132, Federalism, requires no further agency action or analysis.

#### *G. Executive Order 13175, Indian Tribal Governments*

This IFR does not have “tribal implications” because it would 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. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

#### **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.

For the reasons stated in the preamble, the Department of Labor amends 20 CFR part 655 as follows:

#### **Title 20—Employees’ Benefits**

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

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

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 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); 29 U.S.C. 49k; Pub. L. 107-296, 116 Stat. 2135, as amended; Pub. L. 109-423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115-218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A 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).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

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; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

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. Add subpart E to read as follows:

#### **Subpart E—Labor Certification Process for Temporary Employment in the Commonwealth of the Northern Marianas Islands (CW-1 Workers)**

Sec.

655.400 Scope and purpose of this subpart.

655.401 Authority of the agencies, offices, and divisions in the Department of Labor.

655.402 Definition of terms.

655.403 Persons and entities authorized to file.

655.404 Requirements for agents.

655.405-655.409 [Reserved]

#### **Prefiling Procedures**

655.410 Offered wage rate and determination of prevailing wage.

655.411 Review of prevailing wage determinations.

655.412-655.419 [Reserved]

#### **CW-1 Application for Temporary Employment Certification Filing Procedures**

655.420 Application filing requirements.

655.421 Job contractor filing requirements.

655.422 Emergency situations.

655.423 Assurances and obligations of CW-1 employers.

655.424-655.429 [Reserved]

#### **Processing of an CW-1 Application for Temporary Employment Certification**

655.430 Review of applications.

655.431 Notice of Deficiency.

655.432 Submission of modified applications.

655.433 Notice of Acceptance.

655.434 Amendments to an application.

655.435-655.439 [Reserved]

#### **Post Acceptance Requirements**

655.440 Employer-conducted recruitment.

655.441 Job offer assurances and advertising contents.

655.442 Place advertisement with CNMI Department of Labor.

655.443 Contact with former U.S. workers.

655.444 Notice of posting requirement.

655.445 Additional employer-conducted recruitment.

655.446 Recruitment report.

655.447-655.449 [Reserved]

#### **Labor Certification Determinations**

655.450 Determinations.

- 655.451 Criteria for temporary labor certification.  
 655.452 Approved certification.  
 655.453 Denied certification.  
 655.454 Partial certification.  
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#### § 655.400 Scope and purpose of this subpart.

(a) *Purpose.* (1) A temporary labor certification (TLC) issued under this subpart reflects a determination by the Secretary of Labor (Secretary), pursuant to 48 U.S.C. 1806(d)(2)(A), that:

(i) There are not sufficient U.S. workers in the Commonwealth who are able, willing, and qualified and who will be available at the time and place needed to perform the services or labor for which an employer desires to hire foreign workers; and

(ii) The employment of the CNMI-Only Transitional Worker visa program (CW-1) nonimmigrant worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(2) This subpart describes the process by which the Department of Labor (Department or DOL) makes such a determination and certifies its determination to the Department of Homeland Security (DHS).

(b) *Scope.* This subpart sets forth the procedures governing the labor certification process for the employment of foreign workers in the CW-1 nonimmigrant classification, as defined in 48 U.S.C. 1806(d). It also establishes standards and obligations with respect to the terms and conditions of the temporary labor certification (TLC) with which CW-1 employers must comply, as well as the rights and obligations of CW-1 workers and workers in corresponding employment. Additionally, this subpart sets forth integrity measures for ensuring employers' continued compliance with the terms and conditions of the TLC.

#### § 655.401 Authority of the agencies, offices, and divisions in the Department of Labor.

The Secretary has delegated authority 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), to issue certifications and carry out other statutory responsibilities as required by 48 U.S.C. 1806. Determinations on a *CW-1 Application for Temporary Employment Certification* are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff members, e.g., a Certifying Officer (CO).

#### § 655.402 Definition of terms.

For purposes of this subpart:  
*Administrative Law Judge (ALJ)* means a person within the Department's Office of Administrative Law Judges appointed under 5 U.S.C. 3105.

*Agent* means a person or a legal entity, such as an association or other organization of employers, or an attorney for an association or other organization of employers, that:

(1) Is authorized to act on behalf of the employer for Temporary Labor Certification (TLC) purposes;

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

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

*Applicant (or U.S. applicant)* means a U.S. worker who is applying for a job opportunity for which an employer has filed a *CW-1 Application for Temporary Employment Certification*.

*Application for Prevailing Wage Determination* means the Office of Management and Budget (OMB)-approved Form ETA-9141C (or successor form) and the appropriate appendices, submitted by an employer to secure a prevailing wage determination (PWD) from the National Prevailing Wage Center (NPWC).

*CW-1 Application for Temporary Employment Certification* means the OMB-approved Form ETA-9142C (or successor form) and the appropriate appendices, a valid wage determination, as required by § 655.410, and all supporting documentation submitted by an employer to secure a TLC determination from the OFLC Administrator.

*Attorney* means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, 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, or DHS under 8 CFR 1003.101 or 292.3, may represent an employer under this subpart.

*Board of Alien Labor Certification Appeals (BALCA or Board)* means the permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge (Chief ALJ), and consisting of ALJs appointed pursuant to 5 U.S.C. 3105 and designated by the Chief ALJ to be members of BALCA.

*Certifying Officer or CO* means the person who makes determination on a *CW-1 Application for Temporary Employment Certification* filed under the CW-1 program. The OFLC Administrator is the national CO. Other COs may also be designated by the OFLC Administrator to make the determinations required under this subpart, including making PWDs.

*Chief Administrative Law Judge or Chief ALJ* means the chief official of the Department's Office of Administrative Law Judges or the Chief ALJ's designee.

*CNMI Department of Labor* means the executive Department of the Commonwealth Government that administers employment and job training activities for employers and U.S. workers in the Commonwealth.

*Commonwealth or CNMI* means the Commonwealth of the Northern Mariana Islands.

*Corresponding employment* means the employment of U.S. workers who are not CW-1 workers by an employer who has an approved *CW-1 Application for Temporary Employment Certification* in any work included in the approved job offer, or in any work performed by the CW-1 workers. To qualify as corresponding employment the work must be performed during the validity period of the *CW-1 Application for Temporary Employment Certification* and approved job offer, including any approved extension thereof.

*CW-1 Petition* means the U.S. Citizenship and Immigration Services (USCIS) Form I-129CW, *Petition for a CNMI-Only Nonimmigrant Transitional Worker*, a successor form, other form, or electronic equivalent, any supplemental information requested by USCIS, and

additional evidence as may be prescribed or requested by USCIS.

*CW-1 worker* means any foreign worker who is lawfully present in the Commonwealth and authorized by DHS to perform temporary labor or services under 48 U.S.C. 1806(d).

*Date of need* means the first date the employer requires services of the CW-1 workers as indicated on the *CW-1 Application for Temporary Employment Certification*.

*Department of Homeland Security or DHS* means the Federal Department having jurisdiction over certain immigration-related functions, acting through its component agencies, including USCIS.

*Employee* means 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. The terms employee and worker are used interchangeably in this subpart.

*Employer* means 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 Commonwealth 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 employees) with respect to a CW-1 worker or a worker in corresponding employment, as defined under the common law of agency; and

(3) Possesses, for purposes of filing a *CW-1 Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).

*Employer-client* means an employer that has entered into an agreement with a job contractor and that is not an affiliate, branch, or subsidiary of the job contractor, under which the job contractor provides services or labor to the employer-client on a temporary basis and will not exercise substantial, direct day-to-day supervision and

control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

*Employment and Training Administration or ETA* means the agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under for the administration and adjudication of a *CW-1 Application for Temporary Employment Certification* and related functions.

*Federal holiday* means a legal public holiday as defined at 5 U.S.C. 6103.

*Full-time* means 35 or more hours of work per week.

*Governor* means the Governor of the Commonwealth of the Northern Mariana Islands.

*Job contractor* means a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers that are not an affiliate, branch, or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying, and releasing the workers.

*Job offer* means the offer made by an employer or potential employer of CW-1 workers to both U.S. and CW-1 workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

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

*Joint employment* means that where two or more employers each have sufficient definitional indicia of being a joint employer of a worker under the common law of agency, they are, at all times, joint employers of that worker.

*Layoff* means any involuntary separation of one or more U.S. employees other than for cause.

*Long-term worker* means an alien who was admitted to the CNMI as a CW-1 nonimmigrant during fiscal year (FY) 2015, and who was granted CW-1 nonimmigrant status during each of FYs 2016 through 2018, as defined by DHS.

*National Prevailing Wage Center or NPWC* means that office within OFLC from which employers, agents, or attorneys who wish to file a *CW-1 Application for Temporary Employment Certification* receive a PWD.

*NPWC Director* means the OFLC official to whom the OFLC Administrator has delegated authority to

carry out certain NPWC operations and functions.

*National Processing Center (NPC)* means the office within OFLC in which the COs operate, and which are charged with the adjudication of *CW-1 Applications for Temporary Employment Certification*.

*NPC Director* means the OFLC official to whom the OFLC Administrator has delegated authority for purposes of certain NPC operations and functions.

*Occupational employment statistics (OES) survey* means the program under the jurisdiction of the Bureau of Labor Statistics (BLS) that reports annual wage estimates, including those for Guam, based on standard occupational classifications (SOCs).

*Offered wage* means the wage offered by an employer in the *CW-1 Application for Temporary Employment Certification* and job offer. The offered wage must equal or exceed the highest of the prevailing wage, or the Federal minimum wage, or the Commonwealth minimum wage.

*Office of Foreign Labor Certification or OFLC* means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities, including determinations related to an employer's request for an *Application for Prevailing Wage Determination* or *CW-1 Application for Temporary Employment Certification*.

*Place of employment* means the worksite (or physical location) where work under the *CW-1 Application for Temporary Employment Certification* and job offer actually is performed by the CW-1 workers and workers in corresponding employment.

*Prevailing wage (PW)* means the official wage issued by the NPWC on the Form ETA 9141C, *Application for Prevailing Wage Determination for the CW-1 Program*, or successor form. At least that amount must be paid to all CW-1 workers and U.S. workers in corresponding employment.

*Prevailing wage determination (PWD)* means the prevailing wage issued by the OFLC NPWC on the Form ETA-9141C, *Application for Prevailing Wage Determination for the CW-1 Program*, or successor form. The PWD is used in support of the *CW-1 Application for Temporary Employment Certification*.

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

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

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

*Strike means* 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* means an employer, agent, or attorney that is controlling and carrying on the business of a previous employer.

(1) Where an employer, agent, or attorney has violated 48 U.S.C. 1806 or the regulations in this subpart and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer, agent, or attorney 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, agent, or attorney is a successor in interest; no one factor is dispositive, and all the circumstances will be considered as a whole:

- (i) Substantial continuity of the same business operations;
- (ii) Use of the same facilities;
- (iii) Continuity of the work force;
- (iv) Similarity of jobs and working conditions;
- (v) Similarity of supervisory personnel;
- (vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;
- (vii) Similarity in machinery, equipment, and production methods;
- (viii) Similarity of products and services; and
- (ix) The ability of the predecessor to provide relief.

(2) 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 labor certification or TLC* means the certification made by the OFLC Administrator, based on the *CW-1 Application for Temporary Employment Certification*, job offer, and all supporting documentation, with respect to an employer seeking to file with DHS a visa petition to employ one or more foreign nationals as a *CW-1* worker.

*United States* means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, Guam,

the U.S. Virgin Islands, and the Commonwealth.

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

- (1) A citizen or national of the United States;
- (2) An alien lawfully admitted for permanent residence; or
- (3) A citizen of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau, who is eligible for nonimmigrant admission and is employment-authorized under the Compacts of Free Association between the United States and those nations.

*U.S. Citizenship and Immigration Services or USCIS* means the Federal agency within DHS that makes the determination whether to grant petitions filed by employers seeking *CW-1* workers to perform temporary work in the Commonwealth.

*Wages* mean all forms of cash remuneration to a worker by an employer in payment for labor or services.

*Work contract* means the document containing all the material terms and conditions of employment relating to wages, hours, working conditions, places of employment, and other benefits, including all assurances and obligations required to be included under this subpart. The contract between the employer and the worker may be in the form of a separate written document containing the advertised terms and conditions of the job offer. 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 required terms of the certified *CW-1 Application for Temporary Employment Certification* will be the work contract.

#### **§ 655.403 Persons and entities authorized to file.**

(a) *Persons authorized to file.* In addition to the employer, a request for a PWD or TLC under this subpart may be filed by an attorney or agent, as defined in § 655.402.

(b) *Employer's signature required.* Regardless of whether the employer is represented by an attorney or agent, the employer is required to sign the *CW-1 Application for Temporary Employment Certification* and all documentation submitted to the Department.

#### **§ 655.404 Requirements for agents.**

An agent filing a *CW-1 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 to the NPC at the time of filing the application.

#### **§§ 655.405–655.409 [Reserved]**

#### **Prefiling Procedures**

#### **§ 655.410 Offered wage rate and determination of prevailing wage.**

(a) *Offered wage.* (1) The employer must advertise the position to all potential workers at a wage that is at least the highest of the following:

- (i) The prevailing wage for the job opportunity obtained from the NPWC;
- (ii) The Federal minimum wage; or
- (iii) The Commonwealth minimum wage.

(2) The employer must offer and pay at least the wage provided in paragraph (a)(1) of this section to both its *CW-1* workers and its workers in corresponding employment. The issuance of a PWD under this section does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal or Commonwealth law.

(b) *Determinations—(1) Methods.* The OFLC Administrator will determine prevailing wages in the Commonwealth and occupational classification as follows:

(i) If the mean hourly wage for the occupational classification in the Commonwealth is reported by the Governor, annually, and meets the requirements set forth in paragraph (e) of this section, as determined by the OFLC Administrator, that wage must be the prevailing wage for the occupational classification;

(ii) If the OFLC Administrator has not approved a survey, as reported by the Governor, for the occupational classification under paragraph (b)(1)(i) of this section, and the BLS OES survey reports a mean wage paid to workers in the SOC in Guam, the prevailing wage must be the mean wage paid to workers in the SOC in Guam from the BLS OES survey; and

(iii) If the OFLC Administrator has not approved a survey, as reported by the Governor, for the occupational classification under paragraph (b)(1)(i) of this section and the BLS OES survey does not report the mean wage paid to workers in the SOC in Guam under paragraph (b)(1)(ii) of this section, the prevailing wage must be the mean wage paid to workers in the SOC in the United States from the BLS OES Survey, adjusted based on the ratio of the mean wage paid to workers in all SOCs in Guam compared to the mean wage paid to workers in all SOCs in the United States from the BLS OES survey.

(2) *Multiple occupations.* If the job duties on the *Application for Prevailing Wage Determination* do not fall within a single occupational classification, the NPC will determine the applicable prevailing wage based on the highest prevailing wage for all applicable occupational classifications.

(c) *Request for PWD.* (1) *Filing requirement.* An employer must electronically request and receive a PWD from the NPWC then electronically file the *CW-1 Application for Temporary Employment Certification* with the NPC.

(2) *Location and methods of filing—*  
(i) *Electronic filing.* The employer must file the *Application for Prevailing Wage Determination* and all required supporting documentation with the NPWC using the electronic method(s) designated by the OFLC Administrator. The NPWC will return without review any application submitted using a method other than the designated electronic method(s), unless the employer submits with the application a statement of the need to file by mail.

(ii) *Filing by mail.* Employers that are unable to file electronically, either due to lack of internet access or physical disability precluding electronic filing, may file the application by mail. The mailed application must include a statement indicating the need to file by mail. The NPWC will return, without review, mailed applications that do not contain such a statement. OFLC will publish the address for mailed applications in the instructions to Form ETA-9141C.

(d) *NPWC action.* The NPWC will provide the PWD, indicate the source of the PWD, and return the *Application for Prevailing Wage Determination* with its endorsement to the employer.

(e) *Wage survey reported by the Governor.* The OFLC Administrator will issue a prevailing wage for the occupational classification in the Commonwealth based on a wage survey reported by the Governor if all of the following requirements are met:

(1) The survey was independently conducted and issued by the Governor of the Commonwealth, including through any Commonwealth agency, Commonwealth college, or Commonwealth university;

(2) The survey provides the arithmetic mean of the wages of workers in the occupational classification in the Commonwealth;

(3) The surveyor either made a reasonable, good faith attempt to contact all employers in the Commonwealth employing workers in the occupation or conducted a randomized sampling of such employers;

(4) The survey includes the wages of at least 30 workers in the Commonwealth;

(5) The survey includes the wages of workers in the Commonwealth employed by at least three employers;

(6) The survey was conducted across industries that employ workers in the occupational classification;

(7) The wage reported in the survey includes all types of pay;

(8) The survey is based on wages paid to workers in the occupational classification not more than 12 months before the date the survey is submitted to the OFLC Administrator for consideration; and

(9) The Governor submits the survey to the OFLC Administrator, with specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey.

(f) *Review of wage survey reported by the Governor.* (1) If the OFLC Administrator finds the wage reported for any occupational classification not to be acceptable, the OFLC Administrator must inform the Governor in writing of the reasons the wage reported in the survey was not accepted.

(2) The Governor, after receiving notification from the OFLC Administrator that the wage reported in the survey it provided for consideration is not acceptable, may submit corrected wage data or conduct a new wage survey and submit revised wage data to the OFLC Administrator for consideration under this section.

(g) *Validity period.* The NPWC will specify the validity period of the prevailing wage, which in no event may be more than 365 days or fewer than 90 days from the date that the determination is issued.

(h) *Retention of documentation.* The employer must retain the PWD for 3 years from the date of issuance if not used in support of a TLC application or if it is used in support of a TLC application that is denied, and 3 years from the date on which the certification of the *CW-1 Application for Temporary Employment Certification* expires, whichever is later. The employer must submit the PWD to a CO if requested by a Notice of Deficiency (NOD), described in § 655.431, or audit, as described in § 655.470, or to any Federal Government Official performing an investigation, inspection, audit, or law enforcement function.

#### § 655.411 Review of prevailing wage determinations.

(a) *Request for review of PWDs.* Any employer desiring review of a PWD must make a written request for such review to the NPWC Director. The written request must be received by the NPWC Director within 7 business days from the date the PWD was issued. The request for review must clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include any materials submitted to the NPWC for purposes of securing the PWD.

(b) *NPWC review.* Upon the receipt of the written request for review, the NPWC Director will review the employer's request and accompanying documentation, including any supplementary material submitted by the employer, and after review must issue a Final Determination letter; that letter may:

(1) Affirm the PWD issued by the NPWC; or

(2) Modify the PWD.

(c) *Request for review by BALCA.* Any employer desiring review of the NPWC Director's decision on a PWD must make a written request to BALCA for review of the determination, with a copy simultaneously sent to the NPWC Director who issued the final determination. The written request must be received by BALCA within 10 business days from the date the Final Determination letter was issued.

(1) Upon receipt of a request for BALCA review, the NPWC will prepare an Appeal File and submit it to BALCA.

(2) The request for review, statements, briefs, and other submissions of the parties must contain only legal arguments and may refer to only the evidence that was within the record upon which the decision on the PWD by the NPWC Director was based.

(3) BALCA will handle appeals in accordance with § 655.461.

#### §§ 655.412 –655.419 [Reserved]

#### CW-1 Application for Temporary Employment Certification Filing Procedures

##### § 655.420 Application filing requirements.

An employer seeking to hire CW-1 workers must electronically file a *CW-1 Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator. This section provides the procedures an employer must follow when filing.

(a) *What to file.* An employer seeking a TLC must file a completed *CW-1 Application for Temporary Employment Certification* (Form ETA-9142C and the appropriate appendices and valid PWD),



and all supporting documentation and information required at the time of filing under this subpart. Applications that are incomplete at the time of submission will be returned to the employer without review.

(b) *Timeliness.* (1) Except as provided in paragraph (b)(2) of this section, a completed *CW-1 Application for Temporary Employment Certification* must be filed no more than 120 calendar days before the employer's date of need.

(2) If the employer is seeking a TLC to extend the employment of a *CW-1* worker, a completed *CW-1 Application for Temporary Employment Certification* must be filed no more than 180 calendar days before the date on which the *CW-1* status expires.

(c) *Location and methods of filing—*  
(1) *Electronic filing.* The employer must file the *CW-1 Application for Temporary Employment Certification* and all required supporting documentation with the NPC using the electronic method(s) designated by the OFLC Administrator. The NPC will return, without review, any application submitted using a method other than the designated electronic method(s), unless the employer submits with the application a statement of the need to file by mail or indicates that it already submitted such a statement to NPWC during the same fiscal year.

(2) *Filing by mail.* Employers that are unable to file electronically, either due to lack of internet access or physical disability precluding electronic filing, may file the application by mail. The mailed application must include a statement indicating the need to file by mail as indicated above. The NPC will return, without review, mailed applications that do not contain such a statement. OFLC will publish the address for mailed applications in the instructions to Form ETA-9142C.

(d) *Original signature and acceptance of electronic signatures.* An electronically filed *CW-1 Application for Temporary Employment Certification* must contain an electronic (scanned) copy of 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) or, in the alternative, use a verifiable electronic signature method, as directed by the OFLC Administrator. If submitted by mail, the *CW-1 Application for Temporary Employment Certification* must bear the original signature of the employer and, if applicable, the employer's authorized attorney or agent.

(e) *Requests for multiple positions.* An employer may request certification of more than one position on its *CW-1*

*Application for Temporary Employment Certification* as long as all *CW-1* workers will perform the same services or labor under the same terms and conditions, in the same occupation, during the same period of employment, and at a location (or locations) covered by the application.

(f) *Scope of application.* (1) A *CW-1 Application for Temporary Employment Certification* must be limited to places of employment within the Commonwealth.

(2) In a single application filing, an association or other organization of employers is not permitted to file a *CW-1 Application for Temporary Employment Certification* on behalf of more than one employer-member under the *CW-1* program.

(g) *Period of employment.* (1) Except as provided in paragraph (g)(2) of this section, the period of need identified in the *CW-1 Application for Temporary Employment Certification* must not exceed 1 year.

(2) If the employer is seeking TLC to employ a long-term *CW-1* worker, the period of need identified in the *CW-1 Application for Temporary Employment Certification* must not exceed 3 years.

(h) *Return of applications based on USCIS CW-1 cap notice.* (1) Except as provided in paragraph (h)(3) of this section, if USCIS issues a public notice stating that it has received a sufficient number of *CW-1* petitions to meet the statutory numerical limit on the total number of foreign nationals who may be issued a *CW-1* permit or otherwise granted *CW-1* status for the fiscal year, the OFLC Administrator must return without review any *CW-1 Applications for Temporary Employment Certification* with dates of need in that fiscal year received on or after the date that the OFLC Administrator provides the notice in paragraph (h)(2) of this section.

(2) The OFLC Administrator will announce the return of future *CW-1 Applications for Temporary Employment Certification* with dates of need in the fiscal year for which the cap is met with a notice on the OFLC's website. This notice will be effective on the date of its publication on the OFLC's website and will remain valid for the fiscal year unless:

(i) USCIS issues a public notice stating additional *CW-1* permits are available for the fiscal year; and

(ii) The OFLC Administrator publishes a new notice announcing that additional TLCs may be granted in the fiscal year.

(3) After the notice that OFLC will return future *CW-1 Applications for Temporary Employment Certification*,

the OFLC Administrator will continue to process *CW-1 Applications for Temporary Employment Certification* filed before the effective date of the suspension notice and will continue to permit the filing of *CW-1 Applications for Temporary Employment Certification* by employers who identify in the *CW-1 Application for Temporary Employment Certification* that the employment of all *CW-1* workers employed under the *CW-1 Application for Temporary Employment Certification* will be exempt from the statutory numerical limit on the total number of foreign nationals who may be issued a *CW-1* permit or otherwise granted *CW-1* status.

#### **§ 655.421 Job contractor filing requirements.**

(a) A job contractor may submit a *CW-1 Application for Temporary Employment Certification* on behalf of itself and that employer-client. By doing so, the Department deems the job contractor a joint employer.

(b) A job contractor must have separate contracts with each different employer-client. A single contract or agreement may support only one *CW-1 Application for Temporary Employment Certification* for each employer-client job opportunity in the Commonwealth.

(c) Either the job contractor or its employer-client may submit an *Application for Prevailing Wage Determination* describing the job opportunity to the NPWC. However, each of the joint employers is separately responsible for ensuring that the wage offer(s) listed in the *CW-1 Application for Temporary Employment Certification* and related recruitment at least equals the prevailing wage obtained from the NPWC, or the Federal or Commonwealth minimum wage, whichever is highest, and that all other wage obligations are met.

(d)(1) A job contractor that is filing as a joint employer with its employer-client must submit to the NPC a completed *CW-1 Application for Temporary Employment Certification* that clearly identifies the joint employers (the job contractor and its employer-client) and the employment relationship (including the places of employment), in accordance with instructions provided by the OFLC Administrator. The *CW-1 Application for Temporary Employment Certification* must bear the original signature of the job contractor and the employer-client or use a verifiable electronic signature method, consistent with the requirements set forth at § 655.420(d), and be accompanied by the contract or agreement establishing

the employers' relationships related to the workers sought.

(2) By signing the *CW-1 Application for Temporary Employment Certification*, each employer independently attests to the conditions of employment required of an employer participating in the CW-1 program and assumes full responsibility for the accuracy of the representations made in the application and for all of the responsibilities of an employer in the CW-1 program.

(e)(1) Either the job contractor or its employer-client may place the required advertisements and conduct recruitment as described in §§ 655.442 through 655.445. Also, either one of the joint employers may assume responsibility for interviewing applicants. However, both of the joint employers must sign the recruitment report that is submitted to the NPC meeting the requirement set forth in § 655.446.

(2) All recruitment conducted by the joint employers must satisfy the job offer assurance and advertising content requirements identified in § 655.441. Additionally, in order to fully inform applicants of the job opportunity and avoid potential confusion inherent in a job opportunity involving two employers, joint employer recruitment must clearly identify both employers (the job contractor and its employer-client) by name and must clearly identify the place(s) of employment where workers will perform labor or services.

(3)(i) Provided that all of the employer-clients' job opportunities are in the same occupation located in the Commonwealth and have the same requirements and terms and conditions of employment, including dates of employment, a job contractor may combine more than one of its joint employer employer-clients' job opportunities in a single advertisement. Each advertisement must fully inform potential workers of the job opportunity available with each employer-client and otherwise satisfy the job offer assurances and advertising content requirements identified in § 655.441. Such a shared advertisement must clearly identify the job contractor by name, the joint employment relationship, and the number of workers sought for each job opportunity, identified by employer-client names and locations (e.g., five openings with Employer-Client A (place of employment location), three openings with Employer-Client B (place of employment location)).

(ii) In addition, the advertisement must contain the following statement: "Applicants may apply for any or all of

the jobs listed. When applying, please identify the job(s) (by company and work location) you are applying to for the entire period of employment specified." If an applicant fails to identify one or more specific work location(s), that applicant is presumed to have applied to all work locations listed in the advertisement.

(f) If a TLC for the joint employers is granted, the Final Determination certifying the *CW-1 Application for Temporary Employment Certification* will be sent to both the job contractor and employer-client.

#### § 655.422 Emergency situations.

(a) *Waiver of PWD requirement prior to application filing.* The CO may waive the requirement to obtain a PWD, as required under § 655.410(c), prior to filing a *CW-1 Application for Temporary Employment Certification* for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the labor market and to make a final determination as required by § 655.450. The requirement to obtain a PWD prior to filing the *CW-1 Application for Temporary Employment Certification*, under § 655.410(c), is the only provision of this subpart which will be waived under these emergency situation procedures.

(b) *Employer requirements.* The employer requesting a waiver of the requirement to obtain a PWD must submit to the NPC a completed *Application for Prevailing Wage Determination*, a completed *CW-1 Application for Temporary Employment Certification*, and a statement justifying the waiver request. The employer's waiver request must include detailed information describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to an Act of God, or similar unforeseeable man-made catastrophic events (such as a hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside of the employer's control. Issues related to the CW-1 visa cap are not good and substantial cause for a waiver of the filing requirements. Further, a denial of a previously submitted *CW-1 Application for Temporary Employment Certification* or CW-1 petition with USCIS does not constitute good and substantial cause necessitating a waiver under this section.

(c) *Processing of emergency applications.* The CO will process the emergency *CW-1 Application for Temporary Employment Certification*, including the *Application for Prevailing Wage Determination for the CW-1 Program*, in a manner consistent with the provisions of this subpart and make a determination in accordance with § 655.450. The CO will notify the employer, if the application cannot be processed because, pursuant to paragraph (a) of this section, the request for emergency filing was not justified and/or the filing does not meet the requirements set forth in this subpart.

#### § 655.423 Assurances and obligations of CW-1 employers.

An employer employing CW-1 workers and/or workers in corresponding employment under a *CW-1 Application for Temporary Employment Certification* has agreed as part of the *CW-1 Application for Temporary Employment Certification* that it will abide by the following conditions with respect to its CW-1 workers and any workers in corresponding employment:

(a) *Rate of pay.* (1) The offered wage in the work contract equals or exceeds the highest of the prevailing wage, Federal minimum wage, or Commonwealth minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the *CW-1 Application for Temporary Employment Certification* granted by OFLC.

(2) The offered wage is not based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the work contract and the employer must demonstrate that they are normal and usual for non-CW-1 employers for the same occupation in the Commonwealth.

(4) An employer that pays on a piece-rate basis must demonstrate that the piece-rate is no less than the normal rate paid by non-CW-1 employers to workers performing the same activity in the Commonwealth. The average hourly piece-rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece-rate basis and at the end of the workweek the piece-rate does not result in average hourly piece-rate earnings during the workweek at least equal to

the amount the worker would have earned had the worker been paid at the offered hourly wage, then the employer must supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage for each hour worked.

(b) *Wages free and clear.* The payment requirements for wages in this section will be satisfied by the timely payment of such wages to the worker either in cash or in negotiable instrument payable at par. The payment must be made finally and unconditionally and "free and clear." The principles applied in determining whether deductions are reasonable and payments are received free and clear, and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(c) *Deductions.* The employer must make all deductions from the worker's paycheck required by law. The work contract must specify all deductions not required by law that the employer will make from the worker's pay; any such deductions not disclosed in the work contract are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker "kick backs" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: Those required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are contrary to law or from which the employer, agent, or recruiter, including any agents or employees of these entities or any affiliated person, derives any payment, rebate, commission, profit, or benefit

directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the *CW-1 Application for Temporary Employment Certification*.

(d) *Job opportunity is full time.* The job opportunity is a full-time position, consistent with § 655.402, and the employer must use a single workweek as its standard for computing wages due. An employee's workweek must be a fixed and regularly recurring period of 168 hours—7 consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) *Job qualifications and requirements.* Each job qualification and requirement must be listed in the work contract and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-CW-1 employers in the same occupation and in the Commonwealth. The employer's job qualifications and requirements imposed on U.S. workers must not be less favorable than the qualifications and requirements that the employer is imposing or will impose on CW-1 workers. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. A requirement means a term or condition of employment that a worker is required to accept in order to obtain the job opportunity. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification and/or requirement.

(f) *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 of employment specified in the work contract, 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. See the exception in paragraph (f)(1)(iv) of this section.

(i) For purposes of this paragraph (f), a workday means the number of hours in a workday as stated in the work contract. 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) In the event the worker begins working later than the start date of need specified in the application, 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 period, 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) = 472 hours  $\times$  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, the worker will not be required to work more than the number of hours specified in the work contract for a workday but 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 CW-1 worker less employment than that required under this paragraph (f)(1)(iv), 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 of the work contract period if each workday did not consist of a full number of hours of work time as specified in the work contract.

(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 offered wage, whichever is higher, to calculate the amount due under the guarantee in accordance with paragraph (f)(1) of this section.

(3) *Failure to work.* Any hours the worker fails to work, up to a maximum of the number of hours specified in the work contract for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (f)(1) of this section, and all hours of work actually performed (including

voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this subpart.

(g) *Impossibility of fulfillment.* 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, or similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control that makes the fulfillment of the work contract impossible, the employer may terminate the work contract with the approval of the CO. In the event of such termination, the employer must fulfill a three-fourths guarantee, as described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the work contract or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the CW-1 worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with immigration laws, as applicable. If a transfer is not affected, the employer must 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 CW-1 employer, whichever the worker prefers.

(h) *Frequency of pay.* The employer must state in the work contract the frequency with which the worker will be paid, which must be at least every 2 weeks. Employers must pay wages when due.

(i) *Earnings statements.* (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: Records showing the nature, amount, and location(s) 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 in paragraph (f) of this section); the hours actually worked each day by the worker; if the number of hours worked by the worker is less than the number of hours offered, the reason(s) the worker did not work; 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 or additions made to the worker's wages.

(2) The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for each workweek in the pay period;

(ii) The worker's hourly rate or piece-rate of pay;

(iii) For each workweek in the pay period the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (f) of this section, separate from any hours offered over and above the guarantee);

(iv) For each workweek in the pay period the hours actually worked by the worker;

(v) An itemization of all deductions made from or additions made to the worker's wages;

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

(vii) The beginning and ending dates of the pay period; and

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

(j) *Transportation and visa fees—(1)(i) Transportation to the place of employment.* The employer must provide or reimburse the worker for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the United States, including another part of the Commonwealth, or abroad, to the place of employment if the worker completes 50 percent of the period of employment covered by the work contract (not counting any extensions). The employer may arrange and pay for the transportation and subsistence directly, advance at a minimum the most economical and reasonable common carrier cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker for the reasonable costs incurred by the worker. When it is the prevailing practice of non-CW-1 employers in the occupation and in the Commonwealth to do so or when the employer extends such benefits to similarly situated CW-1 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 place of employment from such a distance that the worker is not reasonably able to return to their residence each day. 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 must be at least the amount permitted in § 655.173. Where the employer will reimburse the reasonable costs incurred by the worker, it must keep accurate and adequate records of: The costs of transportation and subsistence incurred by the worker; the amount reimbursed; and the date(s) of reimbursement. Note that the Fair Labor Standards Act applies independently of the CW-1 requirements and imposes obligations on employers regarding payment of wages.

(ii) *Transportation from the place of employment.* If the worker completes the period of employment covered by the work contract (not counting any extensions), or if the worker is dismissed from employment for any reason by the employer before the end of the period, and the worker has no immediate subsequent CW-1 employment, the employer must provide or pay at the time of departure for the worker's cost of return 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 that has not agreed in the work contract to provide or pay for the worker's transportation from the former employer's place of employment to such subsequent employer's place of employment, the former employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the work contract to provide or pay for the worker's transportation from the former employer's place of employment to such subsequent employer's place of employment, the subsequent employer must provide or pay for such expenses.

(iii) *Employer-provided transportation.* All employer-provided transportation must comply with all applicable Federal and Commonwealth laws and regulations including, but not limited to, vehicle safety standards, driver licensure requirements, and vehicle insurance coverage.

(2) The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the CW-1 worker, but not for passport expenses or

other charges primarily for the benefit of the worker.

(k) *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.

(l) *Disclosure of work contract.* The employer must provide to a CW-1 worker outside of the United States no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the work contract including any subsequent approved modifications. For a CW-1 worker changing employment from a CW-1 employer to a subsequent CW-1 employer, the copy must be provided no later than the time an offer of employment is made by the subsequent CW-1 employer. The disclosure of all documents required by this paragraph (l) must be provided in a language understood by the worker. At a minimum, the work contract must contain all of the provisions required to be included 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 certified CW-1 *Application for Temporary Employment Certification* will be the work contract.

(m) *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, discharge, or in any manner discriminate against, any person who has, related to the CW-1 program:

(1) Filed a complaint under or related to any applicable Federal or Commonwealth laws and regulations;

(2) Instituted or caused to be instituted any proceeding under or related to any applicable Federal or Commonwealth laws and regulations;

(3) Testified or is about to testify in any proceeding under or related to any applicable Federal or Commonwealth laws and regulations;

(4) Consulted with a workers' center, community organization, labor union, legal assistance program, or an attorney on matters related to any applicable Federal or Commonwealth laws and regulations; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by any applicable Federal or Commonwealth laws and regulations.

(n) *Comply with the prohibitions against employees paying fees.* The employer and its attorney, agents, or

employees have not sought or received payment of any kind from the worker for any activity related to obtaining CW-1 labor certification or employment, including payment of the employer's attorney or agent fees, application and CW-1 *Petition* fees, recruitment costs, or any fees attributed to obtaining the approved CW-1 *Application for Temporary Employment Certification*. For purposes of this paragraph (n), 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. All wages must be paid free and clear. This paragraph (n) does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(o) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in recruitment of CW-1 workers to seek or receive payments or other compensation from prospective workers. The contract must include the following statement: "Under this agreement, [name of agent, recruiter] and any agent of or employee of [name of agent or recruiter] are prohibited from seeking or receiving payments from any prospective employee of [employer name] at any time, including before or after the worker obtains employment. Payments include but are not limited to, any direct or indirect fees paid by such employees for recruitment, job placement, processing, maintenance, attorneys' fees, agent fees, application fees, or petition fees."

(p) *Prohibition against preferential treatment of foreign workers.* 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 CW-1 workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's CW-1 workers. This does not relieve the employer from providing to CW-1 workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(q) *Nondiscriminatory hiring practices.* The job opportunity is open to any qualified U.S. worker as defined in § 655.402, regardless of race, color, national origin, age, sex, religion,

disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be 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 hired workers and rejected applicants as required by § 655.456.

(r) *Recruitment requirements.* The employer must conduct all required recruitment activities, including any additional employer-conducted recruitment activities as directed by the CO, and as specified in §§ 655.442 through 655.445.

(s) *No strike or lockout.* There is no strike or lockout at any of the employer's place(s) of employment within the Commonwealth for which the employer is requesting CW-1 certification at the time the CW-1 *Application for Temporary Employment Certification* is filed.

(t) *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 CW-1 *Application for Temporary Employment Certification* in the Commonwealth within the period beginning 270 calendar days before the date of need and through the end of the TLC's period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all CW-1 workers are laid off before any U.S. worker in corresponding employment.

(u) *No work performed outside the Commonwealth and job opportunity.* The employer must not place any CW-1 workers employed under the approved CW-1 *Application for Temporary Employment Certification* outside the Commonwealth or in a job opportunity not listed on the approved CW-1 *Application for Temporary Employment Certification*.

(v) *Abandonment/termination of employment.* Upon the separation from employment of any worker employed under the CW-1 *Application for Temporary Employment Certification* or workers in corresponding employment, if such separation occurs before the end date of the employment period specified in the CW-1 *Application for Temporary Employment Certification*, the employer must notify OFLC in writing of the separation from employment not later than 2 working days after such separation is discovered by the employer. An abandonment or abandonment is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. If the

separation is due to the voluntary abandonment of employment by the CW-1 worker or worker in corresponding employment or is terminated for cause, and the employer provides appropriate notification specified under this paragraph (v), the employer will not be responsible for providing or paying for the subsequent transportation and subsistence costs of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (f) of this section.

(w) *Compliance with applicable laws.* During the period of employment specified on the CW-1 Application for Temporary Employment Certification, the employer must comply with all applicable Federal and Commonwealth employment-related laws and regulations, including health and safety laws. This includes compliance with 18 U.S.C. 1592(a), with respect to prohibitions against employers, the employer's agents, or their attorneys knowingly holding, destroying or confiscating workers' passports, visas, or other immigration documents.

#### §§ 655.424–655.429 [Reserved]

#### Processing of an CW-1 Application for Temporary Employment Certification

##### § 655.430 Review of applications.

(a) *NPC review.* The CO will review the CW-1 Application for Temporary Employment Certification for compliance with all applicable program requirements, including compliance with the requirements set forth in this subpart, and make a decision as to whether to issue a NOD under § 655.431 or a Notice of Acceptance (NOA) under § 655.433.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO to an employer requiring a response will be sent electronically or via first class mail using the address, including electronic mail address, provided on the CW-1 Application for Temporary Employment Certification. The employer's response to such a notice or request must be filed electronically or via first class mail. The employer's response must be filed electronically or postmarked by the date due or the next business day if the due date falls on a Saturday, Sunday, or Federal Holiday.

(c) *Information dissemination.* OFLC may forward, to DHS or any other Federal Government Official performing an investigation, inspection, audit, or law enforcement function, information OFLC receives in the course of processing a request for a CW-1 Application for Temporary Employment

Certification or of administering program integrity measures such as audits.

##### § 655.431 Notice of Deficiency.

(a) *Notification.* If the CO determines the CW-1 Application for Temporary Employment Certification contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will issue a NOD to the employer and, if applicable, the employer's attorney or agent.

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

- (1) State the reason(s) the CW-1 Application for Temporary Employment Certification fails to meet the criteria for acceptance;

- (2) Offer the employer an opportunity to submit a modified CW-1 Application for Temporary Employment Certification within 10 business days from the date of the NOD, and state the modification that is required for the CO to issue a NOA; and

- (3) State that if the employer does not comply with the requirements of § 655.432 for submitting a modified application, the CO will deny the CW-1 Application for Temporary Employment Certification.

##### § 655.432 Submission of modified applications.

(a) *Review of a modified CW-1 Application for Temporary Employment Certification.* Upon receipt of a response to a NOD, including any modifications, the CO will review the response. The CO may issue one or more additional NODs before issuing a decision. The employer's failure to comply with a NOD, including not responding in a timely manner or not providing all required documentation, will result in a denial of the CW-1 Application for Temporary Employment Certification.

(b) *Acceptance of a modified CW-1 Application for Temporary Employment Certification.* If the CO accepts the modification(s) to the CW-1 Application for Temporary Employment Certification, the CO will issue a NOA to the employer and, if applicable, the employer's attorney or agent.

(c) *Denial of modified CW-1 Application for Temporary Employment Certification.* If the modified CW-1 Application for Temporary Employment Certification does not cure the deficiencies cited in the NOD(s) or otherwise fails to satisfy the criteria required for certification, the CO will, at its discretion, either send a second NOD or deny the CW-1 Application for Temporary Employment Certification in accordance with the labor certification determination provisions in § 655.453.

(d) *Appeal from denial of modified CW-1 Application for Temporary*

*Employment Certification.* The procedures for appealing a denial of a modified CW-1 Application for Temporary Employment Certification are the same as for appealing the denial of a nonmodified CW-1 Application for Temporary Employment Certification, outlined in § 655.461.

(e) *Post acceptance modifications.* Notwithstanding the decision to accept the CW-1 Application for Temporary Employment Certification, the CO may require modifications to the CW-1 Application for Temporary Employment Certification at any time before the final determination to grant or deny the CW-1 Application for Temporary Employment Certification if the CO determines that the job offer does not contain the minimum benefits, wages, and working conditions set forth in § 655.441. The employer must make such modifications, or the application will be denied under § 655.453. The employer must provide all workers recruited in connection with the job opportunity in the CW-1 Application for Temporary Employment Certification with a copy of the modified CW-1 Application for Temporary Employment Certification, as approved by the CO, no later than the date work commences.

##### § 655.433 Notice of Acceptance.

(a) *Notification.* When the CO determines the CW-1 Application for Temporary Employment Certification contains no errors or inaccuracies, and meets the requirements set forth in this subpart, the CO will issue a NOA to the employer and, if applicable, the employer's attorney or agent.

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

- (1) Direct the employer to engage in recruitment of U.S. workers as provided in §§ 655.442 through 655.444, including any additional recruitment ordered by the CO under § 655.445;

- (2) State that such employer-conducted recruitment must begin within 14 calendar days from the date the NOA is issued, consistent with § 655.440(b);

- (3) Require the employer to submit a report of its recruitment efforts, by the date required by the CO in the NOA, as specified in § 655.446; and

- (4) Advise the employer that failure to submit a complete recruitment report by the deadline will lead to denial of the application.

##### § 655.434 Amendments to an application.

(a) *Increases in number of workers.* The CW-1 Application for Temporary Employment Certification may be amended at any time before the CO's certification determination to increase

the number of workers requested in the initial *CW-1 Application for Temporary Employment 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 employer demonstrates that the need for additional workers could not have been foreseen and is wholly outside of the employer's control. All requests to increase the number of workers must be made in writing and will not be effective until approved by the CO. Upon acceptance of an amendment, the employer must promptly provide copies of any approved amendments to all U.S. workers recruited and hired under the original job offer.

(b) *Minor changes to the period of employment.* The *CW-1 Application for Temporary Employment Certification* may be amended at any time before the CO's certification determination to make minor changes (meaning a change of up to 14 calendar days) in the total period of employment, without requiring an additional recruitment period for U.S. workers. Changes will not be effective until submitted in writing and approved by 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 is wholly outside of the employer's control. The CO will deny any request to change the period of employment where the total amended period of employment will exceed the maximum applicable duration permitted under § 655.420(g). Upon acceptance of an amendment, the employer must promptly provide copies of any approved amendments to all U.S. workers recruited and hired under the original job offer.

(c) *Other minor amendments to the CW-1 Application for Temporary Employment Certification.* The employer may request other minor amendments to the *CW-1 Application for Temporary Employment Certification* at any time before the CO's certification determination is issued. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into

account the effect of the changes on the underlying labor market test for the job opportunity. All requests for minor changes must be made in writing and will not be effective until approved by the CO. Upon acceptance of an amendment, the employer must promptly provide copies of any approved amendments to all U.S. workers recruited and hired under the original job offer.

(d) *Amendments after certification are not permitted.* After the CO has made a determination to certify the *CW-1 Application for Temporary Employment Certification*, the employer may no longer request amendments.

#### §§ 655.435–655.439 [Reserved]

#### Post Acceptance Requirements

##### § 655.440 Employer-conducted recruitment.

(a) *Employer obligations.* Employers must conduct recruitment of U.S. workers to ensure that there are not qualified U.S. workers who will be available for the positions listed in the *CW-1 Application for Temporary Employment Certification*.

(b) *Period to begin employer-conducted recruitment.* Unless otherwise instructed by the CO, the employer must begin the recruitment required in §§ 655.442 through 655.445 within 14 calendar days from the date the NOA is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.446.

(c) *Interviewing U.S. workers.* Employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Employers cannot provide potential *CW-1* workers with more favorable treatment with respect to the requirement for, and conduct of, interviews.

(d) *Qualified and available U.S. workers.* The employer must consider all U.S. applicants for the job opportunity and must hire all U.S. applicants who are qualified and who will be available for the job opportunity. U.S. applicants may be rejected only for lawful, job-related reasons, and those not rejected on this basis will be hired.

(e) *Recruitment report.* The employer must prepare a recruitment report meeting the requirements of § 655.446, by the date specified by the CO in the NOA.

##### § 655.441 Job offer assurances and advertising contents.

(a) *General.* All recruitment conducted under §§ 655.442 through 655.445 in connection with an *CW-1 Application for Temporary Employment Certification* must contain terms and conditions of employment that are not less favorable than those offered to the *CW-1* workers and must comply with the assurances applicable to job offers as set forth in § 655.423.

(b) *Contents.* All advertising must contain the following information:

(1) The employer's name and contact information;

(2) A statement that the job opportunity is a temporary, full-time position and identify the job title and total number of job openings the employer intends to fill;

(3) A description of the job opportunity with sufficient information to apprise applicants of the services or labor to be performed, including the job duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity;

(4) The place(s) of 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;

(5) The wage that the employer is offering, intends to offer or will provide to the *CW-1* workers or, in the event that there are multiple wage offers, the range of applicable wage offers, each of which must equal or exceed the highest of the prevailing wage or the Federal or Commonwealth minimum wage;

(6) If applicable, a statement that overtime will be available to the worker and specify the wage offer(s) for working any overtime hours;

(7) The frequency with which the worker will be paid as required by § 655.423(h);

(8) A statement that the employer will make all deductions from the worker's paycheck required by law, and must specify any deductions the employer intends to make from the worker's paycheck which are not required by law, including, if applicable, any deductions for the reasonable cost of board, lodging, or other facilities;

(9) A statement summarizing the three-fourths guarantee as required by § 655.423(f);

(10) A statement that transportation and subsistence will be provided to the worker while traveling from the worker's origin to the place of employment as will the return transportation and subsistence at the

conclusion of the job opportunity, as required by § 655.423(j)(1);

(11) If applicable, a statement that daily transportation to and from the place(s) of employment will be provided by the employer;

(12) If applicable, a statement that the employer will provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned, in accordance with § 655.423(k);

(13) If applicable, any board, lodging, or other facilities the employer will offer to workers or intends to assist workers in securing;

(14) If applicable, a statement indicating that on-the-job training will be provided to the worker; and

(15) A statement that directs applicants to apply for the job opportunity directly with the employer, and that indicates at least two verifiable methods by which applicants may apply for the job opportunity, one of which must be via electronic means, and that provides the days and hours during which applicants may be interviewed for the job opportunity.

**§ 655.442 Place advertisement with CNMI Department of Labor.**

(a) The employer must place an advertisement with the CNMI Department of Labor for a period of 21 consecutive calendar days satisfying the requirements set forth in § 655.441.

(b) Documentation of this step must include:

(1) Either printouts of web pages in which the advertisement appeared on the CNMI Department of Labor job listing system, or other verifiable evidence from the CNMI Department of Labor containing the text of the advertisement; and

(2) The dates of publication demonstrating compliance with the requirement of this section.

**§ 655.443 Contact with former U.S. workers.**

The employer must contact (by mail or other effective means) its former U.S. workers, including those who have been laid off within 270 calendar days before the date of need, employed by the employer in the occupation at the place(s) of employment during the previous year (except those who were dismissed for cause or who abandoned the place(s) of employment), provide a copy of the *CW-1 Application for Temporary Employment Certification*, and solicit their return to the job. This contact must occur during the period of time that the job offer is being advertised on the CNMI Department of Labor's job listing system under

§ 655.442. The employer must retain documentation sufficient to prove such contact in accordance with § 655.456. An employer has no obligation to contact U.S. workers it terminated for cause or who abandoned employment at any time during the previous year, if the employer provided timely notice to the NPC of the termination or abandonment in the manner described in § 655.423(v).

**§ 655.444 Notice of posting requirement.**

The employer must post a copy of the *CW-1 Application for Temporary Employment Certification* in at least two conspicuous locations at the place(s) of employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the CW-1 workers. Electronic posting, such as displaying an electronic copy of the *CW-1 Application for Temporary Employment Certification* prominently on any internal or external website that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. The notice must be posted for a period of 21 consecutive calendar days. The employer must maintain proof the *CW-1 Application for Temporary Employment Certification* was posted and identify where and during what period of time it was posted in accordance with § 655.456.

**§ 655.445 Additional employer-conducted recruitment.**

(a) *Requirement to conduct additional recruitment.* The employer may be instructed by the CO to conduct additional reasonable recruitment. Such recruitment may be required at the discretion of the CO where the CO has determined that there is a likelihood that U.S. workers who are qualified will be available for the work.

(b) *Nature of the additional employer-conducted recruitment.* The CO will describe the precise number and nature of the additional recruitment efforts. Additional recruitment may include, but is not limited to, advertising the job offer on the employer's website or another electronic job search website; advertising with community-based organizations, local unions, or trade unions; or other advertising using a professional, trade, or other publication where such a publication is appropriate for the workers likely to apply for the job opportunity. When assessing the appropriateness of a particular recruitment method, the CO will

consider the cost of the additional recruitment and the likelihood that the additional recruitment method(s) will identify qualified and available U.S. workers.

(c) *Proof of the additional employer-conducted recruitment.* The CO will specify the documentation or other supporting evidence that must be retained by the employer as proof that the additional recruitment requirements were met. Documentation must be retained as required in § 655.456.

**§ 655.446 Recruitment report.**

(a) *Requirements of the recruitment report.* No fewer than 2 calendar days after the last date on which the last advertisement appeared, as required by the NOA issued under § 655.433, the employer must prepare, sign, and date a recruitment report. Where recruitment was conducted by a job contractor or its employer-client, both joint employers must sign the recruitment report in accordance with § 655.421(e)(1). The recruitment report must be submitted to the NPC, by the date specified in the NOA, and contain the following information:

- (1) The name of each recruitment activity or source;
- (2) 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's application. The employer must clearly indicate whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined;
- (3) Confirmation that the advertisement was posted on the CNMI Department of Labor's job listing system and the dates of advertising;
- (4) Confirmation that former U.S. employees were contacted, if applicable, and by what means and the date(s) of contact;
- (5) Confirmation the employer posted the availability of the job opportunity to all employees in the job classification and area in which the work will be performed by the CW-1 workers and the dates of advertising;
- (6) If applicable, confirmation that additional recruitment was conducted as directed by the CO and the date(s) of advertising; and
- (7) If applicable, for each U.S. worker who applied for the position but was not hired, the lawful job-related reason(s) for not hiring the U.S. worker.

(b) *Duty to update and retain the recruitment report.* The employer must update the recruitment report throughout the recruitment period. In a joint employment situation, either the



job contractor or the employer-client may update the recruitment report throughout the recruitment period. The employer must retain the recruitment report as required in § 655.456.

**§§ 655.447–655.449 [Reserved]**

**Labor Certification Determinations**

**§ 655.450 Determinations.**

Except as otherwise noted in this section, the OFLC Administrator and CO(s), by virtue of delegation from the OFLC Administrator, have the authority to certify or deny *CW-1 Applications for Temporary Employment Certification*. The CO will certify the application only if the employer has met all the requirements of this subpart, including the criteria for certification in § 655.451, thus demonstrating that there is an insufficient number of U.S. workers in the Commonwealth who are able, willing, qualified and who will be available at the time and place of the job opportunity for which certification is sought and that the employment of the *CW-1* workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

**§ 655.451 Criteria for temporary labor certification.**

(a) The criteria for TLC include whether the employer has complied with all of the requirements of this subpart, which are required to grant the labor certification.

(b) In determining whether there are insufficient U.S. workers in the Commonwealth to fill the employer's job opportunity, the CO will count as available any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, but who was rejected by the employer for other than a lawful job-related reason. In making this determination, the CO will also consider the employer's contacts with its former U.S. workers, including workers that have been laid off within 270 calendar days before the date of need.

**§ 655.452 Approved certification.**

If the TLC is granted, the CO will send a Final Determination notice and a copy of the certified *CW-1 Application for Temporary Employment Certification* to the employer and a copy, if applicable, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 655.420(c), the CO will send the Final Determination notice and a copy of the certified *CW-1 Application for Temporary Employment Certification* by first class mail. The CO

will send the certified *CW-1 Application for Temporary Employment Certification*, including approved modifications, on behalf of the employer, directly to USCIS using an electronic method(s) designated by the OFLC Administrator. The employer must retain a copy of the certified *CW-1 Application for Temporary Employment Certification*, including the original signed Appendix C, as required by § 655.456.

**§ 655.453 Denied certification.**

If an electronically filed TLC is denied, the CO will send the Final Determination notice to the employer and a copy, if applicable, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 655.420(c), the CO will send the Final Determination notice by first class mail. The Final Determination notice will:

(a) State the reason(s) certification is denied, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request administrative review of the denial under § 655.461; and

(c) State that if the employer does not request administrative review in accordance with § 655.461, the denial is final, and the Department will not accept any appeal on that *CW-1 Application for Temporary Employment Certification*.

**§ 655.454 Partial certification.**

The CO may issue a partial certification, reducing either the period of need or the number of *CW-1* workers or both, based upon information the CO receives during the course of processing the *CW-1 Application for Temporary Employment Certification*, an audit, or otherwise. The number of workers certified will be reduced by one for each U.S. worker who is able, willing, and qualified, and who will be available at the time and place needed and who has not been rejected for lawful, job-related reasons, to perform the labor or services. If a partial labor certification is issued, the CO will send the Final Determination notice approving partial certification using the procedures at § 655.452.

The Final Determination notice will:

(a) State the reason(s) the period of employment or the number of *CW-1* workers requested has been reduced, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request administrative review of the partial certification under § 655.461; and

(c) State that if the employer does not request administrative judicial review in accordance with § 655.461, the partial certification is final, and the Department will not accept any appeal on that *CW-1 Application for Temporary Employment Certification*.

**§ 655.455 Validity of temporary labor certification.**

(a) *Validity period.* A TLC is valid only for the period of employment as approved on the *CW-1 Application for Temporary Employment Certification*. The certification expires after the last day of authorized employment, including any approved extensions thereof.

(b) *Scope of validity.* A TLC is valid only for the number of *CW-1* positions, the places of employment located in the Commonwealth, the job classification and specific services or labor to be performed, and the employer(s) specified on the approved *CW-1 Application for Temporary Employment Certification*, including any approved modifications. The TLC may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

**§ 655.456 Document retention requirements for *CW-1* employers.**

(a) *Entities required to retain documents.* All *CW-1* employers filing a *CW-1 Application for Temporary Employment Certification* are required to retain the documents and records establishing compliance with this subpart, including but not limited to those specified in paragraph (c) of this section.

(b) *Period of record retention.* The employer must retain records and documents for 3 years from the date on which the certification of the *CW-1 Application for Temporary Employment Certification* expires, or 3 years from the date of the final determination if the *CW-1 Application for Temporary Employment Certification* is denied, or 3 years from the date the Department receives the request for withdrawal of a *CW-1 Application for Temporary Employment Certification* under § 655.462.

(c) *Documents and records to be retained by all employers.* All employers filing a *CW-1 Application for Temporary Employment Certification* must retain the following documents and records and must provide the documents and records to the Department and any other Federal Government Official in the event of an audit or investigation:

(1) Proof of recruitment efforts, including:

(i) Placement of the job offer with the CNMI Department of Labor as specified in § 655.442;

(ii) Contact with former U.S. employees as specified in § 655.443, including documents demonstrating that each such U.S. worker had been offered the job opportunity listed in the *CW-1 Application for Temporary Employment Certification*, and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons;

(iii) Posting notice of the job opportunity to all employees in the job classification and area in which the work will be performed by the *CW-1* workers as specified in § 655.444; and

(iv) All additional employer-conducted recruitment required by the CO as specified in § 655.445.

(2) Documentation supporting the information submitted in the recruitment report prepared in accordance with § 655.446, such as evidence of nonapplicability of contact with former workers as specified in § 655.443 and any supporting resumes and contact information as specified in § 655.446.

(3) Records of each worker's earnings, hours offered and worked, location(s) where work is performed, and other information as specified in § 655.423(i).

(4) If applicable, records of reimbursement of transportation and subsistence costs incurred by the workers, as specified in § 655.423(j).

(5) Copies of written contracts with third parties demonstrating compliance with the prohibition of seeking or receiving payments or other compensation of any kind from prospective workers as specified in § 655.423(o).

(6) Evidence of the employer's contact with U.S. workers who applied for the job opportunity in the *CW-1 Application for Temporary Employment Certification*, including, but not limited to, documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 655.423(q).

(7) Written notice provided to and informing OFLC that a *CW-1* worker or worker in corresponding employment has separated from employment before the end date of employment specified in the *CW-1 Application for Temporary Employment Certification*, as specified in § 655.423(v).

(8) A copy of the *CW-1 Application for Temporary Employment Certification* and all accompanying appendices, including any modifications, amendments, or

extensions, signed by the employer as directed by the CO.

(d) *Availability of documents and records for enforcement purposes.* The employer must make available to the Department, DHS or to any Federal Government Official performing an investigation, inspection, audit, or law enforcement function all documents and records required to be retained under this subpart for purposes of copying, transcribing, or inspecting them.

#### §§ 655.457–655.459 [Reserved]

#### Post Certification Activities

##### § 655.460 Extensions.

(a) *Basis for extension.* Under certain circumstances an employer may apply for extensions of the period of employment. A request for extension 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 not grant an extension where the total period of employment under that *CW-1 Application for Temporary Employment Certification* and the authorized extension would exceed the maximum applicable duration permitted under § 655.420(g).

(b) *Decision by the CO.* The CO will notify the employer of the decision in writing. The employer may appeal a denial of a request for an extension by following the appeal procedures in § 655.461.

(c) *Obligations during period of extension.* The *CW-1* employer's assurances and obligations under the TLC will continue to apply during the extended period of employment. The employer must immediately provide to its *CW-1* workers and workers in corresponding employment a copy of any approved extension.

##### § 655.461 Administrative review.

(a) *Request for review.* Where authorized in this subpart, an employer wishing review of a determination by the CO must request an administrative review before BALCA of that determination to exhaust its administrative remedies. In such cases, the request for review:

(1) Must be received by BALCA, and the CO who issued the determination, within 10 business days from the date of the determination;

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

(3) Must include a copy of the CO's determination;

(4) Must set forth the particular grounds for the request, including the specific factual issues the requesting party alleges needs to be examined in connection with the CO's determination;

(5) May contain any legal argument that the employer believes will rebut the basis for the CO's determination, including any briefing the employer wishes to submit; and

(6) May contain only such evidence as was actually before the CO at the time of the CO's determination.

(b) *Appeal File.* After the receipt of a request for review, the CO will send a copy of the Appeal File, as soon as practicable by means normally assuring next-day delivery, to BALCA, the employer, the employer's attorney or agent (if applicable), and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor (counsel).

(c) *Assignment.* The Chief ALJ will immediately, upon receipt of the appeal file from the CO, assign either a single member or a three-member panel of BALCA to consider a particular case.

(d) *Administrative review—(1) Briefing schedule.* If the employer wishes to submit a brief on appeal, it must do so as part of its request for review. Within 7 business days of receipt of the Appeal File, the counsel for the CO may submit a brief in support of the CO's decision and, if applicable, in response to the employer's brief.

(2) *Standard of review.* The ALJ must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

(e) *Scope of review.* BALCA will affirm, reverse, or modify the CO's determination, or remand to the CO for further action. BALCA will reach this decision after due consideration of the documents in the Appeal File that were before the CO at the time of the CO's determination, the request for review, and any legal briefs submitted. BALCA may not consider evidence not before the CO at the time of the CO's determination, even if such evidence is in the Appeal File, request for review, or legal briefs.

(f) *Decision.* The decision of BALCA must specify the reasons for the action taken and must be provided to the employer, the CO, and counsel for the CO within 7 business days of the submission of the CO's brief or 10

business days after receipt of the Appeal File, whichever is later, using means normally assuring expedited delivery.

**§ 655.462 Withdrawal of a CW-1 Application for Temporary Employment Certification.**

(a) The employer may withdraw a *CW-1 Application for Temporary Employment Certification* after it has been submitted to the NPC for processing, including after the CO grants certification under § 655.450. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *CW-1 Application for Temporary Employment Certification* and work contract with respect to all workers recruited and hired in connection with that application.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the *CW-1 Application for Temporary Employment Certification* and stating the reason(s) for the withdrawal.

**§ 655.463 Public disclosure.**

The Department will maintain an electronic file accessible to the public with information on all employers applying for TLCs. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

**§§ 655.464–655.469 [Reserved]**

**Integrity Measures**

**§ 655.470 Audits.**

The CO may conduct audits of certified *CW-1 Applications for Temporary Employment Certification*.

(a) *Discretion.* The CO has the sole discretion to choose the certified applications selected for audit.

(b) *Audit letter.* Where an application is selected for audit, the CO will issue an audit letter to the employer and a copy, if appropriate, to the employer's attorney or agent. The audit letter will:

- (1) Specify the documentation that must be submitted by the employer;
- (2) Specify a date, no more than 30 calendar days from the date the audit letter is issued, by which the required documentation must be sent to the CO; and
- (3) Advise that failure to comply fully with the audit process may result:
  - (i) In the requirement that the employer undergo the assisted recruitment procedures in § 655.471 in future filings of *CW-1 Applications for Temporary Employment Certification* for a period of up to 2 years; or
  - (ii) In a revocation of the certification or debarment from the *CW-1* program

and any other foreign labor certification program administered by the Department.

(c) *Supplemental information request.* During the course of the audit examination, the CO may request supplemental information or documentation from the employer in order to complete the audit. If circumstances warrant, the CO can issue one or more requests for supplemental information.

(d) *Potential referrals.* In addition to measures in this subpart, the CO may decide to provide the audit findings and underlying documentation to DHS or other appropriate enforcement agencies. The CO may refer any findings that an employer discouraged a qualified U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against a qualified U.S. worker, to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

**§ 655.471 Assisted recruitment.**

(a) *Requirement of assisted recruitment.* If, as a result of audit or otherwise, the CO determines that a violation has occurred that does not warrant debarment, the CO may require the employer to engage in assisted recruitment for a defined period of time for any future *CW-1 Application for Temporary Employment Certification*.

(b) *Notification of assisted recruitment.* The CO will notify the employer (and its attorney or agent, if applicable) in writing of the assisted recruitment that will be required of the employer for a period of up to 2 years from the date the notice is issued. The notification will state the reasons for the imposition of the additional requirements, state that the employer's agreement to accept the conditions will constitute their inclusion as bona fide conditions and terms of a *CW-1 Application for Temporary Employment Certification*, and offer the employer an opportunity to request an administrative review. If administrative review is requested, the procedures in § 655.461 apply.

(c) *Assisted recruitment.* The assisted recruitment process will be in addition to any recruitment required of the employer by §§ 655.442 through 655.445 and may consist of, but is not limited to, one or more of the following:

- (1) Requiring the employer to submit a draft advertisement to the CO for review and approval at the time of filing the *CW-1 Application for Temporary Employment Certification*;
- (2) Designating the sources where the employer must recruit for U.S. workers in the Commonwealth and directing the

employer to place the advertisement(s) in such sources;

(3) Extending the length of the placement of the advertisements;

(4) Requiring the employer to notify the CO in writing when the advertisement(s) are placed;

(5) Requiring an employer to perform any additional assisted recruitment directed by the CO;

(6) Requiring the employer to provide proof of the publication of all advertisements as directed by the CO;

(7) Requiring the employer to provide proof of all U.S. workers who applied (or on whose behalf an application is made) in response to the employer's recruitment efforts;

(8) Requiring the employer to submit any proof of contact with all referrals and former U.S. workers; or

(9) Requiring the employer to provide any additional documentation verifying it conducted the assisted recruitment as directed by the CO.

(d) *Failure to comply.* If an employer materially fails to comply with requirements ordered by the CO under this section, the certification will be denied and the employer and its attorney or agent may be debarred under § 655.473.

**§ 655.472 Revocation.**

(a) *Basis for revocation.* The OFLC Administrator may revoke a TLC approved under this subpart, if the OFLC Administrator finds:

(1) The issuance of the TLC was not justified due to fraud or misrepresentation of a material fact in the application process;

(2) The employer substantially failed to comply with any of the terms or conditions of the approved TLC. A substantial failure is a failure to comply that constitutes a significant deviation from the terms and conditions of the approved certification and is further defined in § 655.473(d); or

(3) The employer impeded the audit process, as set forth in § 655.470, or impeded any Federal Government Official performing an investigation, inspection, audit, or law enforcement function.

(b) *DOL procedures for revocation—*

(1) *Notice of Revocation.* If the OFLC Administrator makes a determination to revoke an employer's TLC, the OFLC Administrator will issue a Notice of Revocation to the employer (and its attorney or agent, if applicable). The notice will contain a detailed statement of the grounds for the revocation and inform the employer of its right to submit rebuttal evidence to the OFLC Administrator or to request administrative review of the Notice of

Revocation by BALCA. If the employer does not submit rebuttal evidence or request administrative review within 10 business days from the date the Notice of Revocation is issued, the notice will become the final agency action and will take effect immediately at the end of the 10 business days.

(2) *Rebuttal.* If the employer timely submits rebuttal evidence, the OFLC Administrator will inform the employer of the final determination on the revocation within 10 business days of receiving the rebuttal evidence. If the OFLC Administrator determines that the certification must be revoked, the OFLC Administrator will inform the employer of its right to appeal the final determination to BALCA according to the procedures of § 655.461. If the employer does not appeal the final determination, it will become the final agency action.

(3) *Request for review.* An employer may appeal a Notice of Revocation or a final determination of the OFLC Administrator after the review of rebuttal evidence to BALCA, according to the appeal procedures of § 655.461. The ALJ's decision is the final agency action.

(4) *Stay.* The timely submission of rebuttal evidence or a request for administrative review will stay the revocation pending the outcome of the proceeding.

(5) *Decision.* If the TLC is revoked, the OFLC Administrator will provide copies of final revocation decisions to DHS and DOS promptly.

(c) *Employer's obligations in the event of revocation.* If an employer's TLC is revoked, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and other required expenses;

(2) The workers' outbound transportation and other required expenses;

(3) Payment to the workers of the amount due under the three-fourths guarantee; and

(4) Any other wages, benefits, and working conditions due or owing to the workers under this subpart.

#### § 655.473 Debarment.

(a) *Debarment of an employer, agent, or attorney.* The OFLC Administrator may debar an employer, agent, attorney, or any successor in interest to that employer, agent, or attorney, from participating in any action under this subpart, subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer, agent, or attorney substantially violated a material term or

condition of the *Application for Prevailing Wage Determination* or *CW-1 Application for Temporary Employment Certification*, as defined in paragraph (d) of this section. The OFLC Administrator will provide copies of final debarment decisions to DHS and DOS promptly.

(b) *Effect on future applications in all foreign labor programs.* The debarred employer, or a debarred agent or attorney, or any successor in interest to any debarred employer, agent, or attorney, will be disqualified from filing any labor certification applications or labor condition applications with the Department subject to the term limits set forth in paragraph (c) of this section. If such an application is filed, it will be denied without review.

(c) *Period of debarment.* No employer, agent, or attorney may be debarred under this subpart for more than 5 years for a single violation.

(d) *Definition of violation.* For the purposes of this section, a violation of a material term or condition of the *Application for Prevailing Wage Determination* or *CW-1 Application for Temporary Employment Certification* includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent or attorney that involve:

(i) Failure to pay or provide the required wages, benefits, or working conditions to the employer's CW-1 workers 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 the NOD process, as set forth in § 655.431, or the assisted recruitment process, as set forth in § 655.471;

(vi) Impeding the audit process, as set forth in § 655.470, or impeding any Federal Government Official performing an investigation, inspection, audit, or law enforcement function;

(vii) Employing a CW-1 worker outside of the Commonwealth, in an activity not listed in the work contract, or outside the validity period of employment of the work contract, including any approved extension thereof;

(viii) A violation of the requirements of § 655.423(n) or (o);

(ix) A violation of any of the provisions listed in § 655.423(q); or

(x) Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(2) Fraud involving the *Application for Prevailing Wage Determination* or the *CW-1 Application for Temporary Employment Certification* under this subpart; or

(3) A material misrepresentation of fact during the course of processing the *CW-1 Application for Temporary Employment Certification*.

(e) *Determining whether a violation is substantial.* In determining whether a violation is substantial as to merit debarment, the factors the OFLC Administrator may consider include, but are not limited to, the following:

(1) Previous history of violation(s) under the CW-1 program;

(2) The number of CW-1 workers, workers in corresponding employment, or U.S. workers who were or are affected by the violation(s);

(3) The gravity of the violation(s); or

(4) 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 OFLC Administrator makes a determination to debar an employer, agent, attorney, or any successor in interest to that employer, agent, or attorney, the OFLC Administrator will issue the party a Notice of Debarment. The notice will state the reason(s) for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and it will inform the party subject to the notice of its right to submit rebuttal evidence to the OFLC Administrator, or to request administrative review of the decision by BALCA. If the party does not file rebuttal evidence or a request for review within 30 calendar days of the date of the Notice of Debarment, the notice is the final agency action and the debarment will take effect on the date specified in the notice or if no date is specified, at the end of 30 calendar days. The timely filing of rebuttal evidence or a request for review stays the debarment pending the outcome of the appeal as provided in paragraphs (f)(2) through (6) of this section.

(2) *Rebuttal.* The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the notice within 30 calendar days of the date the notice is issued. If rebuttal evidence is timely filed, the OFLC Administrator will issue a Final Determination on the debarment within

30 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the party must be debarred, the OFLC Administrator will issue a Final Determination and inform the party of its right to request administrative review of the debarment by BALCA according to the procedures in this section. The party must request review within 30 calendar days after the date of the Final Determination, or the Final Determination will be the final agency order and the debarment will take effect on the date specified in the Final Determination or if no date is specified, at the end of 30 calendar days.

(3) *Request for review.* (i) The recipient of a Notice of Debarment or Final Determination seeking to challenge the debarment must request review of the debarment within 30 calendar days of the date of the Notice of Debarment or the date of the Final Determination by the OFLC Administrator after review of rebuttal evidence submitted under paragraph (f)(2) of this section. A request for review of debarment must be sent in writing to the Chief ALJ, United States Department of Labor, with a simultaneous copy served on the OFLC Administrator; the request must clearly identify the particular debarment determination for which review is sought; and must set forth the particular grounds for the request. If no timely request for review is filed, the debarment will take effect on the date specified in the Notice of Debarment or Final Determination, or if no date is specified, 30 calendar days from the

date the Notice of Debarment or Final Determination is issued.

(ii) Upon receipt of a request for review, the OFLC Administrator will promptly send a certified copy of the ETA case file to the Chief ALJ by means normally assuring expedited delivery. The Chief ALJ will immediately assign an ALJ to conduct the review.

(iii) Statements, briefs, and other submissions of the parties must contain only legal argument and only such evidence that was within the record upon which the debarment was based, including any rebuttal evidence submitted pursuant to paragraph (f)(2) of this section.

(4) *Review by the ALJ.* (i) In considering requests for review, the ALJ must afford all parties 30 days to submit or decline to submit any appropriate Statement of Position or legal brief. The ALJ must review the debarment determination on the basis of the record upon which the decision was made, the request for review, and any Statements of Position or legal briefs submitted.

(ii) The ALJ's final decision must affirm, reverse, or modify the OFLC Administrator's determination. The ALJ's decision will be provided to the parties by expedited mail. The ALJ's decision is the final agency action, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(5) *Review by the ARB.* (i) Any party wishing review of the decision of an ALJ must, within 30 calendar 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 calendar 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 calendar days after the receipt of a timely filing of the petition, the decision of the ALJ is 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.

(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 appeal record to the ARB.

(iii) Where the ARB has determined to review the 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 the presentation must be submitted.

(6) *ARB Decision.* The ARB's final decision must be issued within 90 calendar days from the notice granting the petition and served upon all parties and the ALJ.

**§§ 655.474–655.499 [Reserved]**

Signed at Washington, DC.

**Molly E. Conway,**  
*Acting Assistant Secretary for Employment and Training, Labor.*

[FR Doc. 2019-05937 Filed 3-27-19; 11:15 am]

**BILLING CODE 4510-FP-P**