DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

RIN 1205-AB54

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

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

ACTION: Final Rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (DOL or the Department) is amending its regulations to modernize procedures for the issuance of labor certifications to employers sponsoring H-2B nonimmigrants for admission to perform temporary nonagricultural labor or services, and procedures to enforce compliance with attestations made by those employers. Specifically, this Final

Rule re-engineers the application filing and review process by centralizing processing and by enabling employers to conduct pre-filing recruitment of United States (U.S.) workers. In addition, the rule enhances the integrity of the H-2B program through the introduction of post-adjudication audits and procedures for penalizing employers who fail to meet program requirements. This rule also makes technical changes to both the H-1B and the permanent labor certification program regulations to reflect operational changes stemming from this regulation.

Although Congress has vested the Department of Homeland Security (DHS) with the statutory authority to enforce H-2B program requirements, recent discussions between DHS and the Department have yielded an agreement for the delegation of enforcement authority from DHS to the Department. Accordingly, this Final Rule contains the Wage and Hour Division (WHD) regulations describing H-2B enforcement procedures the Department will institute, consistent with that agreement. Separately, this Final Rule institutes conditions and procedures for the debarment of employers, attorneys, and agents participating the in the H-2B foreign labor certification process. As discussed further below, the Department has inherent authority under case law and general principles of program administration to determine what entities practice before it.

The Department received comments both in support and opposition to the proposed regulation. Comments supported, for example, the processing efficiencies of the process, and a possible planned conversion to electronic filing. Broadly, other commenters opposed the rule because they felt it would undermine program integrity, or weaken worker protections and U.S. worker access to job opportunities. Still others believed it untimely, given a general weakening of the economyor failed to address what

they believed to be key problems underlying the program. Several of those problems cited, such as the annual visa cap of 66,000, are statutory in nature and cannot be changed through regulation.

In addition, as described in greater detail below, the Department received comments raising a variety of concerns with specific proposals and provisions within the rule. After reviewing those comments thoughtfully and systematically, the Department has modified several provisions and retained others as originally proposed in the NPRM.

DATES: This Final Rule is effective [insert date 30 days after publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For information on the H-2B labor certification process governed by 20 CFR 655.1 to 655.35, contact William L. Carlson, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210. Telephone: (202) 693-3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

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

telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background Leading to the NPRM

A. Statutory Standard and Current Department of Labor Regulations

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA or the Act) defines an H-2B worker as a nonimmigrant admitted to the U.S. on a temporary basis to perform temporary nonagricultural labor or services. 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Section 214(c)(1) of the INA requires DHS to consult with "appropriate agencies of the Government" before granting any H-2B visa petition submitted by an employer. 8 U.S.C. 1184(c)(1). The regulations for the U.S. Citizenship and Immigration Services (USCIS), the agency within DHS charged with the adjudication of nonimmigration benefits such as H-2B petitions, currently require, at 8 CFR 214.2(h)(6), that the intending employer (other than in the Territory of Guam) first apply for a temporary labor certification from the Secretary of Labor (the Secretary) advising USCIS whether U.S. workers capable of performing the services or labor are available, and whether the employment of the foreign worker(s) will adversely affect the wages and working conditions of similarly employed U.S. workers.

The Department's role in the H-2B visa program stems from its obligation, outlined in DHS regulations, to certify, upon application by a U.S. employer intending to petition DHS to admit H-2B workers, that there are not enough able and qualified U.S. workers available for the position sought to be filled and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 U.S.C. 1184(c)(1); see also 8 CFR 214.2(h)(6).

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

Currently, the Department's regulations at 20 CFR Part 655, Subpart A, "Labor Certification Process for Temporary Employment in Occupations other than Agriculture, Logging or Registered Nursing in the United States (H-2B Workers)," govern the H-2B labor certification process. Applications for labor certification are processed by the Office of Foreign Labor Certification (OFLC) in ETA, the agency to which the Secretary of Labor has delegated her advisory responsibilities described in the DHS H-2B regulations, after first being processed by the State Workforce Agency (SWA) having jurisdiction over the area of intended employment.[1] The SWA reviews the employer's

[1] The SWAs are agencies of State Government that receive Federal Workforce Investment Act (WIA), Wagner-Peyser Act, and other funds to administer our nation's state-based employment services system and perform certain activities on behalf of the Federal Government.

application and job offer, comparing the employer's offered wage against the prevailing wage for the position; supervises U.S. worker recruitment, and forwards completed applications to OFLC for further review and final determination.

Under current procedures, the employer must demonstrate that its need for the services or labor is temporary as defined under one of four regulatory standards: (1) a one-time occurrence, (2) a seasonal need, (3) a peakload need, or (4) an intermittent need. 8 CFR 214.2(h)(6)(ii)(B). The employer or its authorized representative must currently submit to the SWA a detailed statement of temporary need and supporting documentation with the application for H-2B labor certification. Such documentation must provide a description of the employer's business activities and schedule of operations throughout the year, explain why the job opportunity and the number of workers requested reflects its temporary need, and demonstrate how the employer's need meets one of these four regulatory standards. The employer must also establish that the temporary position is full-time, and the period of need is generally one year or less

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

Historically, the Department's review and adjudication of permanent and temporary labor certification applications (including H-2B) took place through ETA's Regional Offices. However, in December 2004, the Department opened two new National Processing Centers (NPCs), one each located in Atlanta, Georgia, and Chicago, Illinois, to centralize processing of permanent and temporary foreign labor certification cases at the Federal level. The Department published a notice in the Federal Register, at 70 FR 41430 (Jul. 19, 2005), clarifying that employers seeking H-2B labor certifications must file two originals of Form ETA 750, Part A, directly with the SWA serving the area of intended employment. Once the application is reviewed by the SWA and after the employer conducts its required recruitment, the SWA sends the complete application to the appropriate NPC. The NPC Certifying Officer (CO), on behalf of the Secretary, either issues a labor certification for temporary employment under the H-2B program, denies the certification, or issues a notice including the reasons why such certification cannot be made.

Currently, the Department has no enforcement authority or process to ensure H-2B workers who are admitted to the U.S. are employed in compliance with H-2B certification requirements. Congress vested DHS with that enforcement authority in 2005. 8 U.S.C. 1184, Public Law 109-13, 119 Stat. 231, 318. As described more fully below, the Department in this Final Rule establishes the H-2B regulatory enforcement regime proposed in the NPRM, consistent with the agreement for a delegation of enforcement authority reached by the Department and DHS pursuant to 8 U.S.C. 1184(c)(14)(B). This enforcement regime also includes debarment procedures for ETA and the

Employment Standards Administration, Wage and Hour Division (WHD), under the Department's inherent debarment authority.

B. Earlier Efforts to Reform the H-2B Regulatory Process

On January 27, 2005, DHS and the Department issued companion NPRMs to significantly revise each agency's H-2B processing procedures. 70 FR 3984, Jan. 27, 2005, 70 FR 3993, Jan. 27, 2005. As proposed, those changes to both agencies' regulations would have eliminated in whole the Department's adjudicatory role, ending the current labor certification process for most H-2B occupations and requiring employers to submit labor-related attestations directly to USCIS as part of a revised supplement accompanying the H-2B petition.

The two agencies received numerous comments on the joint NPRMs in 2005. Most commenters opposed the proposals to move the program adjudication to USCIS and to eliminate the Department's role in reviewing the need of employers and the recruitment of U.S. workers except in post-adjudication audits. Commenter concerns focused in part on the loss of the Department's experience in adjudicating issues of temporary need and the potential adverse impact on U.S. workers. Based on the significant concerns posed in those comments, and after further deliberation within each agency, the Department and DHS have not pursued their 2005 proposals. Consequently, the NPRM published by the Department on January 27, 2005 (RIN 1205-AB36) was withdrawn in the Department of Labor Fall 2007 Regulatory Agenda. See http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=221117.

As stated in the May 22, 2008 NPRM preceding this Final Rule, the Department continued, however, to closely review the H-2B program procedures in order to determine appropriate revisions to the H-2B labor certification process. This ongoing systematic review was accelerated in light of considerable workload increases for both the Department and the SWAs (an approximate 30 percent increase in applications in Fiscal Year (FY) 2007 over those received in FY 2006, and a similar increase during the first half of FY 2008) as well as limited appropriations funding program operations.

On April 4, 2007, ETA issued Training and Employment Guidance Letter (TEGL) No. 21-06, 72 FR 19961, April 20, 2007, to replace its previous guidance for the processing of H-2B applications (General Administration Letter No. 1-95, 60 FR 7216, Feb. 7, 1995) and update procedures for SWAs and NPCs to use in the processing of temporary labor certification applications. The Department then held national briefing sessions in Chicago and Atlanta on May 1 and May 4, 2007, respectively, to inform employers and other stakeholders of the updated processing guidance contained in TEGL 21-06. Attendees at those briefing sessions raised important questions and concerns with regard to the effective implementation of TEGL 21-06 by the SWAs and NPCs. In response to the substantive concerns raised, the Department further refined the process of reviewing applications in TEGL 27-06 (June 12, 2007), providing special procedures for dealing with forestry related occupations, and TEGL No. 21-06, Change 1 (June 25, 2007), updating procedures by allowing the NPC Certifying Officer (CO) to request additional information from employers to facilitate the processing of H-2B applications. 72 FR 36501, July 3, 2007; 72 FR 38621, July 13, 2007. Several issues were not addressed by these refinements, particularly those relating to increasing workload and

processing delays, which require regulatory changes. This Final Rule addresses a number of those unresolved issues.

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

As described in the May 22, 2008 NPRM, the process for obtaining a temporary labor certification has been described to the Department as complicated, time-consuming, inefficient, and dependent upon the expenditure of considerable resources by employers. The current, duplicative process requires the employer to first file a temporary labor certification with the SWA, which reviews the application, compares the wage offer to the prevailing wage for the occupation, oversees the recruitment of U.S. workers, and then transfers the application to the applicable ETA NPC, which conducts another review of the application. This process has been criticized for its length, overlap of effort, and resulting delays. Application processing delays, regardless of origin, can lead to adverse results with serious repercussions for a business, especially given the limitation or "cap" on visas under this program, where any processing delay may prevent an employer from a chance at obtaining H-2B workers that year. This occurs because employer demand for the limited number of visas greatly exceeds their supply, and all visas are typically allocated in the early weeks of availability. See 8 U.S.C. 1184(g)(1)(B) (setting H-2B annual visa cap at 66,000).

In addition, SWA and the Department's increasing workload poses a growing challenge to efficient and timely processing of applications. As stated in the NPRM, the

H-2B foreign labor certification program continues to increase in popularity among employers. While the annual number of visas available is limited by statute, the number of certifications is not. The number of H-2B labor certification applications has increased 129 percent since FY 2000. In FY 2007, the Department experienced a nearly 30 percent increase in H-2B temporary labor certification application filings over the previous fiscal year. This increasing workload is exacerbated because the INA does not authorize the Department to charge a fee to employers for processing H-2B applications.[2] At the same time, appropriated funds have not kept pace with the increased workload at the State or Federal level. This has resulted in significant disparities in processing times among SWAs receiving the initial H-2B employer application. Some observers have noted these disparities among States unfairly advantage one set of employers (those in which the SWAs are able to timely process applications) over others (those in which SWAs experience delays because of backlogs, inadequate staffing or funding, or for other reasons).[3]

In light of these recurring experiences, this Final Rule institutes several significant measures to reengineer the Department's administration of the program. These

[2] On June 12, 2008, the Department transmitted draft legislation to the Congress that would amend the INA to provide the Department with authority to charge and retain a fee to recoup the costs of administering the H-2B labor certification program. [OFLC – 6/12 is signature date – confirm transmittal date.]

[3] The growth in the number of applications is explained in part by the increasing desire of employers for a legal temporary workforce and by legislation that permitted greater numbers of H-2B workers into the U.S. by exempting from the 66,000 annual cap any H-2B worker who had been counted against the numerical cap in previous years. See Save Our Small and Seasonal Businesses Act of 2005, Public Law 109-13, Div. B, Title IV, 119 Stat. 318 (effective May 11, 2005)(exempting from numerical cap for FY 2005 and FY 2006 returning H-2B workers who had counted against the cap in one of the three fiscal years preceding the fiscal year in which the visa petition was filed), and Save Our Small and Seasonal Businesses Act of 2006, included in the Defense Authorization Act for FY 2007, Public Law 109-364, Sec. 1074, xxx Stat. xxx (making amendment retroactive to October 1, 2006, and extending the exemption through FY 2007); see also Public Law 108-287 Sec. 14006, 118 Stat 951, 1014 (August 6, 2004) (exempting some fish roe occupations from the cap).

changes improve the process by which employers obtain labor certification and where our program experience has demonstrated additional measures would assist the Department's role in protecting the job opportunities and wages of U.S. workers. The Final Rule also provides greater accountability for employers through penalties, up to and including debarment, to further protect against program abuse.

D. Overview of Redesigned H-2B Foreign Labor Certification Process

As proposed in the NPRM and finalized in this rule, the redesigned application process will require employers to complete recruitment steps similar to those now required, but will require them to do so prior to filing the application for labor certification. Once recruitment is complete, this Final Rule maintains the requirement proposed in the NPRM that the application be submitted directly to DOL instead of being filed with a SWA. This Final Rule eliminates the SWA duplicative review of the H-2B application. This rule does not eliminate or federalize SWA activities (e.g. the job order and interstate clearance process) that may ultimately support an employer's H-2B application but are funded and governed independently under the Wagner-Peyser Act. This rule does federalize prevailing wage determinations, previously performed by the SWAs under this program.

To appropriately test the U.S. labor market, employers will be required to first obtain, from the Chicago NPC, a prevailing wage rate to be used in the recruitment of U.S. workers. The employer will then follow recruitment steps similar to those required under the current program. The NPRM proposed increasing the number of required

advertisements to three. However, in response to comments, the Final Rule returns to the current requirement of only two advertisements, although it retains the proposed requirement that one of those advertisements be run on a Sunday.

Consistent with the NPRM, this Final Rule requires the employer to attest to and enumerate its recruitment efforts as part of the application, but does not require the employer submit supporting documentation with its application. To ensure the integrity of the process, the Final Rule requires the employer to retain documentation of its recruitment, as well as other documentation specified in the regulations, for three (3) years from the date of certification. The employer will be required to provide this documentation in response to a request for additional information by the Certifying Officer (CO) prior to certification or, pursuant to an audit by ETA or an investigation by the Wage and Hour Division (WHD) after a determination on the application has been issued. The Department has set the document retention requirement at three (3) years rather than the proposed five (5) years in response to comments received expressing concerns that five years would impose an unnecessary burden on small employers, especially those that are mobile or have a mobile component.

Employers or their authorized representatives (attorneys or agents) will be required to submit applications using a new form designed to demonstrate the employer's compliance with the obligations of the H-2B program. As described in the NPRM and the Final Rule, the application form will collect, in the form of attestations, information similar to that required by the current H-2B labor certification process. These attestations are required from the employer to ensure adherence to program requirements and firmly establish accountability. As with recruitment, employers are required to retain

records documenting their compliance with all program requirements. An application that is complete will be accepted by the NPC for processing and will undergo substantive Federal review by the Department.

Based on the Department's experience, and in response to concerns voiced in public comments about the need for H-2B stakeholder guidance and ETA staff training, we have added a transition period to the Final Rule at new section 655.5. Although the Final Rule takes effect 30 days from publication, it phases in implementation based on employment start dates listed in the application. Employers with a date of need on or after October 1, 2009 will be governed by these new regulations. Employers with a date of need on or after the rule's effective date but prior to October 1, 2009 will follow the transitional process described in section 655.5. Additional information about the transition process appears below.

In order to further protect the integrity of the program, specific verification steps, such as verifying the employer's Federal Employer Identification Number (FEIN) to ensure the employer is a bona fide business entity, will occur during processing to ensure the accuracy of the information supplied by the employer. If an application does not appear to be complete or merit approval on its face but requires additional information in order to be adjudicated, the CO will issue a Request for Further Information (RFI), a process the program already employs. After Departmental review, an application will be certified or denied.

As proposed in the NPRM and adopted in the Final Rule, the introduction of new post-adjudication audits will serve as both a quality control measure and as a means of ensuring program compliance, along with WHD investigations. Audits will be

conducted on adjudicated applications meeting certain criteria, as well as on randomly-selected applications. In the event of an audit or WHD investigation, employers will be required to provide information supporting the attestations made in the application. Failure to meet the required standards or to provide information in response to an audit or investigation may result in an adverse finding on the application in question, Departmental supervised recruitment in future applications, and penalties.[4]

As stated in the NPRM, the Department expects the modernized processing of applications will yield a reduction in the overall average time needed to process H-2B labor certification applications. This process is expected to lead to greater certainty and predictability for employers by reducing processing times which have exceeded our historical 60-day combined State and Federal processing timeframe.

II. Discussion of Comments on the Proposed Rule

In response to the proposed rule, the Department received 134 comments, of which 88 were unique and another 46 were duplicate form comments. Commenters represented a broad range of constituencies for the H-2B program, including individual employers, agents, industry coalitions and trade groups, advocacy and legal aid organizations, labor unions, a bar association, Congressional oversight and authorizing committees, and individual members of the public.

Provisions of the NPRM that received comments are discussed below; provisions that were not commented on or revised for technical reasons have been adopted as proposed. The Department has made some technical changes to the regulatory text for

[4] Further sanctions may be imposed by DHS. See 8 U.S.C. 1184(c)(14).

clarity and to improve readability, but those changes were not designed to alter the meaning or intent of the regulation.

A. Section 655.4 – Definitions.

Of the definitions proposed in the NPRM, comments were received on the definitions for "agent," "attorney," "employ," "employer," "full time," "representative," and "United States worker."

The proposed rule defined an agent as "a legal entity or person which is authorized to act on behalf of the employer for temporary agricultural labor certification purposes, and is not itself an employer as defined in this subpart. The term 'agent' specifically excludes associations or other organizations of employers." In response to comments, the Department has corrected the typographical error and replaced "agricultural" with "nonagricultural".

Some commenters supported the proposed definition of agent with regard to its barring of associations or organizations of employers. One bar association commented there had been many abuses by agents in the past, including the unauthorized practice of law, and recommended the Department adopt the definition under DHS regulations at 8 CFR sec. 292.1. We have reviewed the guidelines under that section and concluded it is inappropriate for the labor certification process. The standard set by sec. 292.1 is overly broad and not tailored to the Department's needs. For example, it includes, among others, law students and "reputable individuals." We have determined such persons may not be appropriate to practice before the Department, in particular for purposes of foreign

labor certification activities. That definition was designed to fit the needs of another Federal agency and would also eliminate many current individuals who act on behalf of employers in the labor certification process with the Department.

The Department acknowledges that its allowance of agents who are not attorneys nor who fit into those narrow categories recognized by DHS creates a difference between the two agencies. The Department has permitted agents who do not meet these narrow criteria to appear before it for decades. Agents who are not attorneys have adequately represented claimants before the Department in a wide variety of activities since long before the development of H-2A program, and DOL's programs, where they intersect with those of DHS, permit a broader range of representation. To change such a long-standing practice in the context of this rulemaking would represent a major change in policy that the Department is not prepared to make at this time. Consequently, the Department has not adopted this recommendation. The Department will maintain its long-standing practice and policy regarding who may represent employers.

For greater clarity, a definition for "Administrator, Wage and Hour Division (WHD)" has been added to the definition section of the regulation to distinguish this official from the "Administrator, Office of Foreign Labor Certification (OFLC)." Regulatory text has been added where needed to distinguish between these officials.

The proposed rule defined an attorney as

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

In the Final Rule, the Department has reworded the definition to provide more clarity regarding the bodies or courts which could suspend or disbar an attorney. The Department has also revised the final sentence in the definition to read, “Such a person is permitted to act as an agent or attorney for an employer and/or foreign worker under this subpart.”

In the NPRM, the Department added a definition for “employ" and made revisions to the definition of “employer.” A trade association suggested that the Department eliminate the definition of “employ” but retain the definition of “employer,” stating that the definition of “employ” adds nothing to clarify status or legal obligations under the H-2B program and insinuate broad legal concepts that add unnecessary confusion. As suggested by commenters, the Department has deleted the definition of “employ.” We agree this definition did not provide any additional clarification regarding status or legal obligations related to the H-2B program, and may generate some confusion with other statutes.

The Department received comments that the requirement for a Federal Employer Identification Number (FEIN) as incorporated in the definition of “employer” could be problematic for some employers. One commenter recommended the use of the DUNS number as a compliment to the FEIN. The “data university numbering system” (DUNS), which is operated by Dunn & Bradstreet, issues nine-digit numbers that serve as unique identifiers and are used, in cases, by the Federal Government or individual businesses to track business entities. The Department has decided to retain the definition as proposed, and notes that it is easy for employers to obtain FEINs, which have the advantage of being assigned by the Internal Revenue Service, although in subsection (1)(iii), we have

added the phrase “for purposes of the filing of an application,” to clarify the FEIN is information gathered specifically at the point of application for H-2B labor certification.. Under subsection (1)(i), the Department has replaced “may” with “must” to clarify U.S. workers must be referred to a U.S. location for employment. Although the Department has considered comments recommending the deletion of the provision on joint employment, we concluded this definition is proper in the context of this regulation and have included it in this Final Rule.

Commenters supported the inclusion of a definition for “full time.” The Department agrees with one commenter’s assertion that, consistent with program practice, the definition should not be construed to establish an actual obligation of the number of hours that must be guaranteed each week. The parameters explained under “full time” refer to the number of hours that are generally perceived to constitute that type of employment, as distinguished from “part time”, not a reflection of an employer’s obligation to offer a certain number of hours or any other terms or conditions of employment.

The Department has also made changes to the definition of a job contractor, for purposes of clarity. The changes make clear that the job contractor must control the wok of the individual employee, rather than the control lying with the client of the contractor.

One trade association commented that to the extent the intent of the rule is to define the respective liability of agents and representatives, it should articulate a clear set of standards for liability. The association found the definition of “representative” to be problematic and suggested deleting or revising it. The commenter questioned whether the intent of the regulation was to make the representative liable for any

misrepresentations in an attestation made on behalf of an employer. Because of potential overlaps with the definition and role of agent, the commenter also requested the rule clarify if, and under what circumstances, an agent is liable for activities undertaken on behalf of an employer. The commenter recommended the Department delete the provision on the representative's role in the consideration of U.S. workers, questioning what rationale the Department had for dictating under what circumstances an attorney or other person can interview U.S. applicants for the job, and why the Department is "singling out" attorneys within the definition.

The Department disagrees with the commenter's interpretation of the liability of an agent or attorney for the acts of the employer. The duties of an agent or attorney may vary widely and not all duties that an agent or attorney undertakes may lead to liability. The Department recognizes, however, that some of an agent's or attorney's duties in representing an employer may put the agent or attorney in the role of the employer and be a basis for assigning liability for the employer's acts or omissions. For example, in undertaking to represent an employer in the H-2A program, an agent or attorney not only performs administrative tasks but also submits attestations regarding the employer's obligations under the program. Attorneys and agents undertake a significant duty in making such representations. They are, therefore, responsible for reasonable due diligence in ensuring that employers understand their responsibilities under the program and are prepared to execute those obligations. Agents and attorneys do not themselves make the factual attestations and are not required to have personal knowledge that the attestations they submit are accurate. They are, however, required to inform the employers they represent of the employers' obligations under the program, including the

employers' liability for making false attestations, and the prohibition on submitting applications containing attestations they know or should know are false. Failure to perform these responsibilities renders the agent or attorney personally liable for false attestations. Following our internal deliberations, the Department has decided to retain the definition as proposed.

One commenter believed that the definition of "United States worker" presented in the NPRM was too narrow and that there are other persons in the United States legally entitled to work in addition to those in the categories listed. The Department disagrees, and has retained the proposed definition, as it is inclusive and consistent with other provisions of immigration law and regulations that define U.S. workers and persons authorized to work in the U.S.

The Department also added to the definitions sections the terms "Administrative Law Judge," "Chief, Administrative Law Judge," "Department of Homeland Security," and "United States Citizenship and Immigration Services" as those terms are defined in the Department's H-2A Final Rule. These terms and definitions were inadvertently omitted from the proposed rule.

B. Section 655.5 – Transition.

The Department recognizes that implementing the provisions of the Final Rule may be somewhat difficult on employers who filed their applications with the SWA to begin recruitment of U.S. workers or whose completed applications were transmitted by the SWA to the NPC and will be awaiting a labor certification determination when these

regulations become effective. Even though the NPRM put current and future users of H-2B workers on notice regarding the Department's intent for a Final Rule, the rule represents a departure from the way in which the current program has been administered for many years. H-2B employers, including those who expressed concern regarding the time frame for a Final Rule, will require some period of time to prepare and adjust their requests for nonimmigrant workers to perform temporary or seasonal nonagricultural services or labor, particularly in tandem with changes to DHS processing of cases, and understand how to complete the Department's new forms for requesting a prevailing wage and applying for temporary employment certification.

In response to comments, the Department is accordingly adopting a transition period, outlined in new § 655.5 (previously reserved). Employers desiring to file applications for H-2B workers on or after the effective date of these regulations where the date of need for the services or labor to be performed is prior to October 1, 2009, will be required to obtain a prevailing wage determination from the SWA serving the area of intended employment, rather than the NPC, and meet all of the other pre-filing recruitment requirements outlined in this regulation before an Application for Temporary Employment Certification can be filed with the NPC. However, employers desiring to file applications on or after the effective date of these regulations where the date of need for H-2B workers is on or after October 1, 2009, must obtain a prevailing wage determination from the NPC and comply with all of the obligations and assurances detailed in this subpart. In both circumstances, the SWAs will no longer accept for processing applications filed by employers for H-2B workers on or after the effective date of these regulations. Rather, the SWAs will assist the Department's transition

efforts by only issuing prevailing wage determinations where the employer's need for H-2B workers is prior to October 1, 2009, allowing the rest of pre-filing recruitment requirements, obligations and assurances to become effective immediately. During this transition period, the Department expects that SWAs will continue to allow employers to file prevailing wage requests on forms they currently use in other visa programs in order to minimize any confusion and expedite the prevailing wage review process.

In order to complete the processing of applications filed with the SWAs prior to the effective date of these regulations, the transition procedures require the SWAs to continue to process all active applications under the former regulations and transmit all completed applications to the NPC for review and issuance of a final determination. In circumstances where the SWA has already transmitted the completed application to the NPC, the NPC will complete its review in accord with the former regulations and issue a final determination. OFLC intends to conduct several national stakeholder briefing sessions to familiarize program users with these requirements.

C. Section 655.6 – Temporary need.

Congress mandated the H-2B program be used to fill only the temporary needs of employers where no unemployed U.S. workers capable of performing the work can be found. 8 U.S.C. 1101(a)(15)(H)(ii)(b). Therefore, as explained in the NPRM, the Department will continue to determine whether the employer has demonstrated that it has

a need for foreign labor that cannot be met by U.S. workers, and that the need is temporary in nature.

The controlling factor continues to be the employer's temporary need and not the nature of the job duties. Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982); Cf. Global Horizons, Inc. v. DOL, 2007-TLC-1 (November 30, 2006)(upheld the Department's position that a failure to prove a specific temporary need precludes acceptance of temporary H-2A application.

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

As proposed in the NPRM, for purposes of a one-time occurrence, under this Final Rule the Department will consider a position to be temporary as long as the employer's need for the duties to be performed is temporary or finite, regardless of whether the underlying job is temporary or permanent in nature, and as long as that temporary need – as demonstrated by the employer's attestations, temporary need narrative, and other relevant information – is less than three (3) consecutive years. This interpretation is consistent with the rule proposed by USCIS on August 20, 2008, 73 FR

49109, which is being finalized in conjunction with this regulation. The interpretation is also supported by a recent opinion by the Department of Justice, Office of Legal Counsel. [CITE]

Consistent with the final USCIS regulations, the Department proposed – and the Final Rule permits – a one-time occurrence to include one-time temporary events that have created the need for temporary workers for up to three years. The Final Rule requires those employers to request annual labor certifications based on new tests of the U.S. labor market. As stated in the NPRM, we believe this is the best method by which to ensure U.S. worker access to these job opportunities, while recognizing an employer's need for workers to fill positions could, in some cases, last more than one year.

The Department received a number of comments in response to the proposed expansion of the one-time occurrence definition. A job contractor commented that it did not believe the Department needed to specifically authorize the possibility of a three-year, one-time need, since it could be inferred as already having the authority to certify such situations as long as the employer's situation described in the application was compelling. However, the commenter believed that establishing a maximum three-year stay may be limiting under certain circumstances such as rebuilding after natural disasters. It also creates confusion and complexity for the employer applicants who may not understand the distinction between a three-year labor need and a one-time occurrence. The Department believes employers are savvy enough to understand that an H-2B visa will only be granted for longer than one year in the case of a one-time occurrence and because we are requiring that employers request recertification annually in such cases, they will be required to reiterate and justify their temporary need as a continuation of the

previously approved one-time occurrence. An employer with an approved need for more than one year, but less than 18 months will not be required to conduct another labor market for the portion of time beyond 12 month point in the work.

A number of individual small business commenters were concerned that the proposed changes went beyond the original intent of the program and would leave seasonal and peakload businesses for which it was intended without adequate visas. They raised longstanding concerns with what many believe is an arbitrarily low visa cap and the strong competition among industries for the limited visas. These commenters posited that expanding the term to three years would open up the program to a wider number of industries, further increasing competition for visas, and effectively crowding out those employers for which these commenters believe the visa was intended by the statute. One small employer thought it would allow high tech businesses to participate in the H-2B program to use up all the visas and leave other employers with real peakload needs wanting. This employer also thought it would create a security threat by letting visas be sold on the black market. SWAs commenting also questioned the change in definition as being what they described as a significant program change, up from the current 10 months. None of the changes proposed by the Department would make the H-2B visa program available to highly skilled workers, who now use the H-1B program. In addition, visas are issued by the State Department based on an approved DHS petition and the Department is unaware of any contemplated change in this or the DHS rulemaking that would create an automatic 3-year H-2B visa. Under current regulationis, an initial H-2B visa is generally issued for a year or less and can be extended for additional periods of time. Nothing in this rule would change that.

Several Members of Congress submitted separate comments on behalf of congressional committees. One U.S. Senator opposed the expansion of the definition of a one-time occurrence as contrary to the 1987 legal opinion of the Department of Justice, Office of the Legal Counsel. The comment stated that the Department of Justice considered various views of the proposed construction of "temporarily" in the context of the H-2A visa program and declined to define temporary as up to three years. According to the comment, the Justice opinion concluded that the statutory text, Congressional intent, and sound policy compelled a definition of temporary to be one year or less for all H-2 classifications. The comment also pointed to the Department's and DHS's proposed rules on the H-2A program that retained the one year or less definition of temporary (absent extraordinary circumstances) as evidence that the current construction should be retained. The commenter was concerned that the regulation would lead to abuse of the H-2B program by encouraging some employers who want to take advantage of the program to characterize long-term or permanent jobs as temporary. The commenter believed that these longer-term jobs should be filled by U.S. workers and, if none are available, only then through the employment-based immigration visa process.

Several labor unions also commented on this provision, largely in opposition. One believed the proposal to be at odds with years of precedent and immigration and workforce policy, as well as current law. The commenter asserted that expanding the definition conflicts with DHS regulations, runs counter to the purpose of the H-2B program, and undermines the Congressional mandate to protect U.S. workers. Another labor organization contended that if an employer's need is longer than a short duration it is not a temporary need, and a period longer than a year is not of short duration. This

commenter opposed the inclusion of this provision and urged the Department to withdraw this proposed change. Another union proposed temporary employment be limited to six months and "certainly no longer than one year." Another labor organization opposing the proposed provision did not believe that the requirement that employers retest the labor market each year represented a meaningful safeguard for domestic workers, particularly if the Department were to adopt an attestation-based system where recruitment of U.S. workers is not actively supervised by the SWAs. It recommended the H-2B program be made consistent with the H-2A program concerning the definition of temporary.

Several worker advocacy organizations also opposed this provision, indicating their belief it was not in keeping with the objectives of the program and would open most construction jobs in the country to be potentially part of the program. An individual employer commented that seasonal should mean eight months or less so as to not compete with local permanent jobs.

A law firm commented that the proposed changes went beyond what it believed Congress intended and claimed anecdotally it would directly and proportionally adversely affect the industries for which it felt the program was designed. It believed that the problems with the program are more associated with the delays and uncertainties related to the inadequate number of visas as well as inadequate budget and staffing at all levels of the application process. The commenter recommended these problems would be best addressed by Congress and by increased fees at each step. It also believed that this expansion of the definition would encourage additional industries to participate, most notably information technology, and put undue pressure on an already pressured program.

Conversely, several employer and trade associations supported the expanded provision. One employer association welcomed the change as long in coming. Another supported it as a means to provide greater flexibility across industries and regions. Still another recommended that the three-year provision be expanded beyond "one-time need" to the other three categories of temporary need.

A legal association supported the proposal to expand temporary need but suggested the Department rethink the requirement that employers retest the market each year. According to the comment, requiring employers to get a new prevailing wage and perform additional recruitment and filing each year would increase workload for the Department, increase costs to employers, and fails to recognize the advantages of the employer having the availability of trained, experienced workers. It recommended that a reasonable alternative would be for employers to check the prevailing wage determination annually to ensure that the workers are being paid the appropriate wage but not to have to undertake further recruitment efforts.

Many SWAs commented on the proposed rule. On the issue of temporariness, one SWA stated its support for retesting the labor market each year. An employer association supported retesting the labor market each year only in situations where there was a significant time period beyond the ordinary ten-month period left on the labor certification. It believed that this requirement would be too onerous on employers if applied to jobs lasting only 18 months, for example.

Finally, a worker advocacy group recommended the addition of a process either through the Department or the SWAs under which workers could challenge the determination that the jobs are temporary.

The Department defers to the Department of Homeland Security and will use their definition of temporary need as published in their Final Rule on H-2B. Currently, that definition, including the four categories of need, appears at 8 CFR 214.2(h)(6)(ii), and requires the employer show extraordinary circumstances in order to establish a need for longer than one year. Consistent with this Final Rule and the Office of Legal Counsel opinion cited earlier, DHS's Final Rule amends 8 CFR 214.2(h)(6)(ii)(B) to eliminate the requirement for extraordinary circumstances and clarify that a temporary need is one that ends in the near, definable future, which in the case of a one-time occurrence could last longer than one year and up to three years. Accordingly, we have deleted the definitions we had in our regulatory text in the NPRM and instead provided a reference to the DHS regulations.. ..

D. Section 655.10 – Determination of prevailing wage for labor certification purposes

1. Federalizing Prevailing Wage Determinations

The Department proposed a new reengineered system to federalize the issuance of prevailing wages, under which employers would obtain the prevailing wage for the job opportunity directly from the NPC. As proposed, the new federalized process would allow employers to file prevailing wage requests with the appropriate NPC –designated as the Chicago NPC for prevailing wage requests – no more than 90 days before the start of recruitment. The proposed rule also clarified the validity period for wage determinations. Based on annual updates to the Occupational Employment Survey (OES) database, and depending on the time of year that the prevailing wage determination

(PWD) was obtained from the Department, relative to the date of the most recent update, the wage determination provided could be valid from several months up to one(1) year. The NPRM sought comments from employers who had utilized the program in the past on the efficacy of this proposed action.

The Department received numerous comments on this new process. After consideration of all comments, we have decided to implement the PWD process as proposed in the NPRM, without change. However, to reflect the transition from the current system to the new, the regulation now clarifies that employers with a date of need on or after October 1, 2009 must seek a PWD from the Chicago NPC prior to beginning recruitment, consistent with this Final Rule, while employers with prior dates of need will continue to seek PWDs from the SWAs, consistent with the current process..

Overwhelmingly, commenters were concerned about the capability of the NPC to provide timely and accurate prevailing wage determinations. Commenters supporting the new centralized process included trade associations, employer-based organizations, businesses, and individual professionals with significant experience in the foreign labor certification field. Of those, some requested reassurance that the Department would allocate sufficient resources and training to the PWD activity at the NPCs to prevent processing delays. They urged the Department to institute mechanisms to ensure consistency between NPCs and across job titles, descriptions, and requirements; and to offer comprehensive training to employers, attorneys, and agents prior to implementation.

Many commenters, including labor unions, advocacy organizations, academic institutions, and SWAs expressed concern that the NPC staff would not possess the same level of expertise, particularly locally-oriented expertise, required to provide accurate,

context-appropriate prevailing wage determinations as the SWA staff. They believed this could lead to reduced scrutiny, inaccuracy, backlogs, and delays, and adversely affect U.S. worker wages and job opportunities. The SWAs that commented on this issue were concerned that transferring the determination to the NPCs would also degrade customer service, and some questioned whether OES really keeps pace with changes in local standards. One state has had success with its own system and recommended the Department replicate that system on a national scale.

One advocacy organization expressed the view that centralization would be particularly harmful to amusement park industry workers, which currently use a weekly rate rather than an hourly rate. One employer was concerned that NPC-issued PWDs would be inaccurate and biased in favor of higher wages, raising program costs. Several commenters opposed PWD federalization in its entirety, and proposed full funding of SWAs for these activities. In the alternative, they recommended that if the Department were to move forward, it hire staff with strong PWD backgrounds and create a separate PWD unit within the NPC.

To guard against potential delays, some commenters requested that a timeframe for the process be established, or recommended adjustments to the process as proposed. A small business coalition recommended the Department permit employers to recruit without first getting the PWD from the NPC, so long as the employer accompanied its H-2B application with a printout of a current and appropriate wage from O*NET, which is the Internet wage survey the Department updates on an annual basis. A large trade association made a similar recommendation, with a proviso that if the employer has not used the correct wage from the database, it would be required to restart the application

process after obtaining a PWD from the NPC. The Department also received a suggestion that employers be allowed to get the OES rate themselves unless they want a safe harbor which would be provided by getting the wage rate from the NPC or SWA. Another commenter was concerned that employer surveys do not provide the same safe harbor as SWA determinations and another commenter was concerned that eliminating the SWA from the process meant that the safe harbor would also be eliminated.

At this time, the Department is not prepared to establish a procedure for employers to get their wage offer without prior Department approval of the specific wage. The Department believes that continued oversight at the Federal level is essential to ensuring that the job opportunities are advertised and paid at the required wage and therefore does not adversely affect U.S. worker wages.

A number of commenters urged that within this new process, the Department provide a vehicle for communication between program users and NPC staff to resolve disagreements on the job opportunity or wage level and educate program users on the Department's methodology. One trade association recommended the Department disclose its methodology for a PWD upon request from an employer, and with sufficient time to avoid delaying the application. Other organizations conditioned their support of the new process specifically on the creation of a mechanism for communicating or interacting with the public. Some commenters observed that the appeal process for wage determinations can be quite lengthy, and not a viable option in the context of H-2B or H-1B, where timing is critical; those commenters were particularly concerned that without such communication the timeframe for resolving any prevailing wage determination issues would be lengthened.

The Department recognizes its responsibility to provide an efficient process for prevailing wage determinations. Now that the backlog in the permanent labor program has been eliminated, resources are being redirected to other priorities, including the re-engineering of the temporary labor certification programs. As the new program design is implemented, we will allocate appropriated resources to key activities, including the PWD function,to ensure effective interaction with the public. As part of this process, the Department will focus on identifying areas where improvements could be made, including developing and providing needed training. The Department will also look to its stakeholder community for input and suggestions for improvements.

The Department will seek to hire qualified staff, will train staff already on board, and if appropriate, will establish a separate PWD unit. In addition, the Department will provide timely, appropriate guidance to program users and SWAs to ensure a successful transition and implementation. We remain confident that federalizing the prevailing wage application component will instill a high level of efficiency and consistency in the process which has been a past problem. This increased efficiency and consistency will help ensure more accurate wage determinations, which result in improved protections for U.S. workers.

As stated in the NPRM, the Department strongly believes that shifting wage determination activities to NPC staff will reduce the risk of job misclassification because of centralized staff experience, thereby not only strengthening program integrity, but also ensuring consistency in classification across States, resulting in improved protections for U.S. workers.

As discussed in the NPRM, the Department has received numerous reports that in cases where job descriptions are complex and contain more than one different and definable job opportunity, some SWAs have made inconsistent classifications that resulted in inconsistent PWDs. Furthermore, where H-2B workers are required to work in several different geographic areas that may be in the jurisdiction of several SWAs (examples include the New York, New Jersey, Connecticut "Tri-state Region" or the Washington, DC-Maryland-Virginia metropolitan area), questions have arisen about where to file a prevailing wage request and how that wage should be determined. Utilizing a federalized system will alleviate such confusion. Moreover, the Department's current prevailing wage guidance requires SWAs refer – with certain exceptions – to federally-provided OES data to determine the appropriate prevailing wage for jobs. Therefore, the NPC can provide the data and there is no requirement for any local input or expertise.

Until the Department implements the new PWD process for the H-2B, PERM, and H-1B and related programs as provided under this Final Rule, the SWAs will continue to be responsible for providing prevailing wage determinations.

The Department understands the desire for a fixed timeframe within which an employer will receive a prevailing wage determination. However, the timeframe depends on a number of factors, including the volume and timing of requests received, the method by which the requests are received (whether paper or electronic) and resources available. These factors, as well as the fact that this is a new process still being designed, led us to the conclusion that it would not make sense to establish a definite timeframe at this time. In addition, the NPC staff who historically have been reviewing H-2B applications have

significant knowledge and expertise on these issues. The Department believes that the procedures established in this Final Rule will provide employers with prevailing wage determinations on a timely basis and, because each case is different, declines to establish specific deadlines for the process at this time.

However, the Department acknowledges that this process of obtaining a prevailing wage will endure a period of processing time fluctuation as a result of the transition. We therefore recommend that, as an initial matter, employers filing H-2B applications should file a Prevailing Wage Determination Request, Form 9141, with the NPC at least 60 days in advance of their initial recruitment efforts. The Department will make every effort to process these requests well within the 60 days, while the Department tracks and analyzes its experience tracking application patterns and workload, especially as the NPCs take on the prevailing wage determinations in programs across the spectrum of those handled by OFLC. During that time, the Department will review not only the level of requests it receives, but the information contained in the requests and whether the information received is typically sufficient to be able to generate accurate prevailing wages, or where employers are providing deficient information. The Department's intent is to substantially reduce the response time for prevailing wage determinations based upon the results of that tracking, to provide employers will greater certainty in their expectation of response time from the NPC.

One commenter thought the prevailing wages would be based on a national average as a result of the centralization in the NPC. That commenter misunderstood the proposal; the wages will continue to be based on applicable data for the area of intended employment. However, the Department did not propose any change to the methodology

used to determine the wage rates under the H-2B program and continues to stand behind the use of OES data as the basis for the prevailing wage determinations. The OES program produces occupational estimates by geographic area and by industry. Estimates based on geographic areas are available at the national, State, and metropolitan area levels. Industry estimates are available for over 450 industry classifications at the national level. The industry classifications correspond to the sector, 3, 4, and 5-digit North American Industry Classification System industrial groups. The OES program also provides data at the substate level in addition to the State level. Data is compiled for each metropolitan statistical area and for additional areas that completely cover the balance of each state. It also offers the ability to establish four wage level benchmarks commonly associated with the concepts of experience, skill, responsibility and difficulty variations within each occupation.

2. Automating the PWD process.

Although initially the PWD process will be a manual process, it is the Department's goal to eventually allow the PWD activity to be performed electronically between the NPC and the employer. The Department sought comment from potential program users on all aspects of its PWD proposal, but in particular regarding the required use of an online prevailing wage system and corresponding form for interaction with the NPC.

The Department received several comments in support of an electronic process. One commenter suggested the centralization of prevailing wage determinations be

delayed until the electronic process was available. Another commenter suggested the electronic process should not be mandatory for all employers, since not all employers have access to the Internet. One commenter expressed concern that employers would use an electronic system to "shop" for occupations with the lowest wages to use in describing their job opportunities. The Department disagrees with the suggestion we delay implementation of the prevailing wage function until an electronic version is available. When the Department implements an electronic application system, it customarily makes special provisions for those who cannot access the electronic system, and advises the public accordingly. The Department appreciates the input on an electronic system and will take the comments into consideration at the time a new system is proposed.

3. Extending the PWD model to PERM, H-1B/H-1B1, E-3, and H-1C programs.

The Department received comments on its proposal to extend the federalized wage determination process to other permanent and temporary worker programs. Some believed that the Department should not include other programs in an H-2B rulemaking. One commenter suggested that the process should not be extended until the new system has proven to be workable. Another commenter was concerned that extending the process to these other programs would result in the total elimination of the States when enforcement capacity is best kept at the State level. One commenter who supported the federalization mentioned that the assignment of occupational codes from the Standard Occupational Classification (SOC) system is also key and should be reviewed. The SOC system is used by many Federal agencies to classify workers into occupational categories.

a. H-1B and PERM programs.

As proposed in the NPRM, for consistency and greater efficiency across non-agricultural programs, this Final Rule extends the new prevailing wage request processing model to the permanent labor certification program, as well as to the H-1B, H-1B1, H-1C and E-3 specialty occupation nonimmigrant programs. As stated in the NPRM, the new process will not alter the substantive requirements of foreign labor certification programs, and we anticipate that, at least in the foreseeable future, the methodology for determining appropriate wage rate will remain much the same as it stands today. Our intent is to modernize, centralize, and make the mechanics and analysis behind wage determination more consistent. Much as the SWAs do now, the NPCs will evaluate the particulars of the employer's job offer, such as the job duties and requirements for the position and the geographic area in which the job is located, to arrive at the correct PWD based on OES data, CBA rates, employer-provided surveys, or other appropriate information. The Department's current prevailing wage guidance for non-agricultural foreign labor certification programs has been in effect since 2005 and is posted in the form of a memorandum on the OFLC website. In the near term, the Department will update and formalize its guidance for making prevailing wage determinations to confirm existing procedures and conform to these regulations. As our program experience administering the PWD process grows, the Department may revise its guidance to explain and assist employers in navigating the process.

To implement and standardize the new process, ETA has developed a new standard Prevailing Wage Determination Request (PWDR) form for employers to use in requesting the applicable wage regardless of program or job classification. As stated in the NPRM, the Department is considering means by which eventually such request could be submitted, and a prevailing wage provided, electronically.

For purposes of the permanent labor certification (PERM) program, this rule amends the regulations at 20 CFR part 656 to reflect the transfer of prevailing wage determination functions from the SWAs to the NPCs, and makes final the technical changes described in the proposed rule.

For purposes of the H-1B program, this rule amends the regulations at 20 CFR part 655 to reflect the transfer of PWD functions from the SWAs to the NPCs, and makes final the technical changes described in the proposed rule. Department regulations covering the H-1B program also govern the H-1B1 and E-3 programs which both require the filing and approval of a "Labor Condition Application," or LCA, rather than a "labor certification application." The Final Rule also amends 655.1112 governing the H-1C program, to provide for the federalization of prevailing wage activity.

As described in the NPRM and included in the Final Rule, under the new process, for purposes of H-2B job classifications, NPC staff will follow the requirements outlined under new Sec. 655.10 and 655.11 when reviewing each position and determining the appropriate wage rate. These new regulatory sections are consistent with existing provisions at 20 CFR 656.40 and the Department's May 2005 Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, but would

supersede current regulations and guidance for the H-2B program to the extent there are any perceived inconsistencies.

These new regulatory sections supersede current regulations and guidelines for all prevailing wage requests in the H-1B, H-1B1, E-3 and PERM programs made on or after January 1, 2010, and for H-1C prevailing wage requests made on or after the effective date of this Final Rule. The Department appreciates that employers will require some time to become accustomed to the new method of securing a prevailing wage determination. The SWAs will also need a time of transition to complete pending prevailing wage determination requests, just as the NPC will require a corresponding time to fully implement the new form and process. The Department believes keeping PWD activities with the SWAs for PERM, H-1B and related programs until January, 2010 will facilitate the transition of Federal staff and program users to complete federalization of prevailing wage determinations. Therefore, the Chicago NPC will initiate its provision of prevailing age determinations in programs other than H-2B and H-1C on January 1, 2010. Given the limited size of the H-1C program, and the potential it may sunset in 2009, the Department believes it can begin processing prevailing wage determination requests shortly after this Final Rule takes effect. Prevailing wage requests under the H-1C program made prior to the effective date of this Final Rule will be governed by the Department's current procedures and its 2005 guidance. Any prevailing wage requests for other non-H-2B programs governed by this regulation made prior to January 1, 2010 must be submitted to the SWA having jurisdiction over the area of intended employment, and will be valid for the period listed on the determination issued by the SWA. Prevailing wage determinations issued prior to January 1, 2010 by a SWA

will be valid after October 1, 2010 if so determined by the SWA issuing them, and fully enforceable as determined by the applicable regulation (H-1B, H-1B1, E-3, H-1C or PERM).

b. H-1C Program.

In the same way that the Department is in this Final Rule establishing national processing for the obtaining of prevailing wages through its National Processing Center for both H-1B (and by extension H-1B1 and E-3) and PERM it will also amend its H-1C regulations to incorporate the same changes. This program, whose prevailing wage processing amendments were inadvertently removed from the NPRM, previously sunset, was reauthorized in December 2006, and is scheduled to sunset again in December 2009.[5] The Department has determined that it is administratively prudent to move the prevailing wage determination function to the NPCs in the H-1C program as in the other programs. This affects a very small number of employers (only 14 hospitals are eligible to participate) and is consistent with the reasoning for administrative efficiency and consistency sought in the other programs. As stated in the preamble to the NPRM, and applies equally here to H-1C, the conversion to a federalized prevailing wage system has no effect on the substantive requirements of foreign labor certification programs, or on the methodology by which the NPC will determine the prevailing wage for workers to be admitted under any of the applicable visas. In fact, the majority of prevailing wage determinations in the H-1C program are based on the wages contained in collective

[5] The Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005, Pub. L. 109-423, took effect December 20, 2006. The Act reauthorized the H-1C nonimmigrant nurses program, a program originally created by the Nursing Relief for Disadvantaged Areas Act of 1999.

bargaining agreements, making the need to obtain a wage determination by the NPC wholly unnecessary. Facilities may begin submitting H-1C prevailing wage requests to the NPC on the date this Final Rule takes effect.

4. Section 655.10(b)(3) – Paying the highest prevailing wage across MSAs.

As proposed in the NPRM, this Final Rule requires that where a job opportunity involves multiple worksites in areas of intended employment and cross multiple Metropolitan Statistical Areas (MSAs) in multiple counties or States with different prevailing wage rates, an employer must pay the highest applicable wage rate of the applicable MSAs throughout the term of employment. The U.S. worker responding to recruitment and the foreign H-2B worker are entitled to know and rely on the wage to be paid for the entire period of temporary employment.

The Department received comments on this requirement, both in support and in opposition. One trade association supported the proposal, concluding it would strengthen protections for U.S. workers while not adding burden to its members, whom it said already paid the highest prevailing wage rate in every MSA. A number of other employer associations opposed the proposal, stating it was arbitrary, unfair, would artificially increase costs for H-2B labor, and would undermine the basic decision-making of many employers, who locate in areas with low labor costs in order to save money.

The Department has decided to retain the requirement that employers advertise and pay the highest of the applicable prevailing wages when the job opportunity involves

multiple worksites across multiple MSAs with varying prevailing wage rates for that occupation and at those worksites. This is retained because it provides greater consistency and predictability for both employers and the workers, and ensures that U.S. workers who are interested in the job opportunity would not be deterred due to varying wage rates. It also ensures greater protection for workers against possible wage manipulation by unscrupulous employers.

5. General process or data integrity concerns.

Some commenters raised concerns about the integrity of the data currently being used for prevailing wage determinations and recommended changes to the OES survey itself. Others commented on different aspects of the methodology and procedures. One commenter suggested that the Department set the minimum wage rate for H-2B workers at or above the wage (presumably the adverse effect wage rate) for H-2A workers in that State. Another commenter suggested the Department require employers in the construction industry to use, first, the Davis-Bacon Act (DBA) survey wage rate; second, if no DBA wage existed, the collective bargaining agreement rate; and as a last resort, the OES rate, if neither of the other rates was available. Another commenter suggested that the provision regarding when an employer may utilize a wage determination under the Davis-Bacon Act also covered when an employer can choose not to utilize that wage rate. One commenter believed that the proposal did not correct what they claimed was a problem with BLS wage rates being two years out of date and also expressed concerns that piece rate policies have led to depressed wages and suggested

that the Department should require advance written disclosure of piece rates on the job orders.

The Department appreciates these suggestions and concerns. However, the Department did not propose changes to the sources of data to be used for prevailing wage determinations and, therefore, these comments are beyond the scope of the current rulemaking. The Department notes that the proposed procedures that were retained in the Final Rule already cover the use of wages specified in a collective bargaining agreement. Similarly, these procedures provide that an employer may use the Davis-Bacon Wage and that such use is at the employer's option unless the employer is a Federal construction contractor. There is a similar provision that applies to Service Contract Act wage rates.

Some commenters suggested that employers should not be allowed to submit their own wage surveys. The Department, however, believes that employers should continue to have the flexibility to submit pertinent wage information and therefore, the Final Rule continues the Department's policy of permitting employers to provide an independent wage survey under certain guidelines. It also continues to provide for an appeal process in the event of a dispute over the applicable prevailing wage.

E. Section 655.15 – Employer Conducted Pre-Filing Recruitment.

Under the Final Rule, employers will continue to be required to test the labor market for qualified U.S. workers at prevailing wages no more than 120 days before the date the work must begin ("date of need"). This will ensure the jobs are made available to U.S. workers most likely to qualify. As described in the NPRM and finalized under

this rule, U.S. worker recruitment will continue to consist of prescribed steps designed to reflect what the Department has determined, based on program experience, are most appropriate to test the labor market. These steps are similar to those currently required under the current H-2B program. However, application processing and consistency will be improved by having employers conduct the recruitment before forwarding the recruitment report and application to the Department for review. Additionally, we will continue the Department's current requirement that recruitment take place no more than 120 days before the date of need to ensure jobs are advertised to U.S. workers with adequate notice.

This Final Rule retains the requirement in the proposal that employer recruitment efforts be documented and retained for production to the Department or other Federal agencies. As stated in the NPRM, the recruitment documentation requirements will be satisfied by copies of the pages containing the advertisement from the newspapers in which the job opportunity appeared and, if appropriate, correspondence signed by the employer demonstrating that labor or trade organizations were contacted . Documentation of a SWA job order will be satisfied by copies of the job order downloaded from the Internet showing the beginning and the ending date of the posting or a copy of the job order provided by the SWA with the dates of posting listed, or other proof of publication from the SWA containing the text of the job order. However, in response to public comments, the Final Rule requires record retention for three (3) years, two years less than the Department originally proposed.

As proposed, the Final Rule permits employers to place their own newspaper advertisements. The Department has revised the proposed requirement of three advertisements and will in this Final Rule revert to the current requirement of two advertisements. The Department, however, has maintained in this Final Rule the proposed requirement that one of the two advertisements must be placed in a Sunday edition of a newspaper.

The Department received several comments that supported the shift to a pre-filing recruitment model. One of these commenters recommended that the job order process should also be centralized or that timelines for posting job orders should be established and SWAs should have staff dedicated to working with H-2B job orders. The centralization of the job order process was not envisioned by this regulation, and would require separate rulemaking. However, posting job orders and referring individuals to those jobs is a core function of the SWAs and one that remains at the local level in this rule. Additionally, the Department believes the SWAs must have the flexibility to assign their limited resources based on needs and priorities and declines to establish a timeline for SWAs to post job orders.

The Department received a number of comments about the proposed timeframe for pre-filing recruitment; some opposing recruitment so far in advance of the date of need and others suggesting the timeframe be lengthened. The commenters opposed to the proposal generally believed that U.S. workers would not be able or willing to commit to temporary jobs so far ahead of the actual start date or would indicate they would accept the jobs but then fail to report on the actual start date. These commenters believed this would result in delays, additional costs to employers and the Department, and the late

arrival of H-2B workers because new applications would have to be filed. One commenter opposed the early pre-filing recruitment and believed the result would be a false indication that no U.S. workers were available. Another commenter opined that employer compliance would be reduced due to the pre-filing recruitment. One SWA recommended that the period for recruitment be shortened because 120 days in advance is not when serious job seekers are looking for temporary employment and stating their view that those U.S. workers who apply are rarely offered employment because the employer knows foreign workers are available. The commenter was further concerned that the U.S. workers who are hired that far in advance of the date of need are not reliable and will not report for work. In contrast, two commenters suggested a longer recruitment period—one recommended 180 days in advance of the date of need—to provide employers with greater flexibility. The Department declines to extend the period of recruitment to 180 days prior to the date of need because we do not believe recruitment that far in advance would be effective given the concerns expressed by some of the commenters.

One commenter was concerned that the proposed pre-filing recruitment period, when combined with a prevailing wage determination request submission 90 days prior to the recruitment start date, advanced the timeframe for beginning the application to more than six (6) months prior to the date of need. This commenter stated this was not characteristic of a user-friendly program. The Department understands that there are trade-offs when designing a new system. In this case, in order to provide the employer more flexibility and eliminate an extra layer of government bureaucracy, the process must begin earlier.

One commenter was concerned about the validity of the pre-filing recruitment when, after completing the recruitment and submitting the application, the employer's needs change and it requires a modification to a term or condition on the application. This commenter questioned whether the recruitment would be considered a valid test of the labor market since, unlike the current process, the underlying application and job order will not have been approved prior to the recruitment effort. The commenter recommended that the Department provide in the regulation that as long as the recruitment was conducted based on the job description and offered wage as determined by the CO and the job order was accepted by the SWA, the recruitment would be considered valid irrespective of any required modifications. It is unclear what kind of modifications would be warranted and, therefore, the Department cannot respond directly to this comment. If modification is needed because the NPC rejected the application then the recruitment might indeed become stale and it is, therefore, the employer's obligation to make sure that the application meets all requirements and is complete. However, if a "modification" is needed pursuant to a Request for Further Information issued by the NPC and the application was timely filed, then the recruitment will continue to be valid for as long as the petition is pending at the NPC.

The Department's requirement that the employer submit an acceptable job order to the appropriate SWA for posting mandates that the employer complete and submit information regarding all of the job duties and terms and conditions of the job offer: the job duties, the minimum qualifications required for the position (if any), any special requirements, and the rate of pay. This information is normally submitted to the SWA for acceptance prior to the employer's recruitment; as long as the employer's

advertisements do not depart from the descriptions contained in the job order, they will be deemed acceptable by the Department. At the same time, the SWA will be the arbiter of the job's acceptability for the job order, and as the job order must be accepted prior to the commencing of recruitment in this Final Rule, all recruitment must reflect the job as accepted by the SWA as well.

The Department has decided to eliminate the document retention requirement in its entirety with respect to applications not certified; therefore, any employer who has been denied can discard the records relevant to the denied application immediately upon receiving the denial notice or whenever the decision becomes final if the employer appeals the decision. If the denial is overturned, the application becomes subject to the document retention requirements for approved cases. The Department determined that a document retention requirement in such cases serves no governmental purpose and is unnecessarily burdensome on employers. The Department would, in virtually all such cases, already have copies of the employer's supporting documentation rendering such a retention requirement unnecessary.

1. Section 655.15(g) – Unions as a source of labor.

As proposed, the rule would have required that if the job opportunity were in an industry, region and occupation in which union recruitment is customary, the appropriate union organization must be contacted. A number of commenters were concerned that the proposed provision places too great a reliance on the employer's ability to determine what the Department will later decide is "appropriate for the occupation and customary to the

industry and area of intended employment". One of these commenters suggested that even if contacting a union may be appropriate in some industries, it would be entirely inappropriate in the construction industry and, at a minimum, the construction industry should be expressly excluded from this requirement under a Final Rule. Another commenter suggested that the requirement was unnecessary, as the required newspaper advertising would reach the same pool of applicants. Another commenter believed the requirement was not authorized by statute and the Department has no basis to impose it. Additionally, the commenter expressed concern that the requirement also has the potential to subject non-unionized employers to "salting" campaigns, during which union organizers retain employment in union shops for the sole purpose of organizing the workforce. According to this commenter, the requirement could unfairly and unnecessarily inject the Department into an area in which it should not be involved.

One specialty bar association opined that the requirement to use unions as a recruitment source would be unworkable in practice, stating that in their experience, unions will not refer workers to non-union shops. The commenter recommended the regulation instead use the approach of the permanent labor certification program, which requires union contact for unionized employers only.

The Department has considered these comments and agrees with the many concerns raised about the proposed requirement, in particular concerns about vagueness and ambiguity, and the dilemma employers would face in trying to interpret and implement it. Accordingly, we have revised the provision to require an employer contact a labor organization only in cases where the employer is already a party to a collective bargaining agreement that covers the occupation at the worksite that is the subject of the

H-2B application. The employer's obligation is only to contact the local affiliate of labor organization that is party to the existing collective bargaining agreement that covers the occupation at the worksite that is the subject of the H-2B application.

2. Section 655.15(i) – Referral of U.S. workers and SWA employment verification.

To strengthen the integrity of the Secretary's determination of the availability of U.S. workers, and to help bolster employers' confidence in their local SWAs and the larger H-2B program, the Department proposed that SWAs verify the employment eligibility of U.S. workers they refer for nonagricultural employment services with the SWA. The Department received a significant number of comments on the practicality of this provision.

Comments on this subject were received from national associations, numerous SWAs, several labor advocacy organizations, and members of Congress. Commenters generally opposed the proposal for a variety of legal, programmatic, resource-related, and policy-based reasons.

Most of the commenters were SWAs that noted the burden this new provision would create. Many saw it as an unfunded Federal mandate in violation of the Unfunded Mandates Reform Act. More than one referred to the Department's recent inclusion of the requirement as a condition for receiving further labor certification grant funding.

As stated in the preamble to the NPRM, the Department is not insensitive to the resource constraints facing state agencies in their administration of the H-2B program. However, as we stated in the NPRM, we do not believe that the requirement will result in

a significant increase in workload or administrative burden not covered by Department-provided resources.

In addition, notwithstanding funding limitations, there is a strong, longstanding need for a consistent verification requirement at the state government level. The Department is not leaving states to their own devices. Precisely to ensure that available Federal funding supports verification activities, the Department has added the verification requirement as an allowable cost under the foreign labor certification grant agreement. While cognizant of the challenges posed by funding limitations, we expect States to comply as they do with other regulatory requirements and other terms and conditions of their grant.

SWAs also expressed concern about possible discrimination suits. The requirement to verify employment eligibility does not violate constitutional prohibitions against disparate impact. The eligibility requirement is similar to verification requirements to gain access to other similar public benefits.

One SWA said it would be impossible to implement verification of work eligibility because they have a virtual one-stop system that is self-service for both employers and job seekers and the SWA would be unable to certify that applicants referred to those job orders are employment-eligible. While we do not disagree that an in-person verification requirement may impact the decisions of a limited number of otherwise eligible workers, such impact does not outweigh the significant value of verification. Moreover, SWAs can respond to any possible inconvenience to workers by designating or creating additional in-person locations where eligibility can be verified. This is not a problem unique to SWAs—workers may be required to travel great

distances to reach a prospective employer, who then (absent a SWA certification) would be required to verify work eligibility. In the end, although employment eligibility verification does require some amount of extra time and effort, the Department has determined that simple convenience must cede to the overarching goal of a legal workforce and has drafted its regulations accordingly.

Several SWAs also pointed out that under the new regulations it will be impossible to identify H-2B job orders, especially now that the SWA will no longer receive a copy of the application or determine prevailing wages and be only responsible for placing the job order. The Final Rule now requires the job order carry a notation identifying it as a job order to be placed in connection with a future application for H-2B workers

Several other commenters supported the contention made by the SWAs that this requirement will drain SWA resources. A few commenters seem to have interpreted this requirement as mandating the use of the "E-Verify" electronic system. However, although both the NPRM and the Final Rule require the use of the DHS process, which requires the completion of I-9 forms and process, the use of the electronic E-verify system is optional.

The Department's expectation is that SWAs not expend federal tax money to refer illegal workers to any job opportunities. The employment verification provisions included in this regulation are part of a concerted effort – one that includes regulation, written guidance, and ongoing outreach and education – to address longstanding weaknesses and to strengthen the integrity of foreign labor certification activities.

3. Section 655.15(h) – Layoff provisions.

Under the Final Rule, an employer seeking to employ H-2B workers must attest that it is not displacing any similarly employed permanent U.S. worker(s) in the occupation in the area of intended employment within the period beginning 120 days before the date of need and throughout the entire employment of the H-2B worker(s). The Department received a number of comments from various groups on this provision. We have addressed those below, in conjunction with comments on the layoff provisions at 655.22(k).

F. Section 655.17 – Advertising requirements.

As proposed in the NPRM, the Final Rule requires employers to advertise for available U.S. workers. The advertisement must: (1) identify the employer with sufficient clarity to notify the potential pool of U.S. workers (by legal and trade name, for example); (2) provide a specific job location or geographic area of employment with enough specificity to apprise applicants of travel or commuting requirements, if any, and where applicants will likely have to reside to perform the services or labor; (3) provide a description of the job with sufficient particularity to apprise U.S. workers of the duties or services to be performed and whether any overtime will be available; (4) list minimum education and experience requirements for the position, if any, or state that no experience is required; (5) list the benefits, if any, and the wage for the position, which must equal or exceed the applicable prevailing wage as provided by the NPC; (6) contain the word

"temporary" to clearly identify the temporary nature of the position; (7) list the total number of job openings that are available, which must be no less than the number of openings the employer lists on the application (ETA Form 9141); and (8) provide clear contact information to enable U.S. workers to apply for the job opportunity. The advertisement cannot contain a job description or duties which are in addition to or exceed the duties listed on the PWDR or on the application, and must not contain terms and conditions of employment which are less favorable than those that would be offered to an H-2B worker.

The Department received multiple comments on the newspaper advertising requirements. Several commenters believed that the requirements, especially the requirement for three ads rather than two, would increase employer costs and time devoted to the application process but not yield additional U.S. workers. The requirement for advertising in a Sunday edition of a newspaper was seen as particularly objectionable due to the higher costs for Sunday ads and the belief that many nonprofessional workers do not read Sunday newspaper editions. Some commenters suggested employers should have the flexibility to use other recruitment methods, such as web sites that have proved successful in locating seasonal workers. Others were concerned that without SWA guidance, employers would have to guess as to the correctness of their ads, risking that if the CO subsequently determined there were errors in the advertisements, it would be too late to get the workers needed. One commenter was concerned that no process was provided for requiring an employer to revise its ad if the content was determined to be unduly restrictive.

As previously discussed, the Department's Final Rule contains the requirement for two newspaper advertisements which must include one Sunday edition. Sunday editions have traditionally provided the most comprehensive job advertisements and many U.S. workers potentially seeking employment would normally choose the Sunday paper to review. If the employer bases its advertisement on the job order accepted and posted by the SWA, the advertisement will be accepted by the NPC as appropriate.

One commenter inquired about the process for employers to follow in selecting an alternate publication in lieu of one of the newspaper ads. Other commenters were concerned about the choice of the specific newspaper in which to advertise and believed that the NPC would not be able to determine the most appropriate newspaper in all cases. One commenter suggested that the SWA should be involved in the process and provide guidance regarding newspaper choices. Another commenter asked whether there would be specific guidance regarding advertisements for live-in jobs, such as those for housekeepers, child monitors, etc. The Department believes that staff at the NPC will be well equipped to handle such issues. The Department declines in the Final Rule to specify the requirements to a high level of detail, as appropriate publication may vary, for example by industry or industry practice, and as the Department normally issues such guidance in the form of Standard Operating Procedures or other policy guidance.

G. Section 655.20 – Direct Filing With the NPC and Elimination of SWA Role.

Consistent with the proposed rule, the Final Rule eliminates the role of the SWAs in accepting and reviewing H-2B labor certification applications. Once the Final

Rule is effective, employers will file H-2B applications directly with the NPC, consistent with the transition provisions of the regulation and with the Department's specialization of its two processing centers effective June 1, 2008. In the long term, under these regulations, each employer will continue to be required to place a job order with the appropriate SWA as part of pre-filing recruitment, and SWAs will continue to place H-2B associated job orders in their respective Employment Service systems. This proposal received comments from a broad range of constituencies, including employers, employer associations, advocacy organizations, labor unions, State agencies, and elected officials. Most of the commenters opposed this provision.

Many commenters remarked that the elimination of the SWA portion of the process only shuffled activities previously performed by the SWAs to the NPCs, and did not actually improve the process. These commenters believed that eliminating the duplicate SWA review and increasing the Federal role in reviewing applications would result in increased delays, particularly when the Department has acknowledged that its funding has not kept pace with increased workloads in the H-2B program. Others also mentioned possible processing delays and were especially concerned that those industries with later dates of need could be locked out of the program.

Other commenters were concerned the new process would result in the loss of local labor market and prevailing practice expertise in the review process, including checks and balances now in the system, and would increase the potential for fraud. These commenters asserted that the knowledge and expertise of local staff in reviewing and processing applications was essential to the integrity of the H-2B certification process. Some commenters also criticized the NPCs for what they view as "ignoring their own

regulations" and "misconstruing the certification process." Several commenters also believed elimination of the duplicate SWA review would result in decreased assistance for employers. One SWA stated that employers would be left without a source for guidance which would drive up the demand for agents, thereby increasing the costs to employers. An employer expressed the opinion that the new process would replace longstanding relationships with SWA employees and reliable determinations with unpredictable determinations and potentially overly stringent penalties.

The Department remains committed to modernizing the application process and continues to believe that the submission of applications directly to the NPC is the most effective way of accomplishing this goal. Processing of H-2B applications by NPC staff will allow for greater consistency for employers, regardless of their industry or location, in both the time required and quality of the application review. The Department believes that by specializing in H-2B application processing, NPC staff will have greater program expertise than SWA staff who are often required to implement a number of diverse programs during the course of their workday, and will generate additional efficiencies in application processing. Therefore, this federalized review of applications will lead to more efficient processing, greater consistency of review, and more effective administration. It will also enable the Department to better identify and implement program improvements.

Eliminating the SWAs' participation in the application review process will provide more efficient review of applications, as well as greater consistency of review. The Department disagrees that NPC staff have insufficient knowledge to undertake this role given that they already perform it. In fact, NPC reviewers who currently review H-

2B applications have, in some cases, more experience with such applications than many SWA staff.

. Moreover, the SWAs have not been removed from the process – they will continue their traditional role in the recruitment process and working with employers on the specifics of the job order. SWAs will be responsible for clearing and posting job orders, both intrastate and interstate thus reducing the risk for employers to make mistakes with respect to job descriptions, minimum requirements, and other application particulars. SWAs will, as part of these duties, review the job offer, its terms and conditions, its special requirements, and the justifications therefore, as part of their duties to clear and post such orders.

H. Section 655.20 – Form Submission and Electronic Filing.

The Final Rule envisions that employers will submit applications on paper, through an information collection (form) modified significantly from the current form to reflect an attestation-based filing process. As stated in the NPRM, the Department will consider in the future an electronic submission system similar to that employed in other programs administered by OFLC, should resources be made available.

The Department received a number of comments from SWAs, a specialty bar association, a large trade association, a small-business coalition, and several industry groups largely supportive of the potential conversion to electronic applications. One commenter encouraged prompt migration to electronic filing, as the commenter felt this would make program data easier to gather, more accurate, and more shareable across

federal agencies. A few comments expressed concern that electronic filing would be mandatory for everyone, and recommended that, in the event the Department converted to electronic submission, it maintain paper filing as an option. Two commenters were concerned making electronic submission mandatory could cause undue hardship to employers that do not have Internet access, are not computer literate, or do not have access to a computer. One bar association recommended the Department not require electronic filing until the system was error-free, that any electronic filing system not include system-generated denials as the PERM system does, and that any defects receive an RFI. The Department takes seriously these recommendations. We will determine appropriate timing for the development and implementation of an electronic system based on program need and available resources. We have learned – as have programs users – from our experience with the electronic filing process used in the permanent program, and will apply those lessons to any system we institute for the H-2B program.

I. Section 655.21 – Supporting Evidence of Temporary Need.

As proposed, this Final Rule provides the employer a variety of options for documenting its chosen standard of temporary need, to be retained by the employer and submitted in the event of a Request for Further Information (RFI), a post-adjudication audit, a WHD investigation, or another agency investigation. As explained in the NPRM, for most employers participating in the H-2B program, demonstrating a seasonal or peakload temporary need can best be evidenced by summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately

for full-time permanent and temporary employment in the requested occupation, the total number of workers employed, the total hours worked. Such reports, however, are not the only means by which employers can choose to document their temporary need. The proposed regulation accordingly leaves it to the employer to retain other types of documentation, including but not limited to work contracts, invoices, client letters of intent, and other evidence that demonstrates that the job opportunity that is the subject of the application exists and is temporary. Contracts and other documents used to demonstrate temporary need would be required to plainly show the finite nature of that need by clearly indicating an end date to the activity requested.

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

As explained in the NPRM and consistent with current program practice, employers should be wary of using documents demonstrating a "season" in general terms (hotel occupancy rates, weather charts, newspaper accounts); in the Department's experience, such generalized statements fail to link a season to a specific position sought to be filled by the employer, which is required under the program. The Department also recognizes that conventional evidence such as payroll information may not be sufficient to

demonstrate a one-time or intermittent need, or seasonal or peakload need in cases in which the employer's need has changed significantly from the previous year. In such cases, the employer should retain other kinds of documentation with the application that demonstrates the temporary need.

J. Section 655.22 – Obligations of H-2B Employers and Attestation-Based Application.

The Department proposed, and this Final Rule institutes, the shift to an attestation-based filing system. The new application form contains a series of attestations to confirm an employers' adherence to its obligations under the H-2B program. The information and attestations on the form will provide the necessary assurances for the Department to initially verify program compliance. As described in the NPRM, the Department anticipates the shift to an attestation-based application will have a number of benefits, including a reduction in processing times while maintaining program integrity.

The Department received numerous comments, many of them negative, on the move to an attestation-based application. Some commenters believed that an attestation-based application would reduce the role of the SWA and thus eliminate local expertise; decrease employer compliance; increase erroneous approvals; and increase the likelihood that the Department will simply “rubber stamp” the certifications and weaken U.S. worker protections. The Department disagrees with these assumptions and conclusions. The Department believes that an attestation-based application, backed by audits, is within the Secretary’s statutory discretion to implement and is an effective means to ensure that all statutory and regulatory criteria are met and all program requirements are satisfied.

Similar approaches have been used successfully by the Department in other contexts, such as in the current permanent labor certification process.

One commenter suggested the Department require that the employer always be the applicant, even if an agent is used, because neither an agent nor the employer would be able to attest to all of the required obligations. This commenter also feared that an employer could shield itself from responsibility by using an agent for such prohibited acts as requiring recruitment fees to be paid by the foreign worker. The Department disagrees with this commenter. In the H-2B program, the agent simply represents the employer in the labor certification process. The employer is ultimately responsible for its obligations under the program and it is the employer who signs the application form, and attests to the veracity of the information provided and that it will meet all of its obligations.

One commenter appeared to confuse the H-2B and H-2A programs. This commenter referred to the 50 percent rule, an H-2A program feature, and requested that the Department include a grace period for a foreign worker to find another employer if dismissed under the 50 percent rule. The H-2B program has no such provision and the Department declines to impose one.

The Department received a number of comments on the specific obligations of H-2B employers outlined in the proposed rule. One commenter pointed out a semantic error in the NPRM version § 655.22(a), which stated the employer must attest that "no U.S. workers" are available. The commenter correctly pointed out that an employer cannot possibly have such broad knowledge and that the statute does not require such knowledge. The Department has deleted that provision. There were other comments about word choice and semantics and, where appropriate, the Department has changed

the wording to make the attestations easier to understand. Unless otherwise noted, no substantive change is intended. Below, we respond to comments on specific obligations and describe substantive changes made to those subsections. In cases where the Final Rule deletes or adds provisions, the numbering has changed accordingly from that published in the NPRM.

1. Sec. 655.22(a) – U.S. worker unavailability

The Department proposed that employers seeking to hire H-2B workers attest there were no U.S. workers in the area of intended employment capable of performing the temporary services or labor in the job opportunity. Comments on this provision reflected strong concern that employers cannot attest to the actual unavailability of U.S. workers, simply that the employer has tested the labor market appropriately and in good faith to demonstrate capable U.S. workers were available. The Department agrees and has deleted this provision from the Final Rule.

2. Section 655.22(f) – Worker abandonment and employer notification to the Department and DHS.

The Department's NPRM would have required employers to notify the Department and DHS within 48 hours if an H-2B worker separated from employment prior to the end date of employment in the labor certification. This notification requirement would have also applied if the H-2B worker absconded from or abandoned

employment prior to the end date of employment. This requirement was included to ensure that if the basis for the worker's status ended before the end date on the application, both DHS and the Department could take appropriate action to monitor the program.

The Department received a number of comments in opposition to this requirement, primarily from employers and employer and trade associations. Several employer associations shared the concern that, in their view, the requirement represented a new and unfair liability for employers, opening them up to potential legal action from H-2B employees if the employee left to pursue other legal employment before the end of the contract period. One association found it problematic, given the perception that this worker population is more transient than the workforce at large. It also was concerned about the administrative burden on employers to comply with the requirement. It asserted that employers were unlikely to know the real circumstances of the worker's departure, if it was a legal extension or change of status or something else. Consistent with a number of other comments either seeking or recommending clarification to the notice requirement, this association stated that such status determinations are complex legal issues and employers should not be required to make them. It also believed that the reporting requirement was unlikely to accomplish anything without imposing additional significant burdens on employers and that it was unlikely that DHS would pursue individuals who are the subject of these reports. A small business association agreed about the unreasonableness of the potential burden on employers and was concerned that the requirement would ask small businesses to become unpaid Immigration Service agents responsible for enforcing immigration laws.

A trade association found the required 48 hours for notification to be an extremely limited period of time for notification, and a burden on employers. It recommended that, if the requirement were continued, it should be extended to 30 days. Further, this trade association recommended that DHS create a simple reporting method to allow employers to provide the information directly through the Internet or by telephone. The requirement was described as too vague and not providing enough specifics as to when the employer would be required to do such notification.

An individual employer found insufficient safeguards in the proposal, as there was no indication of actions that the bureaucracy at the Department or DHS would take based on the information. The employer wanted the two departments to be more specific as to how the information was to be used.

An employer agent believed the requirement was inappropriate in these regulations, as it was tangential to the Department's role regarding the availability of U.S. workers or preventing adverse affect on U.S. workers, and believed that it created additional confusion and potential liability for employers. Similarly, an employer association thought the requirement inappropriate and did not clearly outline the process by which employers would make such notifications. Additionally, the employer association asked for additional guidance as to what information would be required for employers to document separation or job abandonment and was concerned that violations of this provision could lead to debarment from future participation in the program.

The Department reviewed the comments received on this specific reporting requirement and the concerns raised by the employers and associations on its implementation. The Department acknowledges that many of these concerns have merit,

and has therefore sought to provide clarifications and limitations in the Final Rule to address these concerns. The Department did not, however, discern sufficient justification from these comments to eliminate the requirement in its entirety. The notification is necessary in all circumstances because the early separation of a worker impacts not only the rights and responsibilities of the employer and worker but also implicates DOL's and DHS' enforcement responsibilities. The benefits gained from the notification of an employee who abandons employment, or is otherwise separated from employment, accrue to both the employer as well as the government agencies receiving such notification. The employer benefits by being relieved of payment duties under the FLSA. In addition, the employer benefits by having provided notice to the Department of its continuing need for the worker; its need for H-2B workers in subsequent years cannot be reduced by the diminution in employee numbers, that loss having been accounted for. The Department also benefits from the more exact employee tracking, enabling it to review subsequent applications with greater accuracy.

The Department acknowledges the need for clarification in the provision to ensure that the 48 hour requirement begins to run only when the abandonment is actually discovered. The Department has therefore added language to the provision clarifying that the employer must notify DOL no later than 2 working days "after such abandonment or termination is discovered by the employer." The Department has added further clarification to ensure that employers must meet the identical standards for notification to DOL as to DHS, so that an abscondment occurs when the worker has not reported for work for a period of 5 consecutive work days without the agreement of the employer to that non-reporting. This is intended to clarify for the employer that the same standard of

reporting applies across both agencies, making it far easier on the employer to make the report. There is no requirement that the notification be made by certified mail, however. A file copy of a letter sent by normal U.S. mail, with notation of the posting date, will suffice. However, in addition, the Department revised the notification requirement to reflect a time period of no later than 2 working days after the employer discovers the employee has absconded, which, consistent with DHS, has been defined as 5 consecutive days of not reporting for work.

3. Section 655.22(g) [(e) in Final Rule] – Deductions and prohibition on transfer of costs.

The Department received one comment suggesting that this provision, as presented in the NPRM, is overly complex. We agree. The confusion partly results from an overlap with the issue of third party transfers which are dealt with elsewhere in the regulation. We have revised this section in the final rule to deal only with actual deductions from wages and we are utilizing the language from the H-2A regulations which has worked successfully for many years.

4. Section 655.22(h) [(f) in Final Rule] – Basis for offered wage.

This provision requires that the offered wage not be based on commission, bonuses, or other incentives unless the employer guarantees that the wage paid will equal or exceed the prevailing wage. The second sentence of the proposed provision further stated that "the offered wage shall be held to exclude any deductions for reimbursement of the employer or any third party by the employee for expenses in connection with

obtaining or maintaining the H-2B employment including but not limited to international recruitment, legal fees not otherwise prohibited by this section, visa fees, items such as tools of the trade, and other items not expressly permitted by law." This sentence received several comments. A worker's rights advocacy group claimed the Department will not achieve its objective of protecting foreign workers from paying fees that should be paid by the employer. This commenter provided an example of a practice by one employer who required workers to pay for tests to determine their welding and fitting skills in preparation for employment in the United States. This commenter further recommended that this section should clarify that costs paid directly by workers are de facto deductions for the purpose of calculating compliance with the offered wage, even if employers do not directly deduct them and also that DOL should clarify its position on which costs are considered to benefit employers and thus require reimbursement and include specific examples of such costs. This commenter also believed that similar language in the FLSA was confusing. The Department appreciates the detailed analysis provided by this commenter, but we believe the statutory requirements, which are based on decades of administration of the Federal wage and hour laws, are clear and therefore, it is not necessary to make the recommended changes.

5. Section 655.22(i) [(g) in Final Rule] – Position is temporary and full-time.

The Department proposed that an employer seeking to employ H-2B workers be required to attest that the job opportunity is for a full-time, temporary position. One commenter suggested the proposed regulation could harm U.S. workers by guaranteeing full time

work for the period to foreign workers, while there is no such guarantee provided to U.S. workers in any seasonal position. The commenter also stated that while employers can state their intention to hire temporary workers full-time, if the weather does not cooperate, the employer may have no choice but to reduce hours in a particular week and that under this provision, the employer would not be able to do this, causing significant harm to the business and the U.S. workers whose hours would need to be reduced even further in order to ensure that foreign workers were paid a full-time wage. The commenter recommended a revised attestation stating: "The job opportunity is a bona fide, temporary position and hours worked will be comparable to the full time hours worked by associates in the same position at the employment site." As stated in the proposal, the H-2B program has always required that the positions being offered be temporary and full-time in nature, and the Department recognizes that some industries, occupations and States have differing definitions of what constitutes full-time employment. For example, certain landscaping positions are often classified as full-time for a 35-hour work week. To provide additional clarity, the Department under Sec. 655.4 has provided a definition of full-time employment that reflects our experience in the administration of this program. We will continue to make determinations of whether work is full-time for foreign labor certification purposes based the facts, program experience, customary practice in the industry, and any investigation of this attestation. The Department has therefore decided to retain the proposed language.

6. Section 655.15(h) and 655.22(k) [(h) in Final Rule] – Layoff provisions.

Under the Final Rule, an employer seeking to employ H-2B workers must attest that it is not displacing any similarly employed U.S. worker(s) in the occupation in the area of intended employment within the period beginning 120 days before the date of need and throughout the entire employment of the H-2B worker(s). The Department received a number of comments from various groups on this provision.

A number of commenters favored the requirement, noting that it assisted efforts to ensure that employers cannot lay off U.S. workers after seeking to hire H-2B workers to perform the same services. Other commenters, however, had concerns regarding the implementation of the prohibition and the potential liability.

Several commenters were concerned that the requirement to contact former employees who had been laid off would be onerous, given the difficulties in reaching what is purportedly a transient population, making such contact unduly burdensome. The Department finds this argument unpersuasive. The commenter did not support the summary statements that all temporary or seasonal help is transient and rootless in the communities in which the work is performed. Even assuming that such workers do not have lasting ties to the employer, employers assume continuing contact with former employees for many purposes – including, but not limited to, the provision of payroll tax information the following year and the transfer or disposition of benefits (including unemployment benefits). Moreover, by limiting the requirement for such contact to the 120 days or less prior to the employer's date of need for the H-2B workers, the employer's contact information would be to those workers who had just been released and would therefore be extremely likely to be current, making such contact relatively simple.

One commenter asserted that the layoff provision conflicts with the definition of seasonality, noting that by definition a seasonal employee will always be laid off within the period set forth in an annual cycle. An employer association also objected to the provision on the ground that requiring the consideration of U.S. workers would force employers who laid off U.S. workers at the end of one season to hire them again at the commencement of the next season because the timing would put the next season within the 120-day window.

The Department acknowledges that its definition of layoff under this program would have U.S. workers who undergo involuntary separation at the end of a season be considered first for these temporary or seasonal positions in the next season. "Unemployed persons capable of performing such service or labor" are the very workers the statute requires be found by the Department to be not available prior to certification of any job openings for H-2B workers. Thus, it makes sense that the employer's laid off workers be notified of the opportunity. The Department is requiring contact with those former employees who are most likely to be affected by the hiring of H-2B workers. Requiring they be contacted helps ensure that if they are uninterested in the offered position, the employer has fulfilled the statutory requirement that U.S. workers are unavailable before resorting to hiring H-2B workers.

The Department notes that much of the concern of those commenters regarding the re-hiring of U.S. workers stems from a belief that such workers will not show or be interested in being re-hired. But by limiting the applicability of the provision to within 120 days of the date of need (as well as the actual occupation and the area of intended employment of the sought-after H-2B certification), this provision affords laid off

workers a reasonable opportunity to apply for vacancies for which they qualify, striking an appropriate balance between worker protection and employer needs.

Some commenters noted the need for a strengthening of the layoff provision, calling for additional safeguards against massive layoffs of U.S. workers by strengthening requirements for how employers will demonstrate they've made efforts to contact former employees. The Department declines to do so at this time. Employers will be allowed to document their contact of former employees using any objective means at their disposal in a manner guaranteed to ensure a good faith contact effort has been made. The Department does not have evidence at this time that employers will engage in fraudulent behavior with respect to this requirement. The Department will monitor this attestation, as it will all of its attestations, through post-certification audits, and will note the need for program modifications through that process.

7. Section 655.22(l) [(i) in Final Rule] – Prohibition against payments.

As in the proposal, the Final Rule requires that an employer attest that it has not and will not shift the costs of preparing or filing the H-2B application to the temporary worker, including the costs of domestic recruitment or attorneys' and agent fees. The domestic recruitment, legal, and other costs associated with obtaining the labor certification are business expenses necessary for or, in the case of legal fees, desired by, the employer to complete the labor certification application and labor market test. The employer's responsibility to pay these costs exists separate and apart from any benefit that may accrue to the foreign worker. Prohibiting the employer from passing these costs on

to foreign workers allows the Department to protect the integrity of the process, and protect the wage of the foreign worker from deterioration by unwarranted deduction. The Department will continue to permit employers, consistent with the Fair Labor Standards Act (FLSA), to make deductions from a worker's pay for the reasonable cost of furnishing housing and transportation.

This section, pertaining to the receipt of payments by the employer from the employee or a third party, received many comments. Some of the commenters opposed the provision in its entirety, arguing it will make the program prohibitively expensive for employers. Other commenters were concerned the requirement would eliminate the current practice of having the employee pay for part of the recruiting and visa costs as an incentive for the workers not to leave the employer. Others supported this provision in its entirety, while still others agreed with the intent of the provision but found the language ambiguous. One specialty bar association not only supported the prohibition on cost-shifting for recruitment and visa costs, but asked the Department to strengthen the prohibition language. However, this commenter was adamantly opposed to the prohibition against foreign workers paying the attorney's fees. The Department disagrees with the comments opposing this provision. We believe that these costs are the costs of doing business and should be borne by the employer. The Department took all comments into consideration and modified the provision to clarify and strengthen the prohibition. The Final Rule applies the prohibition to attorneys and agents, not simply to employers. As rewritten, the provision eliminates reference to payments from "any other party"; it applies only to payments from the employees.

This section in the NPRM also would have prohibited the employer from receiving payments "of any kind for any activity related to the labor certification" process. The Department received a comment arguing that the phrase "received payment…as an incentive or inducement to file" is ambiguous. The Department took this comment into consideration and removed reference to incentive or inducement.

In addition, and based upon the comments received, the Department has revised the provision on cost-shifting for greater clarity to employer. As mentioned above, the Department has eliminated the qualifying language regarding the incentive and inducement to filing, again to simplify for all employers engaging in recruitment activities what is prohibited. By simplifying the provision to prohibit employers who submit applications from seeking or receiving payment for any activity related to the recruitment of H-2B workers, the Department hopes to achieve consistent and enforceable compliance.

8. Section 655.22(m) [(j) in Final Rule] – Bona fide inquiry.

As proposed in the NPRM, the Final Rule at 655.22(j) requires an employer that is a job contractor to attest that if it places its employees at the job sites of other employers, it has made a written bona fide inquiry into whether the other employer has displaced or intends to displace a similarly employed U.S. worker within the area of intended employment within the 120 days prior to the date of need and continuing throughout the placement. To comply with this attestation, the Department is requiring the employer to inquire in writing to and receive a written response from the employer

where the H-2B worker(s) will be placed. This can be done by exchange of correspondence or attested to by the secondary employer in the contract for labor services with the employer petitioning to bring in H-2B workers. This proposed attestation at sec. 655.22(j) also requires the employer to attest that all worksites where the H-2B employee will work are listed on the Application for Temporary Employment Certification.

The Department received several comments on this secondary placement attestation provision. While some were in favor of the requirement, some employer associations expressed concern that making such an inquiry of their clients was unfair and unduly burdensome. The Department acknowledges that this attestation imposes an additional level of inquiry between job contractors and their clients where the contractor will be providing H-2B workers at a client site. The INA's mandate of the unavailability of persons capable of performing the job duties for which the H-2B workers are sought is at the heart of this requirement.

. It is the H-2B worker's job activity, rather than the identity of the H-2B worker's employer, which is required to be measured against the availability of U.S. workers; the H-2B worker can be admitted only upon assurances of the unavailability of unemployed persons able to take the H-2B job opportunity As a result, an H-2B worker performing duties at company X, for which company Y has hired him and pays him, may have an adverse effect not only on employees at the company employing him but also the company benefitting from his services. The limitations imposed by the Department – area of intended employment, occupation, and timing – provide parameters to reassure employers while at the same time enable them to ensure full compliance with the predicates of the H-2B program.

One commenter agreed with this provision but did not believe a labor contractor should be held liable for the statements provided by those entities. The Department believes this commenter misinterpreted this section. The job contractor should make a bona fide inquiry and document the inquiry and response. If it later turns out that the employer who received the H-2B worker from the job contractor displaced a U.S. worker during the stated timeframe, proof of the inquiry relieves the job contractor of liability.

Another commenter requested that we strike this provision in its entirety because it does not allow for change in circumstances that would warrant displacing U.S. workers. The Department sees no reason why the U.S. worker would have to be displaced over the foreign worker and therefore, declines to eliminate this provision.

Finally, an industry association commented that H-2B workers employed by carnivals and circuses are constantly being placed on job sites of other employers as they travel the circuit and that this requirement is too difficult to comply with. It is difficult for the Department to discern, from the manner in which this comment was written, whether the H-2B workers are being paid by one petitioning employer throughout the itinerary or whether these H-2B workers are placed on the payroll of the fixed-site employer at each location. The Department has not made any changes to this section as no compliance challenge was clearly communicated.

9. Section 655.22(o) [(l) in Final Rule] – Notice to worker of required departure.

Under the Final Rule, employers have a responsibility to inform foreign workers of their duty to leave the U.S. at the end of the period certified by the

Department, and to pay for the return transportation of the H-2B worker if that worker is dismissed early. As stated in the NPRM, DHS will establish a new land-border exit system for H-2B and other foreign workers to help ensure that departure follows the end of work authorization, regardless of whether it flows from a premature end or from the end of the authorized labor certification.

The Department received one comment on the duty to inform the worker of the obligation to leave. This commenter opined that it is not the responsibility of employers to become unpaid immigration officers. The Department is not suggesting that it is placing any burden on employers to act as immigration officers. The Department has retained the requirement, while clarifying it to be consistent with DHS' regulations on this issue.

10. Section 655.22(p) [(n) in Final Rule] – Representation of need.

The Final Rule requires the employer to attest that it truly and accurately stated the number of workers needed, the dates of need, and the reasons underlying the temporary need in its labor certification request. The Department received two comments on this provision. One requested that we change the words "truly and accurately" to "reasonable and good faith" based on estimates from information available at the time of filing the certification. The Department has considered this change, but declines to amend the regulatory language. The concern of the commenter of the need for flexibility is found in the provision in both the NPRM and this Final Rule regarding amendments (§ 655.34(c)(2)) regarding amendment of the start date of the certification.

Any need for additional flexibility on the part of the Department must be balanced against the Department's need to ensure integrity in an attestation-based program; giving freedom to elide dates of need allows unscrupulous employers to overrun the program with applications not based on an actual need, thus circumventing the entire process in an attempt to obtain limited visas.

The second commenter expressed concern with the date of need requirement and requested the Department change several sections on which this attestation is predicated. One of the major concerns of this commenter was the potential need to amend start dates after certification if an employer must wait for visa numbers to become available. The Department has, however, retained the underlying provision for this attestation. While the Department permits amendment of the start date of the certification both by the employer prior to certification (§ 655.34(c)(2)) and to certify a late adjudication (§ 655.34(c)(4). After certification, the reconciliation of the start date becomes an issue for DHS adjudication. The Department notes that a statement from the Department allowing movement of the date of need after certification would be inconsistent with the DHS proposed rule, which would not permit the filing of a petition whose start date was inconsistent with the start date of the labor certification.

This commenter also proposed, in the alternative, that employers be allowed to submit their I-129 applications to DHS with a note that they have submitted their request for an amendment to the Department and that the Department be required to adjudicate the request for amendment within five days. The Department considered all comments and has decided not to establish a deadline for the processing of amendment requests.

We defer to DHS to determine what is appropriate for its adjudication of I-129 petitions, including the filing of "placeholders," which falls exclusively under its jurisdiction.

K. Retention of Supporting Documentation

The Final Rule contains a modified requirement that employers retain specified documentation outlined in the proposed regulations to demonstrate compliance with program requirements. The proposed retention period was for five years. This documentation must be provided in the event of an RFI, post-adjudication audit, WHD investigation or other similar activity. The Department received a few comments in response to this proposed requirement. One small business coalition expressed its support, while another organization expressed concern that a five- year document retention requirement was too long, especially for small employers, or employers like circuses and carnivals that are mobile or have a mobile component. Another commenter requested the Department prepare and provide a list to H-2B employers in one place, in plain language – perhaps as part of broad stakeholder compliance assistance – the documentation that should be retained. In response to concerns about the length of time for records retention, the Department has reduced the requirement from five years to three. The documentation required will support specific attestations by the employer under the program. We will provide additional guidance in the course of individual and broad-based technical assistance and educational outreach to the employer community, including on the OFLC website. We will consider the issuance of additional written guidance, as appropriate.

L. Section 655.23 – Request for Further Information

The Department proposed to issue a Request for Further Information (RFI) within 14 days of receiving the application, if needed, for the purpose of adjudicating the application for employment certification. All of those who commented on this provision requested that the timeframes be changed, but most also recommended an additional provision that would obligate the Department to process and respond to the information received through the RFI within a certain period of time. The Department agrees and has shortened both the issuance and response time to seven (7) days. The Department also has added a provision that obligates the CO to issue a Final Determination within seven (7) business days of receiving the employer's response, or by 60 days before the date of need, whichever is greater.

M. Section 655.30 – Supervised Recruitment.

The Department proposed to require employers warranting the sanction of supervision to ensure compliance with recruitment requirements to engage in supervised recruitment. One comment was received on this provision. The commenter believes that the NPC will be unable to handle such a responsibility as effectively and as efficiently as did the local SWAs and that it will affect the integrity of the program. The Department respectfully disagrees with this commenter and has retained the provision. We believe that centralizing the process will provide uniformity and expertise that will enhance

program integrity, and therefore retained the provision as proposed. Further, in the permanent labor certification program, supervised recruitment is conducted under Federal guidance and not SWA supervision.

N. Section 655.31 – Debarment.

The Department's NPRM proposed a mechanism allowing the Department to debar an employer/attorney/agent from the H-2B program for a period of up to three (3) calendar years. Debarment from the program is a necessary and reasonable mechanism to enforce H-2B labor certification requirements and ensure compliance with the Secretary's statutory objectives. Further, debarment and other enforcement mechanisms, e.g. audits, are necessary program compliance checks to balance the transition to an attestation-based filing system. The proposed rule would permit the Department to debar an employer, attorney, and/or agent for a period of up to three (3) calendar years for misrepresenting a material fact or for making a fraudulent statement on an H-2B application, for a material or substantial failure to comply with the terms of the attestations, for failure to cooperate with the audit process or ordered supervised recruitment, or if the employer/attorney/agent has been found by a court of law, WHD, DHS, or the DOS to have committed fraud or willful misrepresentation involving any OFLC employment-based immigration program.

Upon further consideration, based in part upon the Department's recent efforts to modernize its H-2A labor certification regulations, the Department has decided to modify the debarment provision so that it more closely parallels the debarment provision

for the H-2A regulation at 20 CFR 655.118, given the similarity of the H-2A and H-2B labor certification programs. While many of the grounds for debarment are substantially similar in the final rule as in the NPRM, the final rule contains additional safeguards for both workers and employers, which are explained in greater detail below.

1. Debarment Authority

An advocacy organization questioned the Department's authority to debar attorneys, agents, or employers from the H-2B program and asserted that a determination of a violation should only be made after notice of violation and an opportunity for a hearing. The debarment of entities from participating in a Government program is an inherent part of an agency's responsibility to maintain the integrity of that program. 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 [s]he may find necessary and proper in the public interest to prevent injustice of undue hardship or to avoid serious impairment of the conduct of Government business." *Id.* at 89.

In order to encourage compliance, the regulatory scheme for the H-2B program relies on attestations, audits and, through this Final Rule, investigations and the remedial measure of debarment. Use of debarment as a mechanism to encourage compliance has been endorsed in the INA for a number of foreign labor certification and attestation

programs. Ensuring the integrity of a statutory program enacted to protect U.S. workers is an important part of the Department's mission.

As part of the Department's inherent debarment authority, the Department may determine the particular procedures that may apply to the process. Accordingly, it is within the Department's authority to require the OFLC Administrator to issue a Notice of Intent to Debar no later than 2 years after the occurrence of the violation; offer the employer an opportunity to submit evidence in rebuttal; and if the rebuttal evidence is not timely filed or if the Administrator determines that the employer, attorney, or agent more likely than not meets one or more of the bases for debarment, issue a Notice of Debarment which may be subject to administrative appeal through the BALCA. Like the NPRM, the final rule provides that the Notice of Debarment shall be in writing, state the reason for the debarment finding and duration of debarment, and identify the appeal rights. Additionally, the final rule provides that the debarment will take effect on the start date identified in the Notice of Debarment unless the administrative appeal is properly filed within 30 days of the date of the Notice, thereby, staying the debarment pending the outcome of the appeal.

2. Grounds for debarment

While a union and a state agency expressed their support for the debarment provisions, a law firm asserted that the debarment was an unduly strict sanction for minor violations of new procedures, the details of which are still not clear. We disagree with the commenter's characterization of violations warranting debarment as "minor." The Department will not debar for "minor" violations. Rather most of the violations that will

be the basis of potential debarment actions require a pattern or practice of acts which are: i) significantly injurious to the wage, benefits offered under the H-2B program, or working conditions of a significant number of the employer's U.S. or H-2B workers; ii) reflect a significant failure to offer employment to each qualified domestic worker who applied for the job opportunity for which certification was being sought, except for lawful job-related reasons; iii) reflect a significant failure to comply with the employer's obligations to recruit U.S. workers; iv) reflect a significant failure to comply with the RFI or audit process; v) reflect the employment of an H-2B worker outside the area of intended employment, or in an activity/activities, not listed in the job order (other than an activity minor and incidental to the activity/activities listed in the job order), or after the period of employment specified in the job order and any approved extension; or vi) reflect a significant failure to comply with supervised recruitment. However, the Department acknowledges that acts which the Department would have no other available remedy to enforce would warrant debarment even without a pattern or practice. These acts are set forth separately under 655.31(d)(2)-(5). These include: fraud; the failure to cooperate with a DOL investigation or interference with a DOL official performing an investigation, inspection or law enforcement function; the failure to comply with one or more sanctions or remedies imposed by the ESA, or with one or more decisions of the Secretary or court; and a single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

As to the details of the violation not being clear, we believe that the regulations are quite clear in setting forth the various grounds under which an employer, attorney or agent may be debarred The Department understands the seriousness of debarment as a

penalty and, in considering the comments received in response to the NPRM, believes that the resulting debarment provision upholds the integrity of the H-2B labor certification program and puts employers on notice of what violations are sufficiently serious that could result in potential debarment.

Additionally, the law firm requested a provision for training prior to being subject to sanctions such as debarment. While we do not think that it is necessary to address such training directly in the regulation, OFLC will issue further guidance, as appropriate, to orient stakeholders and staff to these new provisions.

3. Debarment of attorneys and agents

An international recruiting company requested that the Department apply a different standard for the debarment of attorneys and agents from the debarment of employers. In particular, the commenter asserted that the evidence to debar the agent or attorney would need to be legally significant since they do not share in the task of employment and stated that many agents accept information from the employer at face value and accept information as true. The Department disagrees. Regardless of the role that agents and attorneys may or may not play in employment, they should be held to the same standards with regard to applicable responsibilities, as the employer for purposes of the labor certification application process. Employers, agents, and attorneys each must remain aware of their particular responsibilities under the labor certification process and of the consequences of submitting false or misleading information to a Federal agency. The burden for verifying the information submitted by an attorney or agent to a Federal

agency rests with that representative as similar responsibilities rest with employers to understand the programs and any information submitted on their behalf. Accordingly, the regulation provides that the Administrator may debar agents and attorneys not only for participating in, but also having knowledge of, or having reason to know of, the employer's substantial violation.

An advocacy organization objected to the omission of appeal rights for attorneys and agents with respect to a Notice of Debarment. The commenter stressed that since attorneys and agents may themselves be subject to a Notice of Debarment, they ought to have recourse to correct a conceivably incurred or unfair decision. The commenter also noted that there may be certain instances where the interests of an employer and attorney or agent may diverge with respect to pursuing an appeal and the latter would be harmed due to the lack of appeal rights. The commenter also noted that the Department's permanent labor certification regulations provide not only the employer but any debarred person or entity the right to appeal the debarment decision. We agree with commenter's concern and have included references to attorneys' and agents' rebuttal and appeal rights, in additional to that of employers.

4. Use of Labor Contractors

An advocacy organization expressed a concern that employers would manipulate their legal identities resulting in abuses that would not be cured by debarment. In particular, the commenter set forth a scenario in which a company would retain a labor

contractor or temporary agency to serve as the "employer" for a group of foreign workers at the company's work site. The commenter was concerned that the company would take advantage of a labor contractor's false claim that no domestic workers could be found, yet only the labor contractor would be debarred as the "employer," thus allowing the company to hire another labor contractor to repeat the same abuses.

It is not clear why and employer should be responsible for the violations of a labor contractor cited in the example. If the employer is not culpable in a violation, they should not be punished. The commenter also seems to presume all labor contractors would commit violations of the program, which is gross generalization that unfairly portrays law abiding labor contractors in a negative light.

Nonetheless, this is a situation that would be of concern to the Department and, if appropriate, we would pursue administrative means to ascertain the veracity of applications and information submitted to the Department.

O. Section 655.32 – Labor certification determinations.

The proposed language delineated the criteria by which the Administrator of OFLC will certify or deny applications. The commenters, though citing to this particular section of the NPRM, actually commented on the attestation-based process in general. Their comments were incorporated into that discussion above.

P. Section 655.33 – Appeals to the BALCA.

The Department's and DHS' NPRMs proposed a new model for the adjudication of H-2B applications. Under current procedures, the Department does not provide for any administrative review of decisions either denying H-2B labor certification applications or rendering a non-determination. Currently, the Department's decisions are advisory to DHS and employers whose applications are denied or issued a non-determination by the Department may submit countervailing evidence to DHS and have access to administrative review under DHS procedures. In its NRPM, DHS expressed dissatisfaction with this current procedure in which H-2B applications are, essentially, adjudicated by both DOL and DHS. Under the DHS NPRM, the countervailing evidence process is eliminated and employers seeking to file H-2B visa petitions will be required to present an approved labor certification from DOL. Since DOL decisions denying H-2B labor certification will no longer be subject to additional review outside of the Department, we concluded that it would be appropriate to provide an employer whose labor certification application is denied an opportunity to seek review in the Department. The Department's NPRM included such a procedure providing for administrative review before the Department's Board of Alien Labor Certification Appeals (BALCA).

The Department received a number of comments on this portion of the NPRM, the majority of which expressed dissatisfaction with the proposal. We have carefully reviewed these comments and made several changes in response. Several commenters expressed satisfaction with the current appeal process and requested that it not be changed. To the extent these comments related to concerns about the length of that process, that question is discussed below. To the extent the commenters simply expressed a preference for the retention of the current practice in which countervailing

evidence can be submitted to DHS when an H-2B labor certification application is denied, similar comments were submitted to DHS in response to its NPRM and DHS made no change in it final rule. We defer to and adopt DHS's response on this issue. Likewise, the concern expressed by one commenter that the time spent utilizing the Department's appeals procedures will delay employers getting into the queue at DHS for the limited number of available H-2B visas, is a matter that is addressed by DHS in their final rule..

With regard to matters directly related to the Department's proposal, a number of commenters objected to the provision that precluded the submission of new evidence to the BALCA. We believe these commenters do not recognize the totality of the proposal. The NPRM provides that before a CO can finally deny an H-2B application, he/she must issue a RFI that apprises the employer of the grounds for the proposed denial and provides an opportunity to submit additional information. The Department does not see any reason to provide another opportunity to submit necessary information. In addition, providing such an opportunity would inevitably delay issuance of final decisions from the BALCA. Concerns about delays at the BALCA were expressed by a number of commenters even in the absence of any authorization for the submission of new evidence.

Several commenters expressed concern that the appeal process before the BALCA would take too long. One noted specifically that no time limit was contained for the BALCA to issue its docketing statement and a briefing schedule. It was also pointed out that the NPRM provided merely that the BALCA "should" notify the employer of its decision with 20 days of the filing of the CO's brief. In response to comments reflecting

concerns about the timeliness of the appeal process, the Final Rule reflects dramatically shorter time frames, with the BALCA decision due no later than 15 business days after the request for review is filed.

One commenter suggested the possibility of allowing worker representatives to participate in the administrative appeal process. We have rejected that suggestion. Generally, the Department's labor certification procedures do not involve participation by third parties and we do not believe that their involvement would enhance the process given the nature of the labor certification determination.

Q. Amendments

The Department received several comments on the provision requiring the amendment of labor certifications if the start dates change and/or the number of workers change. All commenters opposed this change. One commenter admitted that employers set their start date based on the availability of visa numbers. Other commenters claimed that this provision makes it impracticable to adjust to market fluctuations during the season. The Department appreciates the candid comments about the difficulties this new requirement will create. However, we believe this is the only logical solution to the problem of dates of need, and number of workers needed, being changed to such a degree that the recruitment previously done is stale by the time USCIS receives the application, and to the concern that U.S. workers who might indeed be available for work on the new start date were not given the chance to apply originally. Therefore, the only changes made to the section were for clarification purposes.

R. Post-Adjudication Audits

The Department proposed to use various selection criteria for identifying applications for audit review after the application has been adjudicated in an effort to maintain and enhance program integrity. The audits are meant to permit the Department to ensure compliance with the terms and conditions by an employer and to fulfill the Secretary's statutory mandate to certify applications only where unemployed U.S. workers capable of performing such services cannot be found. Failure by an employer to respond to the audit could lead to debarment from the program as could a finding by the Department that the employer has not been complying with the terms and conditions attested to in the application. The Department received many comments on this provision. They were equally divided between those that opposed post-adjudication audits and those that believed audits are an effective tool to enhance integrity. Those who opposed the post-adjudication audits did not make any alternative suggestions on how the Department could determine compliance with the program. Therefore, with no other alternatives available, the Department believes its initial analysis is correct and, therefore, has not made any substantive changes to this section, save for including the option for the CO to refer any findings that an employer violated the terms and conditions of the program with respect to eligible U.S. workersto the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices. as suggested by one commenter.

S. Section 655.35 – Required Departure

In consultation with DHS, the Department proposed to include, as part of the employer's obligations, the requirement that employers provide notice to the H-2B workers of their required departure at the end of their authorized stay or separation from employment, whichever occurs first. This section was designed in anticipation of DHS establishing a registration of departure program. The provision requires employers to inform their H-2B workers of their obligation to register their departure at the port of exit. The Department received one comment suggesting that we eliminate this provision because it is unworkable due to the requirement for specific entry and exit points, which is inevitably a guarantee for violations occurring. This commenter also suggested we work with DHS instead. The Department respectfully declines to eliminate this language. The entry-exit ports and requirements continue to be matters of immigration under DHS's jurisdiction; this language simply makes it an employer obligation to inform foreign workers of the workers' responsibility. The Department did consult with DHS on this language to establish this employer obligation and lay the appropriate groundwork as DHS continues to build their next-generation entry-exit system.

T. Delegation of Enforcement Authority

As previously discussed, the INA provides the Department no direct authority to enforce any conditions concerning the employment of H-2B workers, including the prevailing wage attestation. DHS possesses that authority pursuant to_____ DHS also has the

ability to delegated that authority to the Deparment. This authority was delegated to the Department by DHS on _____pursuant to authority vested in the Secretary of Homeland Security under sections 103(a)(6) and 214(c)(14)(B) of the INA, 8 U.S.C.1103(a)(6), 1184(c)(14)(B).

U. Compliance with Application Attestations

The NPRM proposed a WHD enforcement program addressing H-2B employers' compliance with attestations made as a condition of securing authorization to employ H-2B workers. The proposed enforcement program also covered statements made to DHS as part of the petition for an H-2B worker on the DHS Form I-129, Petition for a Nonimmigrant Worker. Compliance with attestations and the DHS petition are designed to protect U.S. workers and would be reviewed in WHD enforcement actions. This Final Rule adopts this proposal.

A trade union and U.S. senator commented that the proposal did not include a mechanism for accepting complaints of potential violations. The Department intends to accept complaints, as it does under other statutes it administers such as the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., which does not have a specific regulatory mechanism for the taking of complaints. Thus, the Department has not added a specific regulatory procedure here.

Another trade union commented that the Department should adopt the definition of "employ" found in the FLSA, which defines the term to include "suffer or permit to work." In fact, the proposed regulations included such a definition. However, the terms "employer" and "employee" were defined in terms of the common law test of

employment which does not include "suffer or permit to work." Since the two concepts are different and the use of the "suffer or permit" test is precluded by the U.S. Supreme Court opinion in Nationwide Mutual Ins. v. Darden, 503 U.S. 318, 322-323 (1992), the reference to "suffer or permit to work" has been removed.

V. Remedies for Violations of H-2B Attestations

Assessment of civil money penalties. Under the proposed rule, the WHD would assess civil money penalties in an amount not to exceed $10,000 per violation for a substantial failure to meet conditions of the H-2B labor condition application or of the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker;or for a willful misrepresentation of a material fact on the DOL application or DHS petition; or a failure to cooperate with a Department of Labor audit or investigation. No comment addressed this provision and it is adopted in the Final Rule, with one change, as discussed below..

Reinstatement of illegally displaced U.S. workers. Under the NPRM the WHD would seek reinstatement of similarly employed U.S. workers who were illegally laid off by the employer in the area of intended employment. Such unlawful terminations are prohibited if they occur less than 120 days before the date of requested need for the H-2B workers or during the entire period of employment of the H-2B workers. No comments addressed this proposal and it is adopted in the Final Rule.

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

under the FLSA (29 U.S.C. 201 et seq.), the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801, et seq.), and the McNamara-O'Hara Service Contract Act (41 U.S.C. 351 et seq.). WHD also may seek other administrative remedies for violations as it determines to be appropriate.

The Department sought public comments on whether back wages can be assessed under the H-2B program when an employer fails to pay the prevailing wage rate. The most extensive comments received were from a U.S. Senator asserting that the lack of back pay as a remedy is a "weakness of the Department's enforcement proposal" and that back pay is "an essential make-whole remedy for both H-2B program participants and American workers . . . [and] would provide a key incentive for otherwise vulnerable workers to come forward and protect their rights." He also states that "[t]here is ample authority establishing that similarly broad grants of remedial authority are sufficient to authorize an award of back [pay], even when this remedy is not specifically enumerated."

The Department has carefully considered whether Congress has provided authority to assess back wages under the H-2B provisions. As noted in the NPRM, the H-1B provisions of the INA contain language that is nearly identical to the language found in H-2B,\5\ and unlike the H-2B provisions, H-1B also contains explicit authorization for the assessment of back pay, Id. at 1182(n)(2)(D). Based upon this language it is the Department's view that where Congress intended the assessment of back wages under the INA, it said so explicitly and the lack of such explicit authority under the H-2B statute precludes such an assessment. See Beverly Enterprises v. Herman, 119 F. Supp. 2d1 (D.D.C. 2000) (regulation requiring payment of prevailing wage in the absence of a statutory requirement found invalid).

Based upon this lack of authority, the Department has not included a back wage remedy in the final rule. However, in order to assure, so far as possible, that an employer who fails to pay the required wage does not profit from the violation, the regulations provide for a civil money penalty assessment that is at least as high as the back wage amount, so long as the assessment does not exceed the statutory cap of $10,000. This is a change from the NPRM, which set civil money penalty assessments for failure to pay back wages at the amount of the back wage deficiency. This change allows the WHD Administrator to assess a penalty that exceeds the amount of a back wage deficiency when the Administrator determines that a penalty beyond the legally required payment is appropriate.

W. Comments beyond the scope

In addition to those discussed above, the Department received numerous comments that were beyond the scope of or not directly relevant to the proposed regulation. We did not respond to these comments, but find it appropriate to note them. They included: calls for the Department to work with Congress to extend the Save Our Small and Seasonal Business Act returning workers provision; calls for the Congress to raise the H-2B 66,000 annual visa cap, or to allocate visa numbers more equitably across States; calls for the government to "recapture" H-2B visa numbers that expire the same year they are issued so they can be used for different workers; calls for the Congress to increase funding for all Federal agencies administering the H-2B visa program, and the SWAs, either through appropriations, or applications or fraud preventions fees; request

that DHS establish a special fraud investigative unit for certain visa related crimes and offenses; concerns about the requirement that workers use DHS's designated entry-exit system, and about the burdens and policies behind such a system; a request that foreign workers be given a two-month grace period between employers when the worker needs an extension but his visa terminates before the beginning of his next employment; a request that employers have the authority to activate or deactivate the H-2B visa like a credit card to allow immediate action and loss of status if the worker fails to comply with the terms of the H-2B contract; calls for the government to require that H-2B workers (over whom the Department has no jurisdiction) purchase travel insurance or prohibit H-2B workers from identifying themselves as "self-employed" on their federal tax forms, or to eliminate the requirement that H-2B workers pay Social Security or Medicare; opinions that we have sufficient foreign workers to meet the needs of U.S. employers, especially at a time when the economy is slowing down and many U.S. workers are unemployed; calls for U.S. employers to provide higher wages and better working conditions; calls to cap the fees workers pay to agencies or recruiters; and a call for H-2B workers to be permitted representation by federally funded legal services corporations, and that resources for such counsel be increased.

III. Administrative Information

A. Executive Order 12866--Regulatory Planning and Review

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

The Department determined that this regulation is a "significant regulatory action" under section 3(f)(4). This Final Rule implements a significant policy related to the President's policies on immigration. However, the Department determined that this rule is not an "economically significant" rule under E.O. 12866 because it will not have an annual effect on the economy of $100 million or more.

Analysis Considerations

The direct incremental costs employers will incur because of this Final Rule, above and beyond the current costs required by the program as it is currently implemented, are not economically significant. The total annual cost associated with this Final Rule is approximately $1,225,198 per year or $109 per employer.

The only additional costs on employers resulting from this Final Rule are those involved in the placement of a Sunday advertisement, which replaces one of the former daily advertisement and the additional paperwork costs. The cost range for advertising and recruitment is taken from a recent (October 2008) sample of newspapers in various urban and rural U.S. cities, and reflects approximate costs for placing one 10-line advertisement in those newspapers. The cost of advertising in a Sunday paper instead of during the week is approximately $234, which represents an increase of approximately $31.16 over the weekday advertisement.[6] The additional total cost for the 11,267 employers utilizing the H-2B program of one Sunday ad would average approximately $351,080 assuming that such ads would not have been placed by the business as part of its normal practices to recruit U.S. workers.[7] In addition, the paperwork and record retention costs are minimal, as records will require a burden of approximately 1.35 hours

[6] The Department based this average on 10 locations with the highest number of H-2B applications, including the following: Houston, Texas; Orlando, Florida; Vail, Colorado; Orange County, California; Cape Cod, Massachusetts; Detroit, Michigan; Baton Rouge, Louisiana; Houma, Louisiana; Columbus, Ohio; and Washington, DC.

[7] The Department notes that this cost is based on the highest costs in each location. Fees are likely to be lower given that many newspapers offer lower rates for consecutive ads, for placing two ads in the same week, or for purchasing a Sunday and weekday ad. For example, in the Cape Cod Times, a Sunday ad costs $197.30 and a weekday ad costs $255.88 (for 3 days), including internet posting, but if one of the 3 days is a Sunday, the total cost is $255.88 for a cost saving of $197.30. In a second example, the Detroit News would charge $275 for a Sunday ad alone and $380 for 2 weekday ads. As long as the 2 weekday ads are published within 7 days of each other, the total cost for a Sunday and weekday is $380 or a saving of $275.

per year per application. Based on the median hourly wage rate for a Human Resources Manager ($40.47), as published by the Department's Occupational Information Network, O*Net OnLine, and increased by a factor of 1.42 to account for employee benefits and other compensation, a total cumulative burden of 15,210 hours will result in a total cost of $874,118.

Employers will also experience significant time-savings as a result of the reengineered process. The Department estimates the average time-savings to employers will be at least 28 days from the current process, based on the current average H-2B application processing time of 73 days in the fiscal year (FY) 2007 (October 1, 2006-September 30, 2007). Although the Department cannot estimate the cost savings as a result of this time saved, it acknowledges employers will experience a variety of economic benefits, including benefits from predictability of workforce size and availability regardless of geographic area, as a result of reengineering the application process.

The Department received seven comments related to the cost of this rulemaking. One comment was directed at the cost to small businesses and has been addressed in Section B of this preamble below. The remaining six comments were related to the costs to the SWAs, which is not a cost calculated in the total cost of this final rule because they are considered transfer costs under OMB Circular A-4. Therefore, the Department has addressed those comments in Section C of this preamble. The Department notes, however, that based on the comments, it reduced the number of required advertisements from three in the preamble to two in this Final Rule, which is reflected in the cost analysis above.

B. Regulatory Flexibility Analysis/SBREFA

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. A significant economic impact is defined as eliminating more than 10 percent of the businesses' profits; exceeding 1 percent of the gross revenue of the entities in a particular sector; or exceeding 5 percent of the labor costs of the entities in the sector. Further under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C 801 (SBREFA), an agency is required to produce compliance guidance for small entities if the rule has a significant economic impact. Although the RFA and the SBREFA analyses were included as separate sections in the proposed rule, the Department has included them in one section in this Final Rule to avoid unnecessary duplication. The Department has certified that this Final Rule does not have a significant economic impact on a substantial number of small entities.

1. Definition of a Small Entity

A small entity is one that is “independently owned and operated and which is not dominant in its field of operation.” The definition of small business varies from

industry to industry to the extent necessary to properly reflect industry size differences. An agency must either use the SBA definition for a small entity, or, establish an alternative definition. Given that this rulemaking crosses industry sectors, the Department has adopted the SBA size standards defined in 13 CFR 121.201. The SBA utilizes annual revenue in some industries, while utilizing number of employees in others to determine whether or not a business is considered a small business. Historically however, the Department has not collected information about an employer's industry classification, annual revenues, or number of employees currently on payroll in the H-2B program. Therefore, the Department cannot accurately and comprehensively categorize each applicant-employer for the purpose of conducting the RFA analysis by industry and size standard. In lieu of the industry and size standard analysis, the Department based the estimated costs of the reformed H-2B process assuming all employers-applicants were small entities.

2. Factual Basis for Certification

The factual basis for such a certification is that this Final Rule does not affect a substantial number of small entities and there will not be a significant economic impact on them. The Department receives more than 10,000 applications a year under this program. In FY 2006 (October 1, 2005-September 30, 2006), ETA received from SWAs 11,267 applications from employers seeking temporary labor certification under the H-2B program. According to the SBA, there were approximately 25.7 million small businesses in the U.S. in 2005. Thus, even assuming that all H-2B employer applicants are small

entities, the percentage of small entities that file applications for temporary foreign worker certification would be less than 0.05 percent (11,267 / 25,700,000 = 0.043 percent). Although this number may increase in FY 2008, it is not expected to significantly change the estimate of .05 percent because of the continuing legislative cap on the H-2B program and the absence of a returning worker exemption which the program has had in previous years. Therefore, this rule will not affect a substantial number of small businesses.

Furthermore, the Department determined that this Final Rule will not have a substantial economic impact on those small businesses that utilize the program. The RFA and the SBREFA, which amended the RFA, require that an agency promulgating regulations segment and analyze industrial sectors into several appropriate size categories for the industry being regulated. However, the foreign labor certification programs are open to all industries. Therefore, in analyzing the number of small businesses that might be affected, the Department looked at all small entities that had gross receipts of $120,000 or less and profits of $12,000 or less and determined that the costs do not make up a significant economic impact on a substantial number of small entities.

The Department believes that the costs incurred by employers under this Final Rule will not be substantially different from those incurred under the current application filing process. Employers seeking to hire foreign workers on a temporary basis under the H-2B program must continue to establish to the Secretary's satisfaction that their recruitment attempts have not yielded enough qualified and available U.S. workers. Similar to the current process, employers under this H-2B process will file a standardized application but will retain recruitment documentation, a recruitment report, and any

supporting evidence or documentation justifying the temporary need for the services or labor to be performed. To estimate the cost of this reformed H-2B process on employers, the Department calculated each employer will pay an additional $31.16 to meet the advertising requirements for a job opportunity, and will spend an additional 1.35 hours staff time preparing the standardized application, narrative statement of temporary need, final recruitment report, and retaining all other required documentation (e.g., newspaper ads, business necessity) for audit purposes or $77.58 per employer.

Using the RFA standard to determine whether a rule will have a substantial impact on a significant number of small business, the Department determined that this Final Rule will not eliminate more than 10 percent of the businesses' profits; exceed 1 percent of the gross revenue of the entities in a particular sector; or exceed 5 percent of the labor costs of the entities in the sector. The total cost per employer is approximately $109, which represents .09 percent of the gross receipts and profits of a small entity with $120,000 in revenues and $12,000 profits. Therefore, this rule will not have a significant impact on a substantial number of small businesses.

The Department received one comment on this section, which generally stated that the rule would increase the cost to employers, especially given the changes to advertising. Although this statement is partly true given that the cost of the rule increased by approximately $109, in light of the other non-quantifiable benefits, the Final Rule will likely represent a cost-savings to the employer. Therefore, for the reasons stated, the Department believes that total costs for any small entities affected by this program will be reduced or stay the same as the costs for participating in the current program. Even

assuming that all entities who file H-2B labor certification applications qualify as small businesses, there will be no net negative economic effect.

C. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1501 et seq.) directs agencies to assess the effects of a Federal regulatory action on State, local, and tribal governments, and the private sector to determine whether the regulatory action imposes a Federal mandate. A Federal mandate is defined in the Act at 2 U.S.C. 658(5) – (7) to include any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H-2B worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

The Department received six comments on this section from SWAs related to the increase in cost and workload and/or the lack of funding to support the new H-2B processing requirements. One commenter generally noted that its jurisdiction was neither financially nor functionally prepared to take on this added workload. Three States specifically stated that the funds provided under the Wagner-Peyser Act were insufficient to carry out their H-2B responsibilities prior to the changes in this rule, and the new eligibility verification requirements increased their funding challenges. Three States specifically related the lack of resources to the additional cost of storing and processing the I-9 documents related to the eligibility verification requirements.

The Department disagrees that this Final Rule imposes an unfunded mandate. As noted in the proposed rule, the Department is not insensitive to the resource and time constraints facing SWAs in their administration of H-2B activities and the difficulties inherent in making informed referrals on a population of workers that may be itinerant and difficult to contact. 73 FR 29950, May 28, 2008. However, we do not believe that this requirement will result in a significant workload increase or administrative burden. The Department points out that although there may be some new requirements for SWAs, there are many requirements for SWAs that have been eliminated in this Final Rule given the reengineered approach. The SWAs will experience a direct impact on their foreign labor certification activities in the elimination of certain H-2B activities under this Final Rule. These eliminated activities are currently funded by the Department pursuant to grants provided under the Wagner-Peyser Act, 29 U.S.C. 49 et seq. In addition, other tools will be available to the SWAs to make this requirement relatively easy to implement, such as the E-Verify system. As a result, the net effect of this Final Rule will likely be to ensure the amounts of such grants available to each State correspond or even increase relative to its workload under the H-2B program in the receipt, processing and monitoring of each application.

One State commented that the new eligibility verification requirements could lead to discriminatory practices subject to legal challenge, which in this commenter's opinion, the legal costs associated with any defense also represented an unfunded mandate. The Department believes it is premature to presume that the States will have to bear a significant cost to defend against any potential litigation associated with the

implementation of this Final Rule, and which is typically considered part of a grantee's programmatic responsibility, should it occur.

Therefore, for the reasons stated above, the Department finds that this Final Rule does not impose an unfunded mandate.

D. Executive Order 13132—Federalism

Executive Order 13132 addresses the Federalism impact of an agency's regulations on the States' authority. Under E.O. 13132, Federal agencies are required to consult with States prior to and during the implementation of national policies that have a direct effect on the States, the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Further, an agency is permitted to limit a State's discretion when it has statutory authority and the regulation is a national activity that addresses a problem of national significance.

The Department received one comment on this section. This commenter stated that the Department's reversal of a long-standing position on U.S. worker self-attestation creates a Federalism impact. According to this commenter, TEGL 11-07, Change 1, mandates that SWAs perform pre-employment eligibility verifications on every U.S. worker that requests a referral to an H-2A job order. This commenter requests that the Department prepare a summary impact statement and acknowledge that many States currently have attestation-based systems for U.S. worker access to public labor exchange services.

The Department disagrees with this commenter's assessment of a Federalism impact and therefore, the need for a summary impact statement. In this case there is no direct effect on the States because the States are not in the best position to address the needs to re-engineer a Federal program to relieve the backlog that has occurred due to inadequate staffing, funding, or other issues of concern. The issues addressed by the regulations are of national concern to ensure an effective program that regulates temporary alien workers and protects U.S. workers.

As noted elsewhere in this preamble, the Department attempted to reform this program in 2005. To meet the demands of the considerable workload increases for both the Department and the SWAs and limited appropriations, the Department determined that regulatory changes were still necessary. These changes are consistent with the Department's review, program experience, and years of stakeholder feedback on longstanding concerns about the integrity of the prior program. Therefore, as a program of national scope, the Department is implementing requirements that apply uniformly to all States.

Even if there were an argument that the Department should defer to the States on the eligibility verification requirements, the Department is authorized by the INA to implement Federal regulations to ensure consistency across States on immigration matters. Therefore, rather than having separate eligibility verification processes that vary from State to State, the Department is exercising its right under the INA to impose consistent requirements for all participants across the H-2B program**.** In addition, given that the H-2B program is an immigration-related program, it also is a program of national security and therefore, of national significance with Federal oversight and uniformity.

The verification requirement is designed to strengthen the integrity of the temporary labor certification process, afford employers a legal pool of applicants, protect U.S. workers, and improve confidence in and use of the H-2B program.

Further, the relationship the States have with this program and the Federal Government is by grants from the Department to the States for the sole purpose of maintaining consistency across States. As a voluntary Federal program, the Department may change the direction from time to time as dictated by the changes to immigration-related concerns, but at the same time are consistent with the underlying legislation.

Therefore, for the reasons stated, the Department has determined that this rule does not have sufficient Federalism implications to warrant the preparation of a summary impact statement.

E. Executive Order 13175 – Indian Tribal Governments

Executive Order 13175 requires Federal agencies to develop policies in consultation with tribal officials when those policies have tribal implications. This Final Rule regulates the H-2B visa program and does not have tribal implications. Therefore, the Department has determined that this E.O. does not apply to this rulemaking. The Department did not receive any comments related to this section.

F. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires agencies to assess the impact of Federal regulations and policies on families. The assessment must address whether the regulation strengthens or erodes the stability, integrity, autonomy, or safety of the family.

The Final Rule does not have an impact on the autonomy or integrity of the family as an institution, as it is described under this provision. The Department did not receive any comments related to this section.

G. Executive Order 12630 – Protected Property Rights

Executive Order 12630, Governmental Actions and the Interference with Constitutionality Protected Property Rights, prevents the Federal government from taking private property for public use without compensation. It further institutes an affirmative obligation that agencies evaluate all policies and regulations to ensure there is no impact on constitutionally protected property rights. Such policies include rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property.

The Department did not receive any comments on this section. The Department certifies that this Final Rule does not infringe on protected property rights.

H. Executive Order 12988 – Civil Justice Reform

Section 3 of E.O. 12988, Civil Justice Reform, requires Federal agencies to draft regulations in a manner that will reduce needless litigation and will not unduly burden the Federal court system. Therefore, agencies are required to review regulations for drafting errors and ambiguity; to minimize litigation; ensure that it provides a clear legal standard for affected conduct rather than a general standard; and promote simplification and burden reduction.

The rule has been drafted in clear language and with detailed provisions that aim to minimize litigation. The purpose of this Final Rule is to reengineer the H-2B program and simplify the application process. Therefore, the Department has determined that the regulation meets the applicable standards set forth in section 3 of E.O. 12988. The Department received no comments regarding this section.

I. Plain Language

Every Federal agency is required to draft regulations that are written in plain language to better inform the public about policies. The Department has assessed this Final Rule under the plain language requirements and determined that it follows the Government's standards requiring documents to be accessible and understandable to the public. The Department did not receive any comments related to this section.

J. Executive Order 13211 – Energy Supply

This Final Rule is not subject to E.O. 13211, which assesses whether a regulation is likely to have a significant adverse effect on the supply, distribution, or use of energy. Accordingly, the Department has determined that this rule does not represent a significant energy action and does not warrant a Statement of Energy Effects. The Department did not receive any comments related to this section.

K. Paperwork Reduction Act

1. Summary

The Paperwork Reduction Act (44 U.S.C. 3501) information collection requirements, which must be implemented as a result of this regulation, were submitted to OMB on February 14, 2008, along with its proposed rule to reform the H-2A agricultural foreign labor certification program, and then again on May 22, 2008, in conjunction with the H-2B proposed rulemaking preceding this Final Rule. Therefore, the public was given 60 days to comment on this information collection with both submissions, for a total of 120 days. All comments received were taken into consideration and a final package was submitted to OMB. The collection of information for the current H-2B program under the regulations in effect prior to the effective date of this rule were approved under OMB control number 1205-0015 (Form ETA 750).

This Final Rule implements the use of the new information collection, which OMB approved on [DATE] under OMB control number 1205-0466 [EXPIRATION DATE]. The new forms, ETA 9141 and ETA 9142, have a public reporting burden estimated to average 55 minutes for Form ETA 9141 and 2.75 hours for Form ETA 9142

per response or application filed. The overall annual burden hours for the H-2B program now total 10,366 hours for Form ETA 9141 and 30,984 hours for Form ETA 9142 based on the 11,267 applications the Department received in FY 2006. As defined by the Paperwork Reduction Act, there are no costs associated with either the ETA 9141 or ETA 9142.

The Department notes that this Final Rule and this paperwork package applies to the H-2B, H-1B, H-1B1, H-1C, E-3, and PERM programs as noted in the preamble of the proposed and this Final Rule. The burden hours associated with the additional programs include the wage determination and retention of documents requirements. In each of these programs only the ETA 9141 form is used, which replaces the State specific forms that were used to obtain the prevailing wage prior to the implementation of this Final Rule. Again, as noted above, there are no costs associated with these programs as costs are defined by the Paperwork Reduction Act and the burden hours are as follows:

H-1B (which includes H-1B1 and E-3): 353,676 burden hours for the ETA 9141 or 55 minutes per application. The Department based the burden hours on an estimate of 385,828 applications the Department received in FY 2006.

H-1C: 158 burden hours for the ETA 9141 or 55 minutes per application. The Department based the burden hours for this program on the 172 applications it received in FY 2006.

PERM: 91,667 burden hours for the ETA 9141 or 55 minutes per application based on an annual average of 100,000 applications the Department receives.

2. Procedural Detail

The Department requested comments on four specific areas of interest, including comments that:

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

The Department also noted in the proposed rule and accompanying preamble that the new collection applied to the H-1B, H-1B1, E-3, and PERM programs as well. As the Department notes elsewhere in this preamble, the H-1C program was inadvertently removed. Consistent with the proposed rule at 73 FR 29947, May 28, 2008, it was the Department's intention to standardize all forms for better program effectiveness and efficiency in its non-agricultural programs, which necessarily extends also to the H-1C program.

The Department received six comments on this section, all related to the H-2B program. One commenter stated that the form 9141 was unnecessarily long and complex and should be simplified. The Department has attempted to shorten the form and make it easier to use. It has been reduced from seven pages to four pages.

Three of the comments related to the burden associated with the paperwork requirements. Two final commenters stated that they did not have the funding or staff time to manage the record retention requirements or to process and store the paperwork. None of the commenters specifically addressed the issue of our methodology or assumptions, or the other programs to which the ETA 9141 now applies.

The paperwork burden estimate for the forms used for the H-2B program under the regulations in effect prior to the effective date of this Final Rule, Forms ETA 750 was approximately 1.4 hours. Under this new collection of information, the Department estimates that the burden will be approximately 2.75 hours for Form ETA 9142 and 55 minutes for Form ETA 9141. We based this calculation on a burden estimate of 2.5 hours for those program requirements that remained the same and allocated approximately 1.35 hours for the additional information requirements.

Although the Department did not receive any comments related to the remaining programs (H-1B, H-1B1, E-3, H-1C, and PERM), it notes that only the Form ETA 9141 applies to these programs. This Form will be used in lieu of the State form for submitting a prevailing wage request. Although the burden hours for each State application vary, the Department estimates the burden hours to complete the State forms to be approximately 1.0 hour. As a result, and for the reasons discussed elsewhere in this preamble, the Department does not expect the paperwork burden hours to increase for these programs.

In sum, without more persuasive analysis rebutting the analysis used by the Department, we assume our calculations are representative of the actual hourly burden for the new collection, which represents no increase for most programs and a minimal increased for the H-2B program.

K. Catalog of Federal Domestic Assistance Number

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

List of Subjects

20 CFR Part 655

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

20 CFR Part 656

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

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

PART 655--[AMENDED]

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

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); Sec. 3(c)(1), Public Law 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); Sec. 221(a), Public Law 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); Sec. 303(a)(8), Public Law 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); Sec. 323(c), Public Law 103-206, 107 Stat. 2428; Sec. 412(e), Public Law 105-277, 112 Stat. 2681 (8 U.S.C.1182 note); Sec. 2(d), Public Law 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Public Law 109-423, 120 Stat. 2900; and 8 CFR 214.2(h).

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

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

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

Subpart C issued under 8 CFR 214.2(h).

Subparts D and E authority repealed.

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

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

Subparts J and K authority repealed.

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

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

PART 655--TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

3. Revise subpart A to read as follows:

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

Sec.

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

Sec. 655.1 Purpose and scope of subpart A.

(a) Before granting the petition of an employer to admit nonimmigrant workers on H-2B visas for temporary nonagricultural employment in the United States (U.S.), the Secretary of Homeland Security is required to consult with appropriate agencies regarding the availability of U.S. workers. Immigration and Nationality Act of 1952 (INA), as amended, sections 101(a)(15)(H)(ii)(b) and 214(c)(1), 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184(c)(1).

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

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

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

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

(1) This subpart sets forth the procedures through which employers may apply for H-2B labor certifications, how such applications are considered and how they are granted or denied.

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

Sec. 655.2 Territory of Guam.

Subpart A of this part does not apply to temporary employment in the Territory of Guam, and the Department of Labor (Department or DOL) does not certify to the USCIS

of DHS the temporary employment of nonimmigrant foreign workers under H-2B visas, or enforce compliance with the provisions of the H-2B visa program provisions in the Territory of Guam. Pursuant to DHS regulations, 8 CFR 214.2(h)(6)(iii)9D), administration of the H-2B temporary labor certification program is performed by the Governor of Guam, or the Governor's designated representative.

Sec. 655.3 Special procedures.

(a) Systematic process. This subpart provides procedures for the processing of H-2B applications from employers for the certification of employment of nonimmigrant positions in nonagricultural employment.

(b) Establishment of special procedures. The Office of Foreign Labor Certification (OFLC) Administrator has the authority to establish or to devise, continue, revise, or revoke special procedures in the form of variances for the processing of certain H-2B applications when employers can demonstrate, upon written application to the OFLC Administrator, that special procedures are necessary. These include special procedures currently in effect for the handling of applications for tree planters and related reforestation workers, professional athletics, boilermakers coming to the U.S. on an emergency basis, and professional entertainers. Prior to making determinations under this paragraph (b), the OFLC Administrator may consult with employer and worker representatives.

Sec. 655.4 Definitions of terms used in this subpart.

For the purposes of this subpart:

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

Administrative law judge means a person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105, or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by part 656 of this chapter, which will hear and decide appeals as set forth in § 655.115.

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

Administrator, Wage and Hour Division (WHD), Employment Standards Administration means the primary official of the WHD, or the Administrator's designee

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

Applicant means a lawful U.S. worker who is applying for a job opportunity for which an employer has filed an Application for Temporary Employment Certification (Form ETA 9142).

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved form submitted by an employer to secure a

temporary nonagricultural labor certification determination from DOL. A complete submission of the Application for Temporary Employment Certification includes the form, all valid wage determinations as required by 655.101(a)(1) of this part and the U.S. worker recruitment report.

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

Attorney means any person who is currently 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, and who is not under suspension, debarment or disbarment from practice before any court or the Department, the Board of Immigration Appeals, the immigration judges, or DHS under 8 C.F.R. 292.3, 1003.101. Such a person is permitted to act as an agent or attorney for 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, and consisting of Administrative Law Judges assigned to the Department and designated by the Chief Administrative Law Judge to be members of BALCA. The Board is located in Washington, DC, and reviews and decides appeals in Washington, DC.

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

Certifying Officer (CO) means the OFLC official designated by the Administrator, OFLC with making programmatic determinations on employer-filed applications under the H-2B program.

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

Date of need means the first date the employer requires services of the H-2B workers as listed on the application.

Department of Homeland Security (DHS) means the Federal agency having jurisdiction over certain immigration-related functions, acting through its agencies, including the U.S. Citizenship and Immigration Services.

Eligible worker means an individual who is not an unauthorized alien (as defined in section 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3), or in this paragraph (c)) with respect to the employment in which the worker is engaging.

Employee means employee 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 should be considered and no one factor is dispositive.

Employer means:

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

(i) Has a place of business (physical location) in the U.S. and a means by which it may be contacted

(ii) Has an employer relationship with respect to H-2A employees or related U.S. workers under this part; and

(iii)Possesses, for purposes of the filing of an application, a valid Federal Employer Identification Number (FEIN).

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

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

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

Full time, for purposes of temporary labor certification employment, means 35 or more hours per week, except where a state or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 35 hours per week, that definition shall have precedence.

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

Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one[A1] or more employers, which is not an affiliate, branch or subsidiary of the job contractor, and where the job contractor will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

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

Joint employment means that where two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, those employers may be considered to jointly employ that employee. An employer in a joint employment relationship to an employee may be considered a "joint employer" of that employee.

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

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

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

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

Occupational Employment Statistics Survey (OES) means that program under the jurisdiction of the Bureau of Labor Statistics (BLS) that provides annual wage estimates for occupations at the state and MSA levels.

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

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

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

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

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

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

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

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

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

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

United States Citizenship and Immigration Services (USCIS) means the Federal agency within DHS making the determination under the INA whether to grant petitions filed by employers seeking H-2B workers to perform temporary nonagricultural work in the U.S.

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

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

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under Sec. 207 of the INA, is granted asylum under Sec. 208 of the INA, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.

Within [number and type] days will, for purposes of determining an employer's compliance with timing requirements with respect to appeals and requests for review, begin to run on the first business day after the Department sends a notice to the employer by means normally assuring next-day delivery, and will end on the day that the employer sends whatever communication is required by these rules back to the Department, as evidenced by a postal mark or other similar receipt.

Sec. 655.5 Application Filing Transition.

(a) Compliance with these regulations. Except as provided in paragraphs (b) and (c) of this section, employers desiring to file applications for H-2B workers on or after the effective date of these regulations where the date of need for the services or labor to be

performed is on or after October 1, 2009, must comply with all of the obligations and assurances detailed in this subpart. SWAs will no longer accept for processing applications filed by employers for H-2B workers for temporary or seasonal nonagricultural services on or after the effective date of these regulations.

(b) Applications filed under former regulations. (1) For applications filed with the SWAs serving the area of intended employment prior to the effective date of these regulations, the SWAs shall continue to process all active applications under the former regulations and transmit all completed applications to the appropriate NPC for review and issuance of a labor certification determination.

(2) For applications filed with the SWAs serving the area of intended employment prior to the effective date of these regulations that were completed and transmitted to the NPC, the NPC shall continue to process all active applications under the former regulations and issue a labor certification determination.

(c) Applications filed with the NPC under these regulations. Employers desiring to file applications on or after the effective date of these regulations where the date of need for H-2B workers is prior to October 1, 2009, must receive a prevailing wage determination from the SWA serving the area of intended employment, who shall process such requests in accordance with the provisions of 655.10, and conduct all of the pre-filing recruitment steps set forth under this subpart prior to filing an Application for Temporary Employment Certification with the NPC.

Sec. 655.6 Temporary need.

(a) To utilize the H-2B program, the employer must establish its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii).

(b) The employer's need is considered temporary if justified to the Secretary as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 8 CFR 214.2(h)(6)(ii)(B).

(c) Except where the employer's need is based on a one-time occurrence, the Secretary will deny an Application for Temporary Employment Certification where the employer has a recurring seasonal or peakload need lasting more than 10 months.

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

(e) The employer filing the application must maintain documentation evidencing the temporary need and be prepared to submit this documentation in response to a Request for Further Information (RFI) from the CO prior to rendering a Final Determination or in the event of an audit examination. The documentation required in this section must be retained by the employer for a period of no less than 3 years from the date of the labor certification.

Sec. 655.7-655.9 [Reserved]

Sec. 655.10 Determination of prevailing wage for temporary labor certification purposes.

(a) Application process. (1) The employer must request a prevailing wage determination from the NPC in accordance with the provisions of 655.5.

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

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

(b) Determinations. Prevailing wages shall be determined as follows:

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

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(4) of this section, of the wages of workers similarly employed at the skill level in the area of intended employment. The wage component of the BLS Occupational Employment Statistics Survey (OES) shall be used to determine the arithmetic mean, unless the employer provides a survey acceptable to OFLC under paragraph (f) of this section.

(3) If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist, for the opportunity and staff level within the area of intended employment i.e. multiple MSAs, the prevailing wage shall be based on the highest applicable wage among all applicable MSAs.

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

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

(6) The NPC will enter its wage determination on the form it uses for these purposes, indicate the source, and return the form with its endorsement to the employer. The employer must offer this wage (or higher) to both its similarly employed U.S. and H-2B workers and any U.S. worker hired in response to the recruitment required as part of the application.

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

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

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

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

(e) Professional athletes. In computing the prevailing wage for a professional athlete when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage (see section 212(p)(2) of the INA).

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

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide 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 in accordance with guidance issued by the OFLC national office.

(3) The survey must be based upon recently collected data:

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

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

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

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

(g) Submission of supplemental information by employer. (1) If the employer disagrees with the wage level assigned to its job opportunity, or if the NPC informs the employer its survey is not acceptable, or if there is another legitimate basis for such a review, the employer may submit supplemental information to the NPC.

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

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

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

(i) Retention of Documentation. The PWD shall be retained by the employer for 3 years and submitted to a CO in the event it is requested in the course of an RFI or an audit or a Wage and Hour representative in the event of a Wage and Hour investigation.

Sec. 655.11 Certifying officer review of prevailing wage determinations.

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

(b) Transmission of request to processing center. Upon the receipt of a written request for review, the NPC shall review the employer's request and accompanying documentation, including any supplementary material submitted by the employer.

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

(d) Review on the record. The CO shall review the PWD solely on the basis upon which the PWD was made and after review may:

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

(2) Modify the PWD.

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

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

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

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

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

Sec. 655.12-655.14 [Reserved]

Sec. 655.15 Required Pre-filing Recruitment.

(a) Time of Filing of Application. An employer may not file an Application for Temporary Employment Certification before all of the pre-filing recruitment steps set forth in this section have been fully satisfied, except where specifically exempted from some or all of those requirements by these regulations or special procedures. Applications submitted not meeting this requirement shall not be accepted for processing.

(b) General Attestation Obligation. An employer must attest on the Application for Temporary Employment Certification to having performed all required steps of the recruitment process as specified in this section.

(c) Retention of documentation. The employer filing the Application for Temporary Employment Certification must maintain documentation of its advertising and recruitment efforts, including prevailing wage determinations, as required in this subpart and be prepared, upon written request, to submit this documentation in response to a RFI from the CO prior to the CO rendering a Final Determination or in the event of a CO directed audit examination. The documentation required in this section is to be retained by the employer for a period of no less than 3 years from the date of the certification.

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

(1) Submit a job order to the SWA serving the area of intended employment;

(2) Publish two print advertisements (one of which must be on a Sunday, except as outlined in paragraph (f)(4) of this section); and

(3) Where the employer is a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application, the employer must formally contact the local union that is party to the collective bargaining agreement as a recruitment source for able, willing, qualified, and available U.S. workers.

(e) Job Order. (1) The employer must place an active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer's date of need for H-2B workers, identifying it as a job order to be placed in connection with a future application for H-2B workers. Unless otherwise directed by the CO, the SWA must keep the job order open for a period of not less than 10 calendar days. Documentation of this step shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting. If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State, the employer shall place a job order with the SWA having jurisdiction over the place where the work has been identified to begin. Upon placing a job order, the SWA receiving the job order under this paragraph shall promptly transmit, on behalf of the employer, a copy of the active job order to all States listed in the application as anticipated worksites.

(2) The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in Sec. 655.17.

(f) Newspaper Advertisements. (1) During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section,

the employer must publish an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday advertisement (except as provided in paragraph (f)(2) of this section), in the newspaper of general circulation serving the area of intended employment that is most appropriate to the occupation and the workers likely to apply for the job opportunity. Both newspaper advertisements must be published only after the job order is placed for active recruitment by the SWA.

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

(3) The newspaper advertisements must satisfy the requirements contained in sec. 655.17. The employer must maintain copies of newspaper pages (with date of publication and full copy of advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper.

(4) If a professional, trade or ethnic publication is more appropriate for the occupation and the workers likely to apply for the job opportunity than a general circulation newspaper, and is the most likely source to bring responses from able, willing, qualified, and available U.S. workers, then the employer may use a professional, trade or ethnic publication in place of one of the newspaper advertisements, but may not replace the Sunday advertisement (or the substitute permitted by paragraph (f)(2) of this section).

(g) Labor Organizations. During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, an

employer that is already a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application must formally contact by U.S. Mail or other effective means the local union that is party to the collective bargaining agreement. An employer governed by this subsection must maintain dated logs demonstrating that such organizations were contacted and notified of the position openings and whether they referred qualified U.S. worker(s), including number of referrals, or were non-responsive to the employer's request.

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

(i) Referral of U.S. workers. SWAs may only refer for employment individuals whom they have verified are eligible U.S. workers through the process for employment verification of all workers that is established by INA section 274A(b). SWAS must provide documentation certifying the employment verification that satisfies the standards of INA section 274A(a)(5) and its implementing regulations.

(j) Recruitment Report. (1) At least 2 calendar days after the last date on which the job order was posted and at least 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign, and date a written recruitment report. The employer may not submit the H-2B application until the

recruitment report is completed. The recruitment report must be submitted to the NPC with the application. The employer must retain a copy of the recruitment report for a period of 3 years.

(2) The recruitment report must:

(i) Identify each recruitment source by name;

(ii) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers;

(iii) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position.

(3) The employer must retain resumes (if available) of, and evidence of contact with (which may be in the form of an attestation), each U.S. worker who applied or was referred to the job opportunity. Such resumes and evidence of contact must be retained along with the recruitment report for a period of no less than 3 years, and must be provided in response to an RFI or in the event of an audit or an investigation.

Sec. 655.17 Advertising requirements.

All advertising conducted to satisfy the required recruitment steps under sec. 655.15 before filing the Application for Temporary Employment Certification must meet the requirements set forth in this section and must contain terms and conditions of employment which are not less favorable than those to be offered to the H-2B workers. All advertising must contain the following information:

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

(b) The geographic area 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;

(c) If applicable, whether transportation to the worksite(s) will be provided by the employer;

(d) A description of the job opportunity (including the job duties) for which labor certification is sought with sufficient detail to apprise applicants of services or labor to be performed and the duration of the job opportunity;

(e) The job opportunity's minimum education and experience requirements and whether or not on-the-job training will be available;

(f) The work hours and days, expected start and end dates of employment, and whether or not overtime will be available;

(g) The wage offer, or in the event that there are multiple wage offers, the range of applicable wage offers each of which must not be less than the prevailing wage, the Federal minimum wage, State minimum wage, or local minimum wage applicable throughout the duration of the certified H-2B employment; and

(h) That the position is temporary and the total number of job openings the employer intends to fill.

Sec. 655.18-655.19 [Reserved]

Sec. 655.20 Applications for temporary employment certification.

(a) Application Filing Requirements. An employer who desires to apply for labor certification of temporary employment for one or more nonimmigrant foreign positions must file a completed Application for Temporary Employment Certification form, and a copy of the recruitment report completed in accordance with section 655.15(j).

(b) Filing. An employer must complete the Application for Temporary Employment Certification and send it by U.S. Mail or private mail courier to the NPC. Employers are strongly encouraged to keep receipts of any mailings. The Department will publish a Notice in the *Federal Register* identifying the address(es), and any future address changes, to which applications must be mailed, and will also post these addresses on the Department's Internet Web site at http://www.foreignlaborcert.doleta.gov/. The form must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent). The Department may, at a future date, require applications to be filed electronically in addition to or instead of by U.S. Mail or private mail courier.

(c) Except where otherwise permitted under Sec. 655.3, an association or other organization of employers is not permitted to file master applications on behalf of its employer-members under the H-2B program.

(d) Certification of more than one position may be requested on the application as long as all H-2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.

(e) Except where otherwise permitted under sec. 655.3, only one Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer.

(f) Where a one-time occurrence lasts longer than one year, the employer must reapply for certification on an annual basis after performing good-faith recruitment, except that an employer with an approved need for more than one year, but less than 18 months will not be required to conduct another labor market for the portion of time beyond 12 month point in the work.

Sec. 655.21 Supporting evidence for temporary need.

(a) Statement of Temporary Need. Each Application for Temporary Employment Certification must include attestations regarding temporary need in the appropriate sections. The employer must include a detailed statement of temporary need containing the following:

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

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

(3) An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need under sec**.** 655.6(b) as defined by DHS under 8 CFR 214.2(h)(6)(ii)(B); and

(4) If applicable, a statement justifying any increase or decrease in the number of H-2B positions being requested for certification from the previous year.

(b) Request for Supporting Evidence. In circumstances where the CO requests evidence or documentation substantiating the employer's temporary need through a RFI under sec. 655.23(c) to support a Final Determination, or notifies the employer that its application is being audited under sec. 655.24, the employer must timely furnish the requested supplemental information or evidence or documentation. Failure to provide the information requested or late submissions may be grounds for the denial of the application. All such documentation or evidence becomes part of the record of the application.

(c) Retention of documentation. The documentation required in this section and any other supporting evidence justifying the temporary need by the employer filing the Application for Temporary Employment Certification must be retained for a period of no less than 3 years from the date of the certification.

Sec**.** 655.22 Obligations of H-2B employers.

An employer seeking H-2B labor certification must attest as part of the Application for Temporary Employment Certification that it will abide by the following conditions of this subpart:

(a) The employer is offering terms and working conditions normal to U.S. workers similarly employed in the area of intended employment and which are not less favorable

than those offered to the H-2B worker(s) and are not less than the minimum terms and conditions required by this subpart.

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

(c) The job opportunity is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship, and the employer has conducted the required recruitment, in accordance with the regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which labor certification is sought. Any U.S. worker applicants were or will be rejected only for lawful, job-related reasons, and the employer must retain records of all rejections.

(d) During the period of employment that is the subject of the labor certification application, the employer will comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;

(e) The offered wage equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage and the employer will pay the offered wage during the entire period of the approved H-2B labor certification.

(f) Upon the separation from employment of H-2B worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing (or any other method specified by the Department or DHS in the Federal

Register) of the separation from employment not later than 2 work days after such separation is discovered by the employer. An abandonment or abscondment shall be 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. Employees may be terminated for cause, however, for shorter unexcused periods of time.

(g) The offered wage is not based on commissions, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage, or the legal Federal or State minimum wage, whichever is highest. The employer must make all deductions from the worker's paychecks that are required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(h) The job opportunity is a bona fide, full-time temporary position, the qualifications for which are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations.

(i) The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the Application for Temporary Employment Certification in the area of intended employment within the period beginning 120 calendar days before the date of need through the entire period of employment of the H-2B worker, except where the employer also attests that it offered the job opportunity that is the subject of the application to those laid off U.S. worker(s)

and the U.S. worker(s) either refused the job opportunity or was rejected for the job opportunity only for lawful, job-related reasons.

(j) The employer and its attorney or agents have not sought or received payment of any kind from the employee for any activity related to obtaining the labor certification, including payment of the employer's attorneys' or agent fees, Application for Temporary Employment Certification, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.

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

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

(2) All worksites are listed on the certified Application for Temporary Employment Certification.

(l) The employer will not place any H-2B workers employed pursuant to this application outside the area of intended employment listed on the Application for

Temporary Employment Certification unless the employer has obtained a new temporary labor certification from the Department.

(m) Unless the H-2B worker will be sponsored by another subsequent employer, the employer will inform H-2B workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required in sec. 655.35, and that if dismissed by the employer prior to the end of the period, the employer is liable for return transportation.

(n) The dates of temporary need, reason for temporary need, and number of positions being requested for labor certification have been truly and accurately stated on the application.

Sec. 655.23 Receipt and processing of applications.

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

(b) Processing. The CO will review complete applications for an absence of errors that would prevent certification and for compliance with the criteria for certification. The CO will make a determination to certify, deny, or issue a Request for Further Information prior to making a Final Determination on the application. Criteria for certification, as used in this subpart, are whether the employer has: established the need for the nonagricultural services or labor to be performed is temporary in nature; the number of

worker positions being requested for certification is justified and represent bona fide job opportunities, made all the assurances and met all the obligations required by sec. 655.22; and complied with all requirements of the program.

(c) Request for Further Information. (1) If the CO determines that the employer has made all necessary attestations and assurances, but the application fails to comply with one or more of the criteria for certification in paragraph (b) of this section, the CO must issue a RFI to the employer. The CO will issue the written RFI within 7 calendar days of the receipt of the application.

(2) The RFI must:

(i) Specify the reason(s) why the application is not sufficient to grant temporary labor certification, citing the relevant regulatory standard(s) and/or special procedure(s);

(ii) Specify a date, no later than 7 calendar days from the date of the written RFI, by which the supplemental information and documentation must be received by the CO to be considered; and

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

(3) The CO will issue the Final Determination or the additional RFI within 7 business days of receipt of the employer's response, or within 60 days of the employer’s date of need, whichever is later.

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

(d) Failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application. Such failure to comply with an RFI may also result in a finding by the CO requiring supervised recruitment under sec. 655.30 in future filings of H-2B temporary labor certification applications.

Sec. 655.24 Audits.

(a) Discretion. OFLC will conduct audits of H-2B temporary labor certification applications. The applications selected for audit will be chosen within the sole discretion of OFLC and without regard to whether the application was certified or is still under review.

(b) Audit Letter. When an application is selected for audit, the CO shall issue an audit letter to the employer. The audit letter will:

(1) State the application has been selected for audit and note documentation that must be submitted by the employer;

(2) Specify a date, no fewer than 14 days and no more than 30 days from the date of the audit letter’s issuance, by which the required documentation must be received by the CO; and

(3) Advise that failure to comply with the audit process may result in a finding by the CO to:

(i) Require the employer conduct supervised recruitment under sec. 655.30 in future filings of H-2B temporary labor certification applications for a period of up to 2 years, or

(ii) Debar the employer from future filings of H-2B temporary labor certification applications as provided in sec. 655.31.

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

(d) Audit violations. If, as a result of the audit, the CO determines the employer failed to produce all required documentation, or determines that the employer made a material misrepresentation with respect to the application, or determines it is appropriate for other reasons, the employer may be required to conduct supervised recruitment under section sec. 655.30 in future filings of H-2B temporary labor certification applications for up to 2 years; may be subject to debarment pursuant to sec. 655.31 or other sanctions. The CO may provide the audit findings and underlying documentation to DHS, WHD, or another appropriate enforcement agency. The CO may refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

Sec. 655.25-655.29 [Reserved]

Sec. 655.30 Supervised recruitment.

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

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

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

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

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

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

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

(6) Additional recruitment. The CO may require the employer to contact appropriate labor organizations as an additional recruitment source if the CO determines it is appropriate for the occupation and customary in the industry in the area of intended

employment. The employer will provide evidence of such contact to the CO in the course of the supervised recruitment.

(d) Recruitment report. No fewerr than 2 days after the last day of the posting of the job order and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare a detailed written report of the employer's supervised recruitment, signed by the employer as outlined in sec. 655.15(i) of this part. The employer must submit the recruitment report to the CO as outlined in paragraph (f) below and must retain a copy for a period of no less than 3 years. The recruitment report must contain a copy of all advertisements and a copy of the SWA job order, including the dates so placed.

(f) The employer shall supply the CO with the required documentation or information within 30 days of the date of the first advertisement. If the employer fails to do so, the CO may deny any applications filed by this employer for the remainder of the Federal Government fiscal year for which the recruitment was being conducted. The CO may refer any findings that an employer or its representative discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

Sec. 655.31 Debarment.

(a) The Administrator may not issue future labor certifications under this subpart to an employer and any successor in interest to the debarred employer, subject to the time limits set forth in subsection (c), if:

(1) The Administrator finds that the employer substantially violated a material term or condition of its temporary labor certification with respect to the employment of domestic or nonimmigrant workers; and

(2) The Administrator issues a Notice of Intent to Debar no later than 2 years after the occurrence of the violation.

(b) The Administrator may not issue future labor certifications under this subpart to an employer's agent or attorney, subject to the time limits set forth in subsection (c), if:

(1) The agent or attorney participated in, had knowledge of, or had reason to know of, the employer's substantial violation; and

(2) The Administrator issues a Notice of Intent to Debar no later than 2 years after the occurrence of the violation.

(c) No employer, attorney, or agent may be denied certification under this subpart for more than three years.

(d) For the purposes of this section, a substantial violation includes:

(1) A pattern or practice of acts of commission or omission on the part of the employer or the employer's agent which:

(i) Are significantly injurious to the wages, benefits offered under the H-2B program, or working conditions of a significant number of the employer's U.S. or H-2B workers;

(ii) Reflect a significant failure to offer employment to each qualified domestic worker who applied for the job opportunity for which certification was being sought, except for lawful job-related reasons;

(iii) Reflect a significant failure to comply with the employer's obligations to recruit U.S. workers as set forth in this subpart;

(iv) Reflect a significant failure to comply with the RFI or audit process pursuant to Sec. 655.24;

(v) Reflect the employment of an H-2B worker outside the area of intended employment, or in an activity/activities, not listed in the job order (other than an activity minor and incidental to the activity/activities listed in the job order), or after the period of employment specified in the job order and any approved extension; or

(vi) Reflect a significant failure to comply with the supervised recruitment process pursuant to Sec. 655.30.

(2) Fraud involving the Application for Temporary Employment Certification or a response to an audit;

(3) A significant failure to cooperate with a DOL investigation or interference with a DOL official performing an investigation, inspection, or law enforcement function under Sec. 218 of the INA (8 U.S.C. 1188), this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(4) A significant failure to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court under Sec. 218 of the INA (8

U.S.C. 1188), this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(5) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(e) DOL procedures for debarment under this section will be as follows:

(1) The Administrator will send to the employer, attorney, or agent a Notice of Intent to Debar by means normally ensuring next-day delivery, which will contain a detailed statement of the grounds for the proposed debarment. The employer, attorney, or agent may submit evidence in rebuttal within 14 calendar days of the date the notice is issued. The Administrator must consider all relevant evidence presented in deciding whether to debar the employer, attorney, or agent.

(2) If rebuttal evidence is not timely filed by the employer, attorney, or agent, the Notice of Intent to Debar will become the final decision of the Secretary and take effect immediately at the end of the 14-day period.

(3) If, after reviewing the employer's timely filed rebuttal evidence, the Administrator determines that the employer, attorney, or agent more likely than not meets one or more of the bases for debarment under § 655.31(d), the Administrator will notify the employer, by means normally ensuring next-day delivery, within 14 calendar days after receiving such timely filed rebuttal evidence, of his/her final determination of debarment and of the employer, attorney, or agent's right to appeal.

(4) The Notice of Debarment must be in writing, must state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and shall offer the employer, attorney, or agent an opportunity to request

review before the BALCA. The notice shall state to obtain such a review or hearing, the debarred party must, within 30 calendar days of the date of the notice file a written request to the Board of Alien Labor Certification Appeals, 800 K Street, NW, Suite 400-N, Washington, DC 20001-8002, and simultaneously serve a copy to the Administrator, OFLC. If such a review is requested, the hearing shall be conducted pursuant to the procedures set forth at 29 CFR Part 18. The debarment will take effect on the start date identified in the Notice of Debarment, unless an administrative appeal request for review is properly filed within 30 days from the date the Notice of Debarment is issued. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal.

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

Sec. 655.32 Labor certification determinations.

(a) COs. The Administrator, OFLC, is the Department's National CO. The Administrator, and the CO(s) in the NPC (by virtue of delegation from the Administrator), have the authority to certify or deny applications for temporary employment certification under the H-2B nonimmigrant classification. If the Administrator directs that certain types of temporary labor certification applications or specific applications under the H-2B nonimmigrant classification be handled by the

National OFLC, the Director of the Chicago NPC will refer such applications to the Administrator.

(b) Determination. The CO will make a determination either to grant or deny the Application for Temporary Employment Certification. The CO will grant the application if and only if the employer has met all the requirements of this subpart, including the criteria for certification defined in sec. 655.23(b), and therefore an insufficient number of qualified U.S. workers are available for the job opportunity for which certification is sought and the employment of the H-2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.

(c) Notice. The CO will notify the employer in writing (either electronically or by U.S. Mail) of the labor certification determination.

(d) Approved certification. If temporary labor certification is granted, the CO must send the certified Application for Temporary Employment Certification and a Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney with a copy to the employer. The Final Determination letter will notify the employer to file the certified application and any other documentation required by USCIS with the appropriate USCIS office.

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

(1) State the reason(s) certification is denied, citing the relevant regulatory standards and/or special procedures;

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

(3) Offer the employer an opportunity to request administrative review of the denial available under sec. 655.33, or to file a new application in accordance with specific instructions provided by the CO; and

(4) State that if the employer does not request administrative review in accordance with sec. 655.33, the denial is final and the Department will not further consider that application for temporary alien nonagricultural labor certification.

(f) Partial Certification. The CO may, in his/her discretion, and to ensure compliance with all statutory and regulatory requirements, issue a partial certification, reducing either the period of need or the number of H-2B positions being requested or both for certification, based upon information the CO receives in the course of processing the temporary labor certification application, a RFI, an audit, or otherwise. If a partial labor certification is issued, the Final Determination letter will:

(1) State the reason(s) for which either the period of need and/or the number of H-2B positions requested has been reduced, citing the relevant regulatory standards and/or special procedures;

(2) If applicable, address the availability of U.S. workers in the occupation;

(3) Offer the employer an opportunity to request administrative review of the partial labor certification available under sec. 655.33; and

(4) State that if the employer does not request administrative review in accordance with sec. 655.33, the partial labor certification is final and the Department will not further consider that application for temporary nonagricultural labor certification.

Sec. 655.33 Administrative review.

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

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

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

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

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

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

(b) Upon the receipt of a request for review, the CO shall, within 5 business days assemble and submit the Appeal File using means to ensure same day or overnight delivery, to the BALCA, the employer, and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor.

(c) Within 5 business days of receipt of the Appeal File, the counsel for the CO may submit, using means to ensure same day or overnight delivery, a brief in support of the CO's decision.

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

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

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

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

(3) Remand to the CO for further action.

(f) The BALCA should notify the employer, the CO, and counsel for the CO of its decision within 5 business days of the submission of the CO's brief or 10 days after receipt of the appeal file, whichever is earlier, using means to ensure same day or overnight delivery

Sec. 655.34 Validity of temporary labor certifications.

(a) Validity Period. A temporary labor certification is valid only for the period of time between the beginning and ending dates of employment, as certified by the OFLC Administrator on the Application for Temporary Employment Certification. The certification expires on the last day of authorized employment.

(b) Scope of Validity. A temporary labor certification is valid only for the number of H-2B positions, the area of intended employment, the specific services or labor to be

performed, and the employer specified on the certified Application for Temporary Employment Certification and may not be transferred from one employer to another.

(c) Amendments to Applications. (1) Applications may be amended at any time, before the CO's certification determination, to increase the number of positions requested in the initial application by not more than 20 percent (50 percent for employers requesting less than 10 positions) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the request is submitted in writing, the need for additional workers could not have been reasonably foreseen, and the employer's services or products will be in jeopardy prior to the expiration of an additional recruitment period.

(2) Applications may be amended to make minor changes in the period of employment, only when a written request is submitted to the CO and written approval obtained in advance. 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(s) of a decision to approve on the adequacy of the underlying test of the domestic labor market for the job opportunity.

(3) Other minor technical amendments to the application, including the job offer, may be requested, in writing, if the CO determines the proposed amendment(s) are justified and will have no significant effect upon the CO's ability to make the labor certification determination required under sec. 655.32.

(4) The CO may change the date of need to reflect an amended date when delays occur in the adjudication of the Application for Temporary Employment Certification, through

no fault of the employer, and a certification would commence validity after the initial date of need.

Sec. 655.35 Required departure.

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

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

Sec. 655.50 Enforcement process.

(a) Authority of the WHD Administrator. The WHD Administrator shall perform all the Secretary's investigative and enforcement functions under sections 101(a)(15)(H)(ii)(b), 214(c) and (g) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(b), 1184(c) and (g)), pursuant

to the delegation of authority from the Secretary of Homeland Security to the Secretary of Labor.

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

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

(d) Confidentiality. The WHD Administrator shall, to the extent possible under existing law, protect the confidentiality of any person who provides information to the

Department in confidence in the course of an investigation or otherwise under this subpart.

Sec. 655.60 Violations.

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

(1) Filed a petition with ETA that willfully misrepresents a material fact.

(2) Substantially failed to meet any of the conditions of the labor certification application attested to, as listed in Sec. 655.22, or any of the conditions of the DHS Form I-129, Petition for a Nonimmigrant Worker for an H-2B worker, listed in 8 CFR 214.2(h), including to provide working conditions normal to workers similarly employed in the area of intended employment and not less favorable than those offered to the foreign workers and that it is offering a job that contains no unduly restrictive job requirements. Such working conditions shall include, but are not limited to: hours; shifts; vacation periods; seniority-based preferences for training programs; and work schedules.

Sec. 655.65 Remedies for violations.

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(a) Upon determining that an employer has willfully failed to pay wages, in violation of the attestation required by Sec. **655**.22(g) or willfully required employees to pay for fees or expenses prohibited by Sec. **655**.22(l), or willfully made impermissible deductions from pay as provided in Sec. **655**.22(h), the WHD Administrator shall assess civil money

penalties that are at least equal to the difference between the amount that should have been paid and the amount that actually was paid to such nonimmigrant(s), not to exceed $10,000.

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

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

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

(e) For purposes of this subpart, "willful failure" means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to section 214(c) of the INA, or this subpart. See McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988); see also Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

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

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

(1) Previous history of violation, or violations, by the employer under the INA and this subpart, and 8 CFR 214.2;

(2) The number of U.S. or H-2B workers employed by the employer and affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made by the employer in good faith to comply with the INA and regulatory provisions of this subpart and at 8 CFR 214.2(h);

(5) The employer's explanation of the violation or violations;

(6) The employer's commitment to future compliance; and

(7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss to the workers.

(g) Disqualification from approval of petitions. Where the WHD Administrator finds a substantial failure to meet any conditions of the application or in a DHS Form I-129, or a willful misrepresentation of a material fact in an application or in a DHS Form I-129, as those terms are defined in 655.31, the Administrator may recommend that ETA debar the employer for a period of no less than 1 year, and no more than 5 years.

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

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

(j) The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), requires that inflationary adjustments to civil money penalties in accordance with a specified cost-of-living formula be made, by regulation, at least every

4 years. The adjustments are to be based on changes in the Consumer Price Index for all Urban Consumers (CPI-U) for the U.S. City Average for All Items. The adjusted amounts will be published in the Federal Register. The amount of the penalty in a particular case will be based on the amount of the penalty in effect at the time the violation occurs.

Sec. 655.70 WHD Administrator's determination.

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

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

(c) The WHD Administrator's written determination shall:

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

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

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

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

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

Sec. 655.71 Request for hearing.

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

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

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

(1) Be dated;

(2) Be typewritten or legibly written;

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

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

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

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

(d) The request for such hearing shall be received by the Chief Administrative Law Judge, at the address stated in the WHD Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An employer which fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge.

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

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

Sec. 655.72 Hearing rules of practice.

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

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

Sec. 655.73 Service of pleadings.

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

(b) Two copies of all pleadings and other documents in any administrative law judge proceeding shall be served on the attorneys for the WHD Administrator. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-2716, Washington, DC 20210, and one copy shall be served on the attorney representing the Administrator in the proceeding.

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

Sec. 655.74 Conduct of proceedings.

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

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

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

be due within the time prescribed by the administrative law judge, and shall be served on each other party.

Sec. 655.75 Decision and order of administrative law judge.

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

(b) The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator, WHD; the reason or reasons for such order shall be stated in the decision.

(c) In the event that the WHD Administrator assesses back wages for wage violation(s) of Secs. 655.22(g), 655.22(l), or 655.22(h) based upon a PWD obtained by the Administrator from OFLC during the investigation and the administrative law judge determines that the Administrator's request was not warranted, the administrative law judge shall remand the matter to the Administrator for further proceedings on the

Administrator's determination. If there is no such determination and remand by the administrative law judge, the administrative law judge shall accept as final and accurate the wage determination obtained from OFLC or, in the event the employer filed a timely complaint through the Employment Service complaint system, the final wage determination resulting from that process. Under no circumstances shall the administrative law judge determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the PWD.

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

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

Sec. 655.76 Appeal of administrative law judge decision.

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

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

(1) Be dated;

(2) Be typewritten or legibly written;

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

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

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

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

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

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

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

(e) The Board's notice shall specify:

(1) The issue or issues to be reviewed;

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

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

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

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

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

Sec. 655.80 Notice to OFLC and DHS.

(a) The WHD Administrator shall notify DHS and OFLC of the final determination of any violation recommending that DHS not approve petitions filed by an employer. The Administrator's notification will address the type of violation committed by the employer and the appropriate statutory period for disqualification of the employer from approval of petitions.

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

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

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

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

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

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

Sec. 655.715 Definitions.

* * * * *

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

* * * * *

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

Sec. 655.731 What is the first LCA requirement regarding wages?

* * * * *

(a) * * *

(2) The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a wage obtained from an OFLC NPC (OES), an independent authoritative source, or other legitimate sources of wage data. One of the following sources shall be used to establish the prevailing wage:

* * * * *

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

(A) <u>OFLC National Processing Center (NPC) determination</u>. Prior to January 1, 2010, the SWA having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009. On or

after January 1, 2010, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. Upon receipt of a written request for a PWD on or after January 1, 2010, the NPC will determine whether the occupation is covered by a collective bargaining agreement which was negotiated at arms length, and, if not, determine the arithmetic mean of wages of workers similarly employed in the area of intended employment. The wage component of the Bureau of Labor Statistics Occupational Employment Statistics survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey. The NPC shall determine the wage in accordance with sections 212(n) and 212(t) of the INA. If an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a PWD, the Chicago NPC will follow sec. 656.40 of this chapter and other administrative guidelines or regulations issued by ETA. The Chicago NPC shall specify the validity period of the PWD, which in no event shall be for less than 90 days or more than 1 year from the date of the determination.

(1) An employer who chooses to utilize an NPC PWD shall file the labor condition application within the validity period of the prevailing wage as specified in the PWD. Any employer desiring review of an NPC PWD, including judicial review, shall follow the appeal procedures at sec. 656.41 of this chapter. Employers which challenge an NPC PWD under sec. 656.41 must obtain a ruling prior to filing an LCA. In any challenge, the Department and the NPC shall not divulge any employer wage data, which were collected under the promise of confidentiality. Once an employer obtains a PWD from the NPC and files an LCA supported by that PWD, the employer is deemed to have accepted the

PWD (as to the amount of the wage) and thereafter may not contest the legitimacy of the PWD by filing an appeal with the CO (see Sec. 656.41 of this chapter) or in an investigation or enforcement action.

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

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

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

* * * * *

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

Sec. 655.731 What is the first LCA requirement, regarding wages?

* * * * *

(b) * * *

(3) * * *

(iii) * * *

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

* * * * *

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

Sec. 655.731 What is the first LCA requirement, regarding wages?

* * * * *

(d) * * *

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, and the employer desires review, including judicial review, the employer shall challenge the ETA prevailing wage only by filing a request for review under Sec. 656.41 of this chapter within 30 days of the employer's receipt of the PWD from the Administrator. If the request is timely filed, the decision of OFLC is suspended until the Center Director issues a determination on the employer's appeal. If

the employer desires review, including judicial review, of the decision of the NPC Center Director, the employer shall make a request for review of the determination by the Board of Alien Labor Certification Appeals (BALCA) under Sec. 656.41(e) of this chapter within 30 days of the receipt of the decision of the Center Director. If a request for review is timely filed with the BALCA, the determination by the Center Director is suspended until the BALCA issues a determination on the employer's appeal. In any challenge to the wage determination, neither ETA nor the NPC shall divulge any employer wage data which was collected under the promise of confidentiality.

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

(ii) [Reserved]

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

8. Amend § 655.1102 to add the definition of "Office of Foreign Labor Certification (OFLC)" to read as follows: Office of Foreign Labor Certification (OFLC) means the organizational component within the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the INA concerning foreign workers seeking admission to the United States.

9. Amend § 655.1112 to revise paragraph (c)(2) to read as follows:

§ 655.1112 Element II – What does "no adverse effect on wages and working conditions" mean?

* * * * *

(c) * * *

(2) Determination of prevailing wage for H-1C purposes. In the absence of collectively bargained wage rates, the National Processing Center (NPC) having jurisdiction as determined by OFLC shall determine the prevailing wage for similarly employed nurses in the geographic area in accordance with administrative guidelines issued by ETA for prevailing wage determination requests submitted on or after the effective date of these regulations.

(i) Prior to the effective date of these regulations, the SWA having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009. On or after the effective date of these regulations, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. A facility seeking to determine the prevailing wage must request a prevailing wage determination from the NPC having jurisdiction for providing the prevailing wage over the proposed area of intended employment not more than 90 days prior to the date the attestation is submitted to the Department. The NPC must enter its wage determination on the form it uses and return the form with its endorsement to the employer. Once a facility obtains a prevailing wage determination from the NPC and files an attestation supported by that prevailing

wage determination, the facility shall be deemed to have accepted the prevailing wage determination as accurate and appropriate (as to both the occupational classification and the wage rate) and thereafter shall not contest the legitimacy of that prevailing wage determination in an investigation or enforcement action pursuant to subpart M.

(ii) A facility may challenge the prevailing wage determination with the NPC having provided such determination according to administrative guidelines issued by ETA, but must obtain a final ruling prior to filing an attestation.

* * * * *

PART 656--LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

8. The authority citation is revised to read as follows:

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

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

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

* * * * *

Prevailing wage determination (PWD) means the prevailing wage provided or approved by an OFLC National Processing Center (NPC), in accordance with OFLC

guidance governing foreign labor certification programs. This includes PWD requests processed for purposes of employer petitions filed with DHS under Schedule A or for sheepherders.

* * * * *

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

* * * * *

Sec. 656.15 [Amended]

10. Amend Sec. 656.15 as follows:

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

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

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

Sec. 656.40 Determination of prevailing wage for labor certification purposes.

(a) Application process. The employer must request a PWD from the NPC, on a form or in a manner prescribed by OFLC. Prior to January 1, 2010, the SWA having jurisdiction over the area of intended employment shall continue to receive and process

prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009. On or after January 1, 2010, the NPC shall receive and process prevailing wage determination requests in accordance with these regulations and with Department guidance. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with section 212(t) of the INA. Unless the employer chooses to appeal the center's PWD under sec. 656.41(a), it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

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

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

* * * * *

(g) Employer-provided wage information.

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

issuance of a PWD derived from the OES survey. In the latter situation, the new employer survey submission will be deemed a new PWD request.

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

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

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

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

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

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

(h) Submittal of supplemental information by employer.

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

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

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

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

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12. Revise Sec. 656.41 to read as follows:

Sec. 656.41 Review of prevailing wage determinations.

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

materials pertaining to the PWD submitted to the NPC up to the date of the PWD received from the NPC.

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

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

(d) Request for review by BALCA. Any employer desiring review of the director's determination must make a request for review by the BALCA within 30 days of the date of the director's decision.

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

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

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

Signed in Washington, DC, this _____ of _____, 2008.

Brent R. Orell,

Deputy Assistant Secretary, Employment and Training Administration.

Alexander J. Passantino,

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

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