

Mid-Atlantic Aviation Partnership (VT MAAP) MOC Version 1.0 an acceptable means, but not the only means, of demonstrating compliance with the requirements of Category 2 and Category 3 small unmanned aircraft systems (small UAS) operations over people.

**DATES:** December 16, 2021.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

**Background**

The FAA published Title 14 Code of Federal Regulations, part 107, subpart D permitting the routine operation of small UAS at night or over people under certain conditions. Subpart D also provides aircraft eligibility and operating requirements for categories of operations over people. When promulgated, this rule was the next step in the FAA's incremental approach to integrating UAS into the national airspace system, based on demands for increased operational flexibility and the experience the FAA has gained since it initially published part 107.

To satisfy the eligibility requirements of part 107, subpart D, a small unmanned aircraft must meet the performance-based safety requirements of § 107.120(a) for operations in Category 2 or the performance-based safety requirements of § 107.130(a) for operations in Category 3 or both by following an FAA-accepted MOC. An FAA-accepted MOC addresses the minimum testing, inspection, or analysis necessary to demonstrate compliance with the safety requirements.

An acceptable MOC must consist of test, analysis, or inspection. It must address the injury severity limits, the exposed rotating parts prohibition, and verification that there are no safety defects. The FAA must accept a MOC before an applicant can rely on it to declare compliance with part 107, subpart D requirements. In addition, the FAA indicates acceptance of a MOC by publishing a Notice of Availability in the **Federal Register** identifying the

MOC as accepted and by informing the applicant of its acceptance.<sup>1</sup>

**Means of Compliance Accepted in This Policy**

VT MAAP published the Operation of Small UAS Over People MOC Version 1.0 on October 20, 2021. The FAA has acknowledged VT MAAP's performance-based MOC as an acceptable MOC to the requirements of § 107.120(a) for operations in Category 2, or the requirements of § 107.130(a) for operations in Category 3.

To utilize this MOC, an applicant should provide the VT MAAP Federal Aviation Administration designated UAS Test Site with data on the small unmanned aircraft. VT MAAP Test Site utilizes this information to conduct a safety defect and failure assessment. This assessment will determine the required testing to assess the small unmanned aircraft's impact injury severity and laceration potential. The VT MAAP Test Site will conduct the necessary testing and document the results. Lastly, VT MAAP conducts a final safety and compliance review to determine the small unmanned aircraft compliance with § 107.120(a) or § 107.130(a) as applicable. VT MAAP provides the results of this process to the applicant for inclusion in a Declaration of Compliance.

**Availability**

This notice serves as a formal acceptance by the Federal Aviation Administrator of the Virginia Tech Mid-Atlantic Aviation Partnership's Means of Compliance Version 1.0.

Issued in Washington, DC, on December 10, 2021.

**Brian E. Cable,**

*Manager, Systems Policy Branch, Policy and Innovation Division, Aircraft Certification Service.*

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**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Part 655**

[DOL Docket No. ETA-2020-0005]

RIN 1205-AB99

**Adjudication of Temporary and Seasonal Need for Herding and Production of Livestock on the Range Applications Under the H-2A Program**

**AGENCY:** Employment and Training Administration, Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** The Department of Labor (the Department or DOL) is amending its regulations regarding the adjudication of temporary need for employers seeking to employ nonimmigrant workers in job opportunities covering the herding or production of livestock on the range. Consistent with a court-approved settlement agreement, this final rule rescinds the regulatory provision that governed the period of need for such job opportunities under the H-2A visa classification to ensure the Department's adjudication of temporary or seasonal need is conducted in the same manner for all applications for temporary agricultural labor certification.

**DATES:** This final rule is effective January 18, 2022.

**FOR FURTHER INFORMATION CONTACT:**

Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Room N-5311, Washington, DC 20210, telephone: (202) 693-8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889-5627.

**SUPPLEMENTARY INFORMATION:**

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<sup>1</sup> *Operation of Small Unmanned Aircraft Systems Over People*, 86 FR 4314 (January 15, 2021), available at <https://www.regulations.gov/document/FAA-2018-1087-0968>.

## I. Background on 20 CFR Part 655, Subpart B

### A. Statutory Framework

The H–2A nonimmigrant worker visa program enables U.S. agricultural employers to employ foreign workers on a temporary basis to perform temporary or seasonal agricultural labor or services where the Secretary of Labor (Secretary) certifies that (1) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of foreign workers in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. See section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. 1101(a)(15)(H)(ii)(a); section 218(a)(1) of the INA, 8 U.S.C. 1188(a)(1). The Secretary has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary, Employment and Training Administration (ETA), who in turn has delegated that authority to ETA’s Office of Foreign Labor Certification (OFLC). Secretary’s Order 06–2010 (Oct. 20, 2010).<sup>1</sup> Once OFLC issues a temporary agricultural labor certification, employers may then petition the U.S. Department of Homeland Security (DHS) to employ a nonimmigrant worker in the United States in the H–2A visa classification.

### B. Regulatory Framework

Since 1987, the Department has operated the H–2A temporary agricultural labor certification program under regulations promulgated pursuant to the INA.<sup>2</sup> With limited exceptions, including those set forth below, the Department’s current regulations governing the H–2A program were published in 2010.<sup>3</sup> The standards and

<sup>1</sup> In addition, the Secretary has delegated to the Department’s Wage and Hour Division the responsibility under section 218(g)(2) of the INA, 8 U.S.C. 1188(g)(2), to assure employer compliance with the terms and conditions of employment under the H–2A program. Secretary’s Order 01–2014 (Dec. 19, 2014).

<sup>2</sup> The Immigration and Nationality Act of 1952 created the H–2 temporary worker program. Public Law 82–414, 66 Stat. 163. In 1986, IRCA divided the H–2 program into separate agricultural and nonagricultural temporary worker programs. See Public Law 99–603, section 301, 100 Stat. 3359 (1986). The H–2A agricultural worker program designation corresponds to the statute’s agricultural worker classification in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

<sup>3</sup> *Temporary Agricultural Employment of H–2A Aliens in the United States*, 75 FR 6884 (Feb. 12, 2010).

procedures applicable to the certification and employment of workers under the H–2A program are found in 20 CFR part 655, subpart B and 29 CFR part 501.<sup>4</sup>

Historically, employers in a number of States (primarily but not exclusively in the western continental United States) have used what is now the H–2A program to bring in foreign workers to work as sheep and goat herders.<sup>5</sup> Beginning in 1989, and consistent with Congress’ historical approach, the Department established variances from certain H–2A regulatory requirements and procedures through sub-regulatory guidance to allow employers of open range sheep and goat herders to use the H–2A program. The Department established similar variances or “special procedures” through sub-regulatory guidance in 2007 for employers seeking to employ H–2A workers for open range herding or production of livestock positions. In 2015, the Department incorporated these “special procedures” provisions for the employment of workers in the herding and production of livestock on the range, with some modifications, into its H–2A regulations. *Temporary Agricultural*

<sup>4</sup> The Department remains engaged in a separate rulemaking that seeks to amend these regulations as they pertain to the H–2A program. Through a Notice of Proposed Rulemaking published in July 2019 (2019 NPRM), the Department proposed amendments to the current regulations that focus on modernizing the H–2A program and eliminating inefficiencies. *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States*, 84 FR 36168 (July 26, 2019). The 2019 NPRM also proposed to amend the regulations for enforcement of contractual obligations for temporary foreign agricultural workers and the Wagner-Peyser Act regulations to provide consistency with proposed revisions to H–2A program regulations governing the temporary agricultural labor certification process. *Id.*; see also *Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States*, 85 FR 70445, 70447 (Nov. 5, 2020) (establishing a revised methodology for determining the Adverse Effect Wage Rate (AEWR) methodology for non-range occupations in one final rule and explaining that “[t]he Department intends to address all of the remaining proposals from the July 26, 2019 proposed rule in a subsequent, second final rule governing other aspects of the certification of agricultural labor or services to be performed by H–2A workers and enforcement of the contractual obligations applicable to employers of such nonimmigrant workers.”).

<sup>5</sup> As the Department explained in its 2015 herder rulemaking, Congress enacted statutes during the early 1950s authorizing the permanent admission of a certain number of “foreign workers skilled in sheepherding.” See *Temporary Agricultural Employment of H–2A Foreign Workers in the Herding or Production of Livestock on the Open Range in the United States*, 80 FR 20300, 20301–20302 (Apr. 15, 2015). Congress subsequently permitted these special laws to expire and signaled that sheepherders should be admitted under the existing temporary (then H–2) program. *Id.*; see also *Changes to Requirements Affecting H–2A Nonimmigrants*, 73 FR 76891, 76906–76907 (Dec. 18, 2008).

*Employment of H–2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States*, 80 FR 62958 (Oct. 16, 2015) (2015 Rule).<sup>6</sup> The 2015 Rule, codified at §§ 655.200 through 655.235, continued the agency’s recognition of the unique occupational characteristics of herding positions, which involve spending extended periods of time herding animals across remote range lands and being on call to protect and maintain herds for up to 24 hours a day, 7 days a week.<sup>7</sup>

Section 101(a)(15)(H)(ii)(a) of the INA permits only “agricultural labor or services . . . of a temporary or seasonal nature” to be performed under the H–2A visa category. 8 U.S.C. 1101(a)(15)(H)(ii)(a). Thus, as part of the Department’s adjudication of applications for temporary agricultural labor certification, the Department assesses on a case-by-case basis whether the employer has established a temporary or seasonal need for the agricultural work to be performed. See 20 CFR 655.161(a). In its initial rulemaking on the H–2A program, the Department explained that it would be appropriate for an employer to apply annually for recurring job opportunities in the same occupation when it involved “truly ‘seasonal’ employment,” but acknowledged that “the longer the employer needs a ‘temporary’ worker, the more likely it would seem that the job has in fact become a permanent one.” *Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States*, 52 FR 20496, 20498 (June 1, 1987). The Department’s current regulations, which adopted DHS’s definition of “temporary

<sup>6</sup> The 2015 Rule followed litigation in *Mendoza v. Perez*, in which the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held the special procedures pertaining to sheep, goat, and other open range herding or production of livestock were subject to the Administrative Procedure Act’s notice and comment requirements. 754 F.3d 1002, 1024 (D.C. Cir. 2014); see *Mendoza v. Perez*, 72 F. Supp. 3d 168, 175 (D.D.C. 2014) (remedial order setting a rulemaking schedule).

<sup>7</sup> The 2019 NPRM proposed clarifying and technical revisions to certain provisions concerning the employment of workers in herding and production of livestock on the range (e.g., portions of 20 CFR 655.205, 655.211, 655.220, and 655.225) that are not the subject of this rulemaking. 84 FR 36168, 36220–21. The 2019 NPRM also proposed to incorporate into the H–2A regulations, with some modifications, the standards and procedures currently found in Training and Employment Guidance Letters related to animal shearing, commercial beekeeping, and custom combining, and to rescind the general provision that allows for the creation of “special procedures” (i.e., sub-regulatory variances from the regulations). *Id.* at 36171–73. As explained above, the Department remains engaged in a separate rulemaking addressing these proposed changes.

or seasonal nature,” specify that employment is of a temporary nature “where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year,” and “of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations.” 20 CFR 655.103(d); 8 CFR 214.2(h)(5)(iv)(A); 75 FR 6884, 6890 (adopting DHS’s definition “was not intended to create any substantive change in how the Department administers the program”). DHS regulations further provide that the Department’s finding that employment is of a temporary or seasonal nature is “normally sufficient” for the purpose of an H–2A petition, but state that notwithstanding this finding, DHS adjudicators will not find employment to be temporary or seasonal in certain situations, such as when “substantial evidence” exists that the employment is not temporary or seasonal. 8 CFR 214.2(h)(5)(iv)(B).

Notwithstanding the regulatory definition found in 20 CFR 655.103(d) and 8 CFR 214.2(h)(5)(iv)(A), the 2015 Rule allowed employers of sheep and goat herders to apply for a temporary agricultural labor certification for a period of up to 364 days. 80 FR 62958, 62999–63000; see 20 CFR 655.215(b)(2) (“The period of need identified on the *H–2A Application for Temporary Employment Certification* and job order for range sheep or goat herding or production occupations must be no more than 364 calendar days.”). Conversely, the same rule limited employers of range livestock work to a temporary agricultural labor certification with a period of need not to exceed 10 months. 80 FR 62958, 63000; see 20 CFR 655.215(b)(2) (“The period of need identified on the *H–2A Application for Temporary Employment Certification* and job order for range herding or production of cattle, horses, or other domestic hooved livestock, except sheep and goats, must be for no more than 10 months.”).

### C. The Hispanic Affairs Project Litigation and Need for Rulemaking

On September 22, 2015, four shepherders and a nonprofit member organization for immigrant workers filed a lawsuit in federal court challenging aspects of the 2015 Rule. *Hispanic Affairs Project v. Perez*, 206 F. Supp. 3d 348 (D.D.C. 2016). As relevant to this rulemaking, the plaintiffs challenged the Department’s decision to allow

employers seeking temporary agricultural labor certifications for sheep or goat herder positions to apply for periods of need that last up to 364 days at a time. See *Hispanic Affairs Project v. Acosta*, 263 F. Supp. 3d 160, 182 (D.D.C. 2017) (citing 20 CFR 655.215(b)(2)). The plaintiffs also challenged DHS’s alleged practice of automatically approving sheep and goat herder petitions for recurring periods up to 364 days, asserting that the Department’s regulation at § 655.215(b)(2) and DHS’s alleged practice did not conform with the INA or the Departments’ regulations, in violation of the APA. See *id.* Specifically, the plaintiffs argued § 655.215(b)(2) and DHS’s alleged practice are inconsistent with 8 U.S.C. 1101(a)(15)(H)(ii)(a), which provides that H–2A visas be only for “temporary” work, and conflicts with the Departments’ regulations defining when employment is of a “temporary or seasonal nature.” See *id.*; compare 20 CFR 655.103(d) and 8 CFR 214.2(h)(5)(iv)(A) (employer’s “need to fill the position with a temporary worker will . . . last no longer than one year”) with 20 CFR 655.215(b)(2) (“The period of need identified on the [application and job order] . . . must be no more than 364 calendar days.”). The district court dismissed the challenge on procedural grounds, concluding the plaintiffs waived their claim against the Department and did not properly or timely raise their claim against DHS. *Id.* at 185–86, 190.<sup>8</sup>

On appeal, the D.C. Circuit reversed and remanded the district court’s decision on these claims for a resolution on the merits. *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 396–97 (D.C. Cir. 2018). The court held the plaintiffs preserved their challenge to the Department’s decision in the 2015 Rule to classify sheep and goat herding as “temporary” employment. *Id.* at 385. In dicta, the court noted the “agency has no power under the statute—it is actually forbidden—to include non-temporary or non-seasonal workers in the H–2A program.” *Id.* at 389. The court also held the complaint

<sup>8</sup> Plaintiffs also challenged two other aspects of the 2015 Rule: (1) Certain definitions and requirements that limit the scope and location of work that H–2A workers in sheep and goat herding positions may perform, 80 FR 62958, 62963–73; and (2) the methodology by which the Department calculates the minimum required wage that such workers (and any non-H–2A workers in corresponding employment) must be offered and paid, *id.* at 62986–96. The Department and DHS prevailed on these issues. See *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 391–96 (D.C. Cir. 2018), *aff’d in part* 263 F. Supp. 3d 160, 190–207 (D.D.C. 2017).

adequately raised a challenge to DHS’s alleged practice of extending “temporary” H–2A petitions beyond the regulatory definition of temporary employment. *Id.* at 385, 388. Taking the evidence submitted by the plaintiffs as true, the court concluded the plaintiffs had “plausibly shown that [DHS]’s *de facto* policy of authorizing long-term visas is arbitrary, capricious, and contrary to law, in violation of the APA and [INA] because it ‘authorizes the creation of permanent herder jobs that are not temporary or seasonal.’” *Id.* at 386 (original alterations omitted).

The parties subsequently reached a settlement in which the Department agreed to engage in rulemaking to propose to rescind § 655.215(b)(2) and DHS, through U.S. Citizenship and Immigration Services (USCIS), agreed to publish a policy memorandum that provided guidance on the determination of temporary or seasonal need for H–2A sheep and goat herder petitions. Joint Status Report at 1, ECF No. 135, *Hispanic Affairs Project, et al. v. Scalia et al.*, No. 15–cv–1562 (D.D.C. Nov. 8, 2019); see also Order Approving the Parties’ Settlement Agreement, ECF No. 136, *Hispanic Affairs Project, et al. v. Scalia et al.*, No. 15–cv–1562 (D.D.C. Nov. 12, 2019). Following a 30-day public comment period, USCIS published a final policy memorandum on February 28, 2020, which became effective on June 1, 2020. See USCIS, *Policy Memorandum: Updated Guidance on Temporary or Seasonal Need for H–2A Petitions Seeking Workers for Range Sheep and/or Goat Herding or Production* (Feb. 28, 2020) (USCIS Policy Memorandum).<sup>9</sup> On May 6, 2021, the Department published a NPRM that proposed to rescind § 655.215(b)(2).

## II. Discussion of Proposed Revision to 20 CFR Part 655, Subpart B

The Department proposed to rescind § 655.215(b)(2) so that the temporary or seasonal need of an employer seeking to fill a herding or production of livestock on the range position would be adjudicated according to the requirement in § 655.103(d) that governs the adjudication of employment of a temporary or seasonal nature for all other H–2A applications. See 20 CFR 655.200(a) (noting that employers whose job opportunities meet the qualifying criteria under §§ 655.200–655.235 must fully comply with all the requirements of §§ 655.100–655.185 unless otherwise specified in §§ 655.200–655.235).

<sup>9</sup> See [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2020/2-PMH2A-SeasonalSheepGoatHerder\\_PolicyMemo.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2020/2-PMH2A-SeasonalSheepGoatHerder_PolicyMemo.pdf).

The Department explained in the NPRM that the proposed rescission of § 655.215(b)(2) would eliminate that provision's presumptive period of need for employment involving range sheep or goat herding and absolute restriction on the period of need for employment involving other range livestock activities. As the NPRM acknowledged, the 2015 Rule suggested the unique nature and history of herding work permitted a variance, on an occupational basis, from the standard H-2A requirements governing the adjudication of an employer's temporary need. As such, § 655.215(b)(2) allowed certification of a specific period of time without requiring the Department to assess the nature of the employer's need for the labor or services to be performed. The NPRM, accordingly, proposed to rescind § 655.215(b)(2) so that all employers applying for temporary agricultural labor certifications must individually demonstrate a temporary or seasonal need for the agricultural labor or services to be performed, regardless of occupation. As the Department explained in the NPRM, this rescission of § 655.215(b)(2) is not only consistent with the D.C. Circuit's decision in *Hispanic Affairs Project* and the guidance issued by USCIS, but also better complies with the requirements of the INA implemented in the Departments' regulations that define when employment is of a "temporary or seasonal nature." 8 U.S.C. 1101(a)(15)(H)(ii)(A) (defining an H-2A nonimmigrant as a foreign worker coming to perform services of a temporary or seasonal nature); 20 CFR 655.103(d); 75 FR 6884, 6890 (adopting DHS's definition of "temporary or seasonal nature" set forth in 8 CFR 214.2(h)(5)(iv)(A)). The Department sought public comment on all issues related to its proposal to rescind § 655.215(b)(2), including economic or other regulatory impacts of the proposed rule on the public.<sup>10</sup>

<sup>10</sup> As noted above, the 2019 NPRM proposed to amend regulations governing the certification of agricultural labor or services to be performed by temporary foreign workers in H-2A nonimmigrant status and the enforcement of contractual obligations applicable to employers of such nonimmigrant workers. 84 FR 36168. In particular, the 2019 NPRM sought public comment on the possibility of moving the adjudication of an employer's temporary or seasonal need exclusively to DHS or exclusively to DOL. *Id.* at 36178. In the NPRM to this rule, the Department explained that comments on the proposals contained in the 2019 NPRM are outside of the scope of the limited rulemaking here. 86 FR 24368, 24371. Given the narrow scope of this rulemaking and because a rule finalizing the non-AEWR provisions of the 2019 NPRM has not published, the rulemaking associated with the 2019 NPRM does not affect the issuance of this rule.

### III. Public Comments Received

The Department's 30-day comment period on its proposed rescission of § 655.215(b)(2) opened on May 6, 2021 and closed on June 7, 2021, with comments submitted electronically at <http://www.regulations.gov/> using docket number ETA-1205-AB99. During this comment period, ETA received eight comments, none of which opposed adopting the proposal. Some contained comments outside of the scope of this rulemaking, as discussed below, while others were submitted on behalf of multiple entities. Commenters represented stakeholders from the public, private, and not-for-profit sectors and included industry associations, worker advocacy organizations, a State Department of Agriculture, a think tank, and private individuals. The Department appreciates all of the comments it received. After full consideration of the comments and for the reasons explained below, the Department is adopting the proposal to rescind § 655.215(b)(2).

#### A. Comments Supporting Rescission of § 655.215(b)(2)

Commenters generally supported the Department's proposal to rescind § 655.215(b)(2), though some commenters expressed potential concerns with the Department's implementation of the change. Several worker advocacy organizations and a think tank stated that the proposed revision more closely reflects statutory requirements by limiting H-2A employment to truly seasonal or temporary work for which employers are unable to find sufficient U.S. workers. Some of these commenters stated that the rescission of § 655.215(b)(2) would simplify the H-2A program, promote consistency between USCIS and DOL with regard to the agencies' adjudication of temporary and seasonal need, and strengthen labor protections, without imposing a substantial or unfair burden on herding employers. Industry associations and a State Department of Agriculture did not oppose the proposed change, though they expressed concerns with its implementation and employers' ability to fulfill their labor needs.

Commenters asked the Department to address how it will assess temporary or seasonal need under § 655.103(d), in particular where an employer has a history of filing under § 655.215(b)(2). Some of the worker advocacy organizations urged the Department to remind employers that the H-2A program is to be used only for agricultural labor needs of a temporary

or seasonal nature and that permanent labor needs are not eligible for H-2A certification but may be eligible for employment-based immigrant visas. These commenters also asked the Department to guard against employers fulfilling permanent job needs with H-2A workers, by noting, for example, that an employer must meet both parts of the definition of seasonal need under § 655.103(d). In contrast, industry associations and a State Department of Agriculture asked the Department not to weigh an employer's filing history too heavily, as employers were previously not required to separate distinct temporary or seasonal needs into different applications under § 655.215(b)(2). These commenters stressed that changes in how an employer describes the services or labor needed, including the period of employment, on new applications may demonstrate compliance with § 655.103(d) rather than changes in the temporary or seasonal nature of an employer's labor needs. In addition, these commenters noted difficulty hiring sufficient U.S. workers to fulfill employers' labor needs and the potential downstream effects of downsizing range operations should employers no longer be able to hire foreign workers, which could necessitate operational changes that affect an employer's temporary or seasonal need for labor. Both worker advocacy organizations and an industry association asked the Department to recognize USCIS' Policy Memorandum and adopt a similar approach to case-by-case assessment of an employer's temporary or seasonal need and filing history.

The Department agrees that adopting the proposal will simplify and promote consistency within the H-2A program, while acknowledging the concerns expressed by commenters regarding how the agency plans to assess an employer's seasonal or temporary need under the standard at § 655.103(d). As noted in the NPRM, the Department will examine—on a case-by-case basis and taking into consideration the totality of the facts presented—whether an employer's need to fill a herding or production of livestock on the range position is of a temporary or seasonal nature, as those terms are defined in the Department's and DHS's regulations. See 20 CFR 655.103(d); 8 CFR 214.2(h)(5)(iv)(A). Section 655.103(d) states that employment "is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no

longer than 1 year.” The same section states that “employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations.” While this rule rescinds § 655.215(b)(2) so that the Department’s adjudication of temporary or seasonal need is conducted in the same manner for all H–2A applications pursuant to § 655.103(d), it does not alter the regulatory definition and standards by which the Department adjudicates temporary or seasonal need under § 655.103(d).

In particular, though recurring year-round activities cannot be classified as temporary, *see* 75 FR 6884, 6891, the Department recognizes, as explained in the NPRM, that some herder employers may be able to establish a need to fill positions on a recurring annual basis consistent with the definition of employment of a seasonal nature in § 655.103(d). *See* 86 FR 24368, 24371; 80 FR 62958, 62999–63000 (2015 Rule describing comments that delineated seasonal aspects of herder work); 52 FR 20496, 20498 (acknowledging it is appropriate to apply annually for truly “seasonal” employment); *see also* USCIS Policy Memorandum at 3 n.3 (explaining that an employer’s need for workers that recurs annually at a given time of year does not mean its need is permanent in nature as employment of a seasonal nature is defined as being tied to a certain time of year). As some commenters noted, such employers will need to show they meet both parts of the definition of seasonal need in § 655.103(d)—that is, the employment (1) “is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle” and (2) “requires labor levels far above those necessary for ongoing operations.” The Department also acknowledged in the NPRM that some employers may have a “temporary” need to fill herding and range livestock job opportunities, which is permissible provided they can show the nature of their need is temporary under § 655.103(d). *See Temporary Workers Under § 301 of the Immigration Reform and Control Act*, 11 Op. O.L.C. 39, 40 & n.4 (1987) (noting “‘temporary’ means something other than seasonal” and explaining employers may fill “permanent jobs that an employer needs to fill on a temporary basis—for example, because the regular American employee has fallen ill or extra hands are needed during a busy period”); 11

Op. O.L.C. at 42 (“The nature of the job itself is irrelevant. What is relevant is whether the employer’s need is truly temporary.”).

This final rule aligns the Department’s adjudication of the temporary or seasonal need of herder applications with the guidance DHS has implemented in the USCIS Policy Memorandum, which the Department encourages employers and other interested parties to review. The memorandum explains, for example, that USCIS will adjudicate H–2A sheep and goat herder petitions filed on or after June 1, 2020, on a case-by-case basis, taking into consideration the totality of the facts presented, and in the same manner as all other H–2A petitions. USCIS Policy Memorandum at 1, 9. Past periods of need approved by USCIS prior to June 1, 2020, will be one element considered when determining whether an H–2A petition demonstrates a true temporary or seasonal need. *Id.* at 9. Similar to USCIS’ approach, and as indicated above, the Department’s adjudication will be conducted on a case-by-case basis and will take into consideration the totality of the facts presented, of which past periods of need will be one element that is considered in determining whether an employer’s need is truly temporary or seasonal.<sup>11</sup>

When an employer is unable to fulfill its need for labor to perform herding and production of livestock duties on the range under the H–2A program, as with any employer whose need is neither temporary nor seasonal, the employer may apply for labor certification through the visa program appropriate to its need. For example, employers with permanent, rather than temporary or seasonal, needs may wish to petition for workers under employment-based immigrant visa programs. *See, e.g.*, 8 U.S.C. 1153(b)(3); *see also* 8 U.S.C. 1101(a)(15)(H)(ii)(a) (INA permits only “agricultural labor or services . . . of a temporary or seasonal nature” to be performed under the H–2A visa category).

<sup>11</sup> In recognition of employers’ need to transition from compliance with § 655.215(b)(2) to § 655.103(d) and similar to guidance in USCIS’ Policy Memorandum, employers seeking herding or production of livestock on the range job opportunities are encouraged, in describing their temporary or seasonal needs in future filings, to explain why any past filings history is not indicative of a non-temporary and non-seasonal need. Although the Department may consider the fact of a past filing history before the effective date of this rule, the Department will fully consider such explanation and possible reliance on past procedures in the totality of the circumstances when making a temporary or seasonal need determination. *See* USCIS Policy Memorandum, at 6 n.5, 9 n.11.

## B. Out of Scope Comments

The NPRM invited comments related to the Department’s proposal to rescind § 655.215(b)(2). Comments received that are unrelated to the Department’s proposal are beyond the scope of this action and have not been considered in the Department’s assessment of its proposed rescission.

Several comments were beyond the scope of this action. Two of the commenters did not address the Department’s proposal; instead, one expressed general dissatisfaction with the H–2A program and the other appeared to be seeking a herding position. Other commenters addressed topics that are not the subject of this rulemaking, including wage and housing requirements for herders and production of livestock workers on the range as well as the definition of “temporary” or “seasonal” under 20 CFR 655.103(d), which reflects DHS’s regulatory definition at 8 CFR 214.2(h)(5)(iv)(A) and has been in effect for more than a decade. For example, one comment requested the Department clarify the definition of “temporary” and “seasonal” under § 655.103(d), including how this definition applies across recurring H–2A applications and in situations where an employer has maintained substantially similar operations in previous seasons. Because proposed changes to the wage and housing requirements for herders and the regulatory definition and standards by which the Department adjudicates temporary or seasonal need under § 655.103(d) are not the subject of this regulatory action, the Department deems the above comments as out of scope.

## IV. Administrative Information

### A. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

Under Executive Order (E.O.) 12866, the Office of Management and Budget (OMB)’s Office of Information and Regulatory Affairs determines whether a regulatory action is significant and therefore, subject to the requirements of the E.O. and OMB review. 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 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. This final rule is a significant, but not economically significant, regulatory action under Section 3(f) of E.O. 12866. The Department has prepared a Regulatory Impact Analysis (RIA) in connection with this final rule, as required under section 6(a)(3) of E.O. 12866.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected 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.

#### Overview of This Final Rule

The Department has determined that this final rule is necessary to clarify the Department's adjudication of temporary or seasonal need for herding and range livestock applications for temporary agricultural labor certification under the H-2A program, and to align that adjudication with the requirements of the INA. The final rule also standardizes the Department's adjudication of temporary need under the H-2A program. The Department's definition of "temporary or seasonal nature" for the H-2A program, with the exception of its current definition of "temporary" for herding and range livestock occupations, is consistent with the Department of Homeland Security's definition specifying that employment is of a temporary nature "where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year," and "of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations." 20 CFR 655.103(d); 8 CFR 214.2(h)(5)(iv)(A).

Notwithstanding the regulatory definition found in 20 CFR 655.103(d) and 8 CFR 214.2(h)(5)(iv)(A), the 2015 Rule allowed employers of sheep and goat herders to apply for a temporary agricultural labor certification for a period of up to 364 days. Conversely, the same rule limited employers of range livestock occupations to a temporary agricultural labor certification with a period of need not to exceed 10 months. As discussed above, an appellate court held that plaintiffs preserved their challenge to the Department's decision in the 2015 Rule to classify sheep and goat herding as "temporary" employment. The court additionally held the complaint adequately raised a challenge to DHS's alleged practice of extending "temporary" H-2A petitions beyond the regulatory definition of temporary employment. Taking the evidence submitted by the plaintiffs as true, the court concluded the plaintiffs had plausibly shown DHS's alleged practice of automatically extending H-2A petitions is inconsistent with the APA and the INA because it "'authorizes the creation of permanent herder jobs that are not temporary or seasonal.'" 901 F.3d at 386 (original alterations omitted). The parties subsequently reached a settlement agreement in which the Department agreed to engage in rulemaking to propose to rescind § 655.215(b)(2) and DHS, through USCIS, agreed to publish a policy memorandum that provided guidance on the determination of temporary or seasonal need for H-2A sheep and goat herder petitions.

In this final rule, the Department rescinds § 655.215(b)(2), eliminating that provision's presumptive period of need for employment involving range herding and absolute restriction on the period of need for employment involving range livestock activities. Instead, all employers applying for H-2A temporary agricultural labor certifications under the final rule must individually demonstrate that their need for workers is temporary or seasonal, regardless of occupation.

#### Economic Impact

The Department estimates that this final rule will result in costs to employers associated with rule familiarization requirements for all herding and range livestock employers utilizing the H-2A program. In addition, the Department believes that employers may incur other unquantifiable costs from the implementation of the final rule that can be attributed to changes in business operations, transportation, staffing turnover, and training

requirements. As explained above, though recurring year-round activities cannot be classified as temporary, the Department recognizes that there may be seasonal aspects of herder work for which employers may still establish a need to fill positions on a recurring annual basis consistent with the definition of employment of a "seasonal" nature in § 655.103(d) and that some herder employers may also still present a need that is truly "temporary" under § 655.103(d) in certain circumstances. The Department qualitatively discusses the potential costs to employers incurred by the implementation of this final rule but does not quantify them due to a lack of available data and the wide spectrum of possible responses by employers that cannot be predicted with specificity. Moreover, apart from some commenters expressing concern about potential downsizing for employers who may not have a demonstrable "seasonal" or "temporary" need due to labor shortages, the Department did not receive public comments in response to the NPRM request for feedback regarding how these employers may be impacted by the proposed change in regulation.

Transfer payments under this final rule will result from eliminating the absolute restriction on the period of need for employment involving other range livestock activities and the presumptive period of need for employment involving range sheep or goat herding. In particular, some employers engaged in non-sheep and/or goat herding activities<sup>12</sup> may potentially extend their period of need beyond 10 months, provided they can show the nature of their need is temporary.<sup>13</sup> In addition, sheep and/or goat herding employers whose need is temporary or seasonal in nature and whose period of need currently exceeds 10 months are generally expected to reduce their period of need to 10 months or less.<sup>14</sup> See the costs and

<sup>12</sup> This includes range herding or production of cattle, horses, or other domestic hooved livestock except sheep and goats.

<sup>13</sup> For the purpose of this analysis, employers engaged in non-sheep and/or goat herding activities with a minimum period of need of 300 days and a maximum period of need of 308 days were used to make the Department's transfer estimates. The Department used 300 days to represent a period of 10 months; in fewer than eight instances, employers engaged in non-sheep and/or goat herding activities requested a longer period of need but none of these requests exceeded 308 days.

<sup>14</sup> The Department's records indicate that the majority of employers engaged in sheep and/or goat herding occupations would likely reduce their requested period of need to 10 months or less.

transfer payments subsections below for a detailed explanation.

As shown in Exhibit 1, the Department estimates this final rule will result in a quantified annualized cost of \$3,144 at a discount rate of 7 percent and \$2,588 at a discount rate of 3 percent, as well as unquantified costs associated with changes in business operations, transportation, staffing turnover, and training requirements. Additionally, this final rule is expected

to result in transfers for all herding and range livestock employers. Some employers engaged in non-sheep and/or goat herding activities will incur a transfer from employers to employees due to rescinding the restriction on the period of need for employment involving range livestock activities. The Department also estimates that the final rule will result in annualized transfers of \$95,556 at a discount rate of 7 percent and \$91,983 at a discount rate of 3

percent for these employers. Furthermore, employers engaged in sheep and/or goat herding activities will experience a transfer from employees to employers due to a reduction in the allowed period of need for the majority of the aforementioned employers. The Department estimates that the final rule will result in annualized transfers of \$8.42 million at a discount rate of 7 percent and \$8.11 million at a discount rate of 3 percent for these employers.

EXHIBIT 1—ESTIMATED COSTS AND TRANSFER PAYMENTS OF THE FINAL RULE

	Costs	Transfer payments from employers of non-sheep and/or goat herding	Transfer payments to employers of sheep and/or goat herding
Undiscounted 10-Year Total .....	\$22,079	\$893,043	\$78,731,848
10-Year total with a discount rate of 3% .....	22,079	784,637	69,174,659
10-Year total with a discount rate of 7% .....	22,079	671,143	59,168,812
Annualized at a discount rate of 3% .....	2,588	91,983	8,109,380
Annualized at a discount rate of 7% .....	3,144	95,556	8,424,308

The Department was unable to quantify some costs and benefits of this final rule, as discussed below.

i. Costs

a. Rule Familiarization Costs

When the final rule takes effect, herding and range livestock employers will need to familiarize themselves with the new regulations; consequently, this will impose a one-time cost in the first year upon implementation. The Department’s analysis assumes that the changes introduced by the rule would be reviewed by Human Resources Specialists (SOC 13–1071). The median hourly wage for these workers is \$29.77 per hour.<sup>15</sup> In addition, the Department assumes that benefits are paid at a rate of 46 percent<sup>16</sup> and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully-loaded hourly wage of \$48.53.<sup>17</sup> This hourly wage was multiplied by the estimated number of herding and range livestock employers (910)<sup>18</sup> and by the estimated amount of

time required to review the rule (.5 hours). This calculation results in a one-time cost of \$22,079 in the first year after this final rule takes effect. The annualized cost over the 10-year period is \$2,588 and \$3,144 at discount rates of 3 and 7 percent, respectively.

b. Other Costs

The Department assumes some employers will experience increased costs associated with changes in business operations, transportation, staffing turnover, and training requirements under this final rule. In accordance with the Department’s current regulation, employers of sheep and goat herders are permitted to apply for a temporary agricultural labor certification for a period of up to 364 days. Under this final rule, sheep and goat herding employers whose need is temporary or seasonal in nature and whose period of need currently exceeds 10 months are generally expected to reduce their period of need to 10 months or less. Although the Department does not anticipate the final rule will have a significant adverse effect, as employers have already adjusted to USCIS’ policy memorandum,<sup>19</sup> the Department

acknowledges that some employers of sheep and goat herders may need to replenish their labor supply by hiring additional U.S. workers to account for the reduced period of need, petitioning for permanent workers through the appropriate visa programs as necessary, or extending the work schedule for U.S. workers that they employ if they are available. The Department also notes that, in instances where employers have recurring year-round labor needs that are actually permanent, rather than temporary or seasonal in nature, the Department expects some employers to utilize the employment-based immigrant petition process to hire foreign workers, which includes options for skilled workers, professionals, and other workers under 8 U.S.C. 1153(b)(3).

In response to the Department’s analysis of costs in the NPRM, commenters including two industry associations and a State Department of Agriculture disagreed with the Department’s assessment that some employers of sheep and goat herders will replenish their labor supply by hiring additional U.S. workers. For example, one industry association stated that DOL’s proposed regulatory changes and economic analysis misconstrue the idea that U.S. workers are willing and

<sup>15</sup> Median hourly wage for Human Resources Specialists were obtained from the Bureau of Labor Statistics Occupational Employment Statistics Survey, May 2019, <https://www.bls.gov/oes/current/oes131071.htm>.

<sup>16</sup> The benefits-earnings ratio is derived from the Bureau of Labor Statistics’ Employer Costs for Employee Compensation data using variables CMU102000000000D and CMU103000000000D.

<sup>17</sup> \$29.77 + \$29.77(0.46) + \$29.77(0.17) = \$48.53.

<sup>18</sup> The Department’s estimate of 910 unique employers is based on H–2A certification data from Fiscal Years (FYs) 2017, 2018, and 2019. The Department identified the average number of unique applicants engaged in sheep and/or goat herding activities across FYs 2017, 2018, and 2019 (744). This was then added to the average number

of unique applicants engaged in non-goat/sheep and/or goat herding activities across the same time period (166). 744 + 166 = 910.

<sup>19</sup> Based on OFLC’s H–2A public disclosure data that is accessible at <https://www.dol.gov/agencies/eta/foreign-labor/performance>, employers seeking range sheep and/or goat herding job opportunities filed 914 applications with OFLC from June 1, 2020—the date USCIS’ policy memorandum went into effect—until June 30, 2021 (i.e., the end of the

third quarter in FY 2021). Of these applications, 99 percent requested periods of need that were 10 months or less. In addition, the average period of need for unique certified employers of sheep and goat herding was approximately 166 days, in contrast to FY 2017 to FY 2019, in which the average period of need exceeded 10 months, ranging from 356 days in FY 2019 to 360 days in FY 2017. See Exhibit 3.

able to perform the jobs agricultural employers are seeking throughout the different times of the year, as ranchers have often found that they cannot find domestic help where the domestic labor force is in short supply. Other commenters noted the skillset to perform herding work is not available domestically and that range management plans on Federal lands and many State and tribal lease lands require at least one herder, without providing additional explanation. Due to the dynamic nature of the labor market, the Department acknowledges that the domestic workforce may not entirely offset the personnel changes that could occur following the implementation of this final rule and anticipates that agricultural employers may also adopt changes to their business practices, such as extending the work schedules for U.S. workers that

they currently employ or petitioning for permanent workers through the appropriate visa programs as necessary. Several industry associations indicated that the cost effects of this final rule are likely to be experienced over time due to industries involved in the production of sheep, goats, and livestock needing time to adapt to the requirements of the new rule. One of these comments suggested that downstream effects on jobs in the agricultural supply chain are those most likely to be impacted over time and should be addressed in the economic analysis of this rulemaking. The Department did not receive any data or information from commenters to allow for a quantification of such impacts. As noted above, however, because USCIS' policy memorandum became effective on June 1, 2020 and—based on recent filing data, employers have already adjusted to this guidance—the

Department anticipates the change in operation costs for most employers and any corresponding downstream effects due to the issuance of this final rule to be limited.

Transfers

The first category of transfers associated with this final rule is an employer to employee transfer incurred due to a potential increase in the maximum period of need from 10 months up to 1 year, or longer in extraordinary circumstances, for a small number of employers engaged in non-sheep and/or goat herding who can demonstrate that their need is temporary.

Exhibit 2 presents the distribution of the period of need on approved applications filed by unique employers of non-sheep and/or goat herders during FYs 2017, 2018, and 2019.

EXHIBIT 2—DISTRIBUTION OF PERIOD OF NEED FOR UNIQUE CERTIFIED EMPLOYERS OF NON-SHEEP/GOAT HERDING BY YEAR [FY 17–19]

Period of need (days)	Year		
	2017	2018	2019
0–70	5	5	10
71–140	15	16	17
141–210	10	10	7
210–299	27	47	48
300–308	72	103	107
>308	0	0	0
Number of Unique Employers	129	181	189
Average Period of Need	254	260	257

Transfer payments were calculated by identifying unique employers engaged in non-sheep and/or goat herding from FYs 2017, 2018, and 2019.<sup>20</sup> The Department then identified employers within this group of unique employers whose applications contained periods of need between 300 and 308 days. The Department identified this subset because some employers whose applications contained periods of need that fall within this range are likely to extend their period of need up to a year, or longer in extraordinary circumstances, if they can demonstrate their need is temporary in nature (e.g., their need is not for recurring year-round activities). The Department expects that a small number of employers of non-sheep and/or goat herders will extend their period of need

beyond 10 months. For this analysis, the Department conservatively assumes that no more than 10 percent of the unique employers who were identified to have a period of need between 300 and 308 days will apply, and be approved by OFLC, to extend their period of temporary need beyond a 10-month period.<sup>21</sup> In the NPRM, the Department sought public comment regarding the assumptions on the percentage of unique employers affected. As discussed above, some commenters noted that changes in how an employer describes the services or labor needed, including the period of employment, on new applications filed under this rule may demonstrate compliance with § 655.103(d) rather than changes in the temporary (or seasonal) nature of an

employer's labor needs. Based on OFLC's performance data, the Department estimated the impact of extending the period of need by multiplying the number of workers certified for each of the unique non-sheep and/or goat herding employers by the basic rate of pay offered to these workers each year. The figures for each year were then multiplied by 2 in order to estimate the impact from an additional 2 months of need, which yields an annualized transfer of \$95,556 at a discount rate of 7 percent and \$91,983 at a discount rate of 3 percent.

The second category of transfers associated with this final rule is an employer to employee transfer incurred due to potential reductions in sheep and/or goat herding employers' period of need from a maximum of 364 days to 10 months or less for annually recurring applications.<sup>22</sup>

<sup>20</sup> Based on FYs 2017, 2018, and 2019 performance data obtained from OFLC, the Department estimates that the number of non-sheep and/or goat herding employers is unlikely to increase over the rule's 10-year time forecast.

<sup>21</sup> The Department assumes a small percentage of the unique employers who were identified to have a period of need between 300 and 308 days will apply to extend their period of temporary need beyond a 10-month period up to 1 year, or longer in extraordinary circumstances.

<sup>22</sup> The Department's analysis of employers of sheep and goat herders represents the transfer from employer to employee. The Department assumes



Exhibit 3 presents the distribution of the period of need on approved applications filed by unique employers of sheep and/or goat herders during FYs 2017, 2018, and 2019.

EXHIBIT 3—DISTRIBUTION OF PERIOD OF NEED FOR UNIQUE CERTIFIED EMPLOYERS OF SHEEP/GOAT HERDING BY YEAR [FY 17–19]

Period of need (days)	Year		
	2017	2018	2019
0–70 .....	0	2	3
71–140 .....	1	4	9
141–210 .....	6	5	3
210–299 .....	4	7	7
>299 .....	743	673	761
Number of Unique Employers .....	754	691	783
Average Period of Need .....	360	357	356

Transfer payments were calculated by identifying unique employers engaged in sheep and/or goat herding from FYs 2017, 2018, and 2019.<sup>23</sup> The Department identified employers within this group of unique employers whose applications contained a period of need of 300 days or more. Based on OFLC’s performance data, the Department estimated the impact of reducing the period of eligibility by multiplying the number of workers certified for each of the unique sheep and/or goat herding employers by the basic rate of pay offered to these workers each year. The figures for each year were then multiplied by the number of days requested for the period of need of 300 days or more in order to estimate the impact from reducing the period of need to 10 months or less, which yields an annualized transfer of \$8,424,308 at a discount rate of 7 percent and \$8,109,380 at a discount rate of 3 percent.

ii. Benefits

By rescinding 20 CFR 655.215(b)(2), the Department standardizes the adjudication of temporary need under the H–2A program and aligns the Department’s adjudication of the temporary or seasonal need of herder applications with the guidance DHS has implemented in the USCIS Policy Memorandum. Furthermore, the rescission of § 655.215(b)(2) better complies with pertinent provisions of the INA and the Departments’ applicable implementing regulations that define when employment is of a “temporary or seasonal nature.” Therefore, this final rule aims to help ensure the employment of H–2A workers in herding and range livestock operations does not adversely affect the

wages and working conditions of workers in the United States similarly employed.

*B. Regulatory Flexibility Analysis and Small Business Regulatory Enforcement Fairness Act and Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604. If the determination is that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA. *Id.*

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Department collected industry data from the Bureau of Labor Statistics’ Quarterly Census for Employment and Wage for FY 2020. This process allowed the Department to identify the number of entities impacted by this final rule for two North American Industry Classification System (NAICS) Codes that frequently request H–2A certification for herding and livestock production job opportunities: NAICS 112410: Sheep Farming, and NAICS 112111: Beef Cattle Ranching, and Farming. The Department was able to identify 9,329 establishments that are classified as part of the beef cattle ranching, and farming industry, and 233 Establishments that are classified as part of the sheep farming industry. Next, the Department used the Small Business Administration (SBA) size standards to classify the vast majority of these employers (approximately 99 percent) as small.

The Department has estimated the cost of the time to read and review the final rule. In addition, the Department assumes some employers will experience increased costs associated with changes in business operations, transportation, staffing turnover, and training requirements under this final rule.

The Department estimates that small businesses engaged in herding and livestock production will incur a one-time cost of \$48.53 to familiarize themselves with the changes in this rule. Other costs that employers could incur are attributed to the potential need to adjust their staffing and business operations as well as employing more U.S. workers to offset the loss of H–2A workers. However, the Department does not expect that these costs will be

that in some instances employers will seek to replace H–2A employees who have met the period of need threshold with U.S. employees, which would constitute a transfer between H–2A

employees and U.S. employees. This potential transfer could not be evaluated due to data limitations.

<sup>23</sup> Based on FYs 2017, 2018, and 2019 performance data obtained from OFLC.

significant. As discussed above, the Department reviewed the impacts of this final rule for two NAICS Codes that frequently request H–2A certification for herding and livestock production job opportunities: NAICS 112410: Sheep Farming, and NAICS 112111: Beef Cattle Ranching, and Farming.

The SBA estimates that revenue for a small business with NAICS Code 112410 is \$1.0 million and for NAICS Code 112111 is \$1.0 million. The rule familiarization cost of \$48.53 will be far less than one percent of the average revenue for small businesses with the two NAICS Codes. Although the Department does not anticipate the final rule will have a significant adverse effect as employers have already adjusted to USCIS' policy memorandum, the Department acknowledges that some employers of sheep and goat herders may need to replenish their labor supply by hiring additional U.S. workers to account for the reduced period of need, petitioning for permanent workers through the appropriate visa programs as necessary, or extending the work schedule for U.S. workers that they employ. The Department did not receive any public comments on this Initial Regulatory Flexibility Analysis. The Department certifies that this rule will not have a significant impact on a substantial number of small entities affected.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections and their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This final rule does not require a collection of information subject to approval by OMB under the PRA, or affect any existing collections of information.

#### D. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this final rule is not a major rule, as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking pursuant to the Congressional Review Act, Public Law 104–121, sec. 251, 110 Stat. 868, 873 (codified at 5 U.S.C. 804). This rule will not 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 the ability

of U.S.-based companies to compete with foreign-based companies in domestic and export markets.

#### E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in \$100 million or more in expenditures (adjusted annually for inflation) in any 1 year by State, local, and tribal governments, in the aggregate, or by the private sector. A Federal mandate is defined in 2 U.S.C. 658, in part, as any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or the private sector. Following consideration of these factors, the Department has concluded that this final rule contains no unfunded Federal mandates, including no “Federal intergovernmental mandate” or “Federal private sector mandate.”

This final rule will not exceed the \$100 million in expenditures in any 1 year when adjusted for inflation, and this rulemaking does not contain such a mandate. The requirements of Title II of the UMRA, therefore, do not apply, and the Department is not required to prepare a statement under the UMRA.

#### F. Executive Order 13132, Federalism

The Department has concluded that this final rule does not have federalism implications, because it will 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 requires no further agency action or analysis.

#### G. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

After consideration, the Department has determined that this final rule will not result in “tribal implications,” because it will 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 tribal governments. Accordingly, E.O. 13175 requires no further agency action or analysis.

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

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

For the reasons set forth above, the Department amends part 655 of title 20 of the Code of Federal Regulations as follows:

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

■ 1. The authority citation for part 655 continues 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).

#### § 655.215 [Amended]

■ 2. Amend § 655.215 by removing paragraph (b)(2) and redesignating paragraph (b)(3) as paragraph (b)(2).

#### Angela Hanks,

Acting Assistant Secretary for Employment and Training, Labor.

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