DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Wage and Hour Division

29 CFR Parts 501, 780, and 788

RIN 1205-AB55

Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement

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

ACTION: Final Rule.

SUMMARY: The Department of Labor (DOL or Department) is amending its regulations regarding the certification of temporary employment of nonimmigrant workers employed in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers.

This Final Rule re-engineers the process by which employers obtain a temporary labor certification from the Department for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2A (agricultural temporary worker) status. The Final Rule utilizes an attestation-based application process based on pre-filing recruitment and eliminates overlapping H-2A activities currently performed by State Workforce Agencies (SWAs). The Rule also provides enhanced enforcement, including more rigorous penalties, to complement the modernized certification process and to appropriately protect workers.

DATES: This Final Rule is effective [insert date 60 days after publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For further information about 20 CFR part 655, subpart B, 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 number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

For further information regarding 29 CFR part 501, contact James Kessler, Farm Labor Team Leader, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3510, Washington, DC 20210; Telephone (202) 693-0070 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION

I. Background Leading to the NPRM

A. Statutory Standard and Current Department of Labor Regulations

The H-2A visa program provides a means for U.S. agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services when U.S. labor is in short supply. Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA or the Act) (8 U.S.C. 1101(a)(15)(H)(ii)(a)) defines an H-2A worker as a nonimmigrant admitted to the U.S. on a temporary or seasonal basis to perform agricultural labor or services. Section 214(c)(1) of the INA (8 U.S.C. 1184(c)(1)) mandates that the Secretary of Labor (the Secretary) be consulted by the Secretary of the Department of Homeland Security (DHS), and Section 218 of the INA (8 U.S.C. 1188) explains the details of the application process and all the requirements to be met by the agricultural employer.

Although foreign agricultural labor has contributed to the growth and success of America's agricultural sector since the 19th century, the modern-day agricultural worker visa program originated with the creation, in the Immigration and Nationality Act of 1952, of the "H-2 program" (P.L. 82-144) – a reference to the INA section that established the program. Today, the H-2A nonimmigrant visa program authorizes the Secretary of Homeland Security to permit employers to hire foreign workers to come temporarily to the U.S. and perform agricultural services or labor of a seasonal or temporary nature, if such employment is first certified by the Secretary.

Section 218(a)(1) of the INA (8 U.S.C. 1188(a)(1)) states that a petition to import H-2A workers by the Secretary of Homeland Security may not be approved unless the petitioner has applied to the Secretary for a certification that:

> (A) There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and
>
> (B) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The INA specifies conditions under which the Secretary must deny certification, and establishes specific timeframes within which employers must file – and the Department must process and either reject or certify – applications for H-2A labor certification. In addition, the statute contains certain worker protections, including the provision of workers' compensation insurance and housing as well as minimum recruitment standards to which H-2A employers must adhere. See 8 U.S.C. 1188(c). The INA does not limit the number of foreign workers who may be accorded H-2A status each year or the number of labor certification applications the Department may process.

The Department has regulations at 20 CFR part 655, subpart B – "Labor Certification Process for Temporary Agricultural Employment Occupations in the United States (H-2A Workers)," governing the H-2A labor certification process, and at 29 CFR part 501 to implement its enforcement responsibilities under the H-2A program. Regulations impacting employer-provided housing for agricultural workers appear at 20 CFR part 654, subpart E (Housing for Agricultural Workers), and 29 CFR 1910.42

(standards set by the Occupational Safety and Health Administration); see also 20 CFR 651.10, and part 653, subparts B and F.

The Department was charged with reviewing the efficiency and effectiveness of its H-2A procedures in light of the increasing presence of undocumented workers in farming industries and because of growing concern about the stability of the agricultural industry amidst its difficulty in gaining access to a legal workforce.[1] The Department reviewed its administration of the program and, in light of its extensive experience in both the processing of applications and the enforcement of worker protections, proposed measures to re-engineer the H-2A program in a Notice of Proposed Rulemaking on February 13, 2008 (73 FR 8538) (NPRM or Proposed Rule).

B. Overview of the Proposed Redesign of the System

The NPRM entailed a pre-filing recruitment and attestation process. The Department proposed a process by which employers, as part of their application, would attest, under threat of penalties, including debarment from the program that they have complied with and will continue to comply with all applicable program requirements. In addition, employers would not be required to file extensive documentation with their applications but would be required to maintain all supporting documentation for their application for a period of 5 years in order to support the Department's enforcement of program requirements. The Department's proposal also contained new and enhanced penalties and procedures for invoking those penalties against employers as well as their attorneys or agents who fail to perform obligations required under the H-2A program.

[1] Fact Sheet: Improving Border Security and Immigration Within Existing Law, Office of the Press Secretary, The White House (August 10, 2007).; see also Statement on Improving Border Security and Immigration Within Existing Law, 43 Weekly Comp. Pres. Doc. (August 13, 2007).

The program also eliminates duplicative administration and processing by the State Workforce Agencies (SWAs) and the Department by requiring filing of the application only with the Department's National Processing Center (NPC) in Chicago, Illinois.

This program would increase the ability of the SWAs to conduct thorough housing inspections by allowing inspections to be done well in advance of the application date. The SWAs would also continue to clear and post intrastate job orders, circulate them through the Interstate Employment Service System, and refer potential U.S. workers to employers.

Finally, the Department has created additional processes for penalizing employers or their attorneys or agents who fail to perform obligations required under the H-2A program. The Department has instituted provisions for debarring employers, agents, and attorneys and revoking approved labor certifications.

II. Discussion of Comments on Proposed Rule

The Department received over 11,000 comments in response to the proposed rule, the vast majority of them form letters or emails repeating the same issues. Commenters included farmers and associations of farmers, agricultural associations, law firms, farmworker advocates, community-based organizations, and members of the public. The Department has reviewed these comments and taken them into consideration in drafting this Final Rule.

We do not discuss provisions of the NPRM on which we received no comments. Those provisions were adopted as proposed. We have also made some editorial changes

to the text of the regulations, for clarity and to improve readability. Those changes are not intended to alter the meaning or intent of the regulations.

A. Revisions to 20 CFR Part 655 Subpart B

1. Section 655.93--Special Procedures

The Department made revisions to the current regulation on special procedures to clarify its authority to establish procedures that vary from those procedures outlined in the regulations. We received numerous comments about this revised language on special procedures. Several commenters questioned the effect the proposed language would have on special procedures currently in use. Section 655.93(b) of the current regulations provides for special procedures, stating that: "the Director has the authority to establish special procedures for processing H-2A applications when employers can demonstrate upon written application to and consultation with the Director that special procedures are necessary." The proposed rule provides, by contrast, that "the OFLC Administrator has the authority to establish or to revise special procedures in the form of variances for processing certain H-2A applications when employers can demonstrate upon written application to and consultation with the OFLC Administrator that special procedures are necessary."

Four associations of growers/producers specifically requested clarification of the phrase "in the form of variances." These associations asked the Department to clarify that the proposed language does not pose a threat to the continued use of the sheepherder special procedures currently in place. One association expressed concern this revised

language would require hundreds of employers engaged in the range production of livestock to annually document their need for special procedures.

The addition of the phrase “in the form of variances” is intended to clarify that special procedures differ from those processes set out in the regulation, which otherwise apply to employers seeking to hire H-2A workers. The special procedures for sheepherders, for example, arise from decades of past practices and draw upon the unique nature of the activity that cannot be completely addressed in the regulatory process. The special procedures recognize the peculiarities of an industry or activity, and provide a means to comply with the underlying program requirements through a parallel but altered process that adequately addresses the unique nature of the industry or activity as well as meeting the statutory and regulatory requirements of the program. The special procedures do not enable industries and employers to evade their statutory or regulatory responsibilities, but rather establish a feasible and tailored means of meeting them while recognizing the unique circumstances of that industry. The language in § 655.93(b) affirms the Department's authority to develop and/or revise special procedures. The Department does not intend to require any industry currently using special procedures to seek ratification of their current practice, nor does the Department intend to require annual or periodic justifications of an industry’s need for special procedures. The Department does reserve the right to make appropriate changes to those procedures after consultation with the industry involved.

Section 655.93(c) proposed language permitting the OFLC Administrator “to devise, continue, revise, or revoke special procedures where circumstances warrant.” In contrast, the current rule states that the subpart permits the Administrator to “continue,

and . . . revise the special procedures previously in effect for the handling of applications for sheepherders in the Western States (and to adapt such procedures to occupations in the range production of other livestock) and for custom combine crews."

The Department received several comments about this proposed language, universally expressing concern that the new language provides the Department with broader authorities for changing or revoking existing special procedures without providing due process with respect to altering the procedures. An association of growers/producers stated that the proposed rule uses "more ominous terms" and gives the impression that the OFLC Administrator has unilateral authority to make changes without giving consideration to safeguards, review, or democratic procedures. One association of growers and producers expressed the view that the revocation language gives the Department authority to revoke the procedures without advance notice and opportunity for comment and is, therefore, a violation of the Administrative Procedure Act.

A law firm that provides counsel to agricultural employers stated that the new language does not adequately solidify the Department's commitment to existing special procedures and recommended that the Department amend the regulation to affirm its commitment to continuing such long-standing special procedures by requiring that any proposed changes to the existing special procedures and policies can be made only after publication in the Federal Register with at least a 120-day period for public comment. The firm also commented that the proposal to empower the OFLC Administrator to revoke special procedures would violate INA Section 218(c)(4), which requires the Secretary of Labor to issue regulations addressing the specific requirements of housing for employees principally engaged in the range production of livestock.

The Department has decided, after consideration of these concerns, to retain the NPRM language in the final regulation, with the addition of language similar to that in the current regulation, to enumerate those special procedures currently in effect, to provide examples of the use of special procedures. It is our belief that this provision, as it now reads, provides both the Department and employers using the H-2A program essential flexibility regarding special procedures, thus permitting the Department to be far more responsive to employers' changing needs, crop mechanization, and similar concerns. In addition, the language on special procedures reaffirms the Department's continuing commitment to use special procedures where appropriate. The Department has no present intent to revoke any of the special procedures that are in place, nor does the language of the final regulation give the Department any new power to do so. While it is possible that at some time in the future the Department would need to revoke or revise existing special procedures, that step would be taken with the same level of deliberation and consultation that was employed in the creation of those procedures. To make this intent to continue the current consultative process clearer, we have changed the word "may" in the last sentence of paragraph (b) to "will." The provision also provides the Department with the authority to develop new procedures to meet employer needs and, additionally, provides employers with the opportunity to request additional procedures or revisions to existing special procedures, to be considered by the Department.

Two associations of growers and producers requested that the Department formulate special procedures for dairy workers, stating that these special procedures should not be different from those already established for sheepherders. The associations

stated the provisions for sheepherders have "special relevance to the current dairy situation" and also stated the "special procedures relieve the sheepherding industry from having to make a showing of temporary or seasonal employment." The procedures that allow sheepherders to participate in the H-2A program have a unique statutory history going back to the 1950s. The Department does not see any statutory basis for allowing H-2A workers to perform year-round employment in the dairy industry.

The Department would, of course, consider a formal request from the dairy industry for the development of special procedures, assuming such occupations otherwise qualified for consideration as an H-2A occupation (for further discussion on this point, see section discussing the definition of "agricultural activity" below.) However, the Department does not believe that it is appropriate to address the merits of such a request in the preamble to this regulation.

An individual employer commented that those involved in discussing and considering changes to the H-2A program should preserve the special procedures for sheepherders and extend them to all occupations engaged in the range production of other livestock (cattle and horses). A private citizen provided suggestions for improving the handling of certification for sheep shearers.

The Department has previously established special procedures for sheep shearers and does not have any plans to change those procedures at this time and does not believe that it is appropriate to address the merits of the commenters' suggestions for revising the special procedures for sheep shearers in the preamble to this regulation. The Department would, of course, consider a formal request for the revision or expansion of special procedures.

2. Section 655.100 -- Overview and Definitions

a. Overview

The Department included a provision in the NPRM, similar to a provision in the current regulation, that provides an overview of the H-2A program. This overview provides the reader, especially readers unfamiliar with the program, a general description of program obligations, requirements, and processes.

Only two commenters identified concerns with the overview as written. Both expressed concern with the time period for the recruitment of U.S. workers, specifically that the recruitment is so far in advance that the employers question the likelihood of U.S. workers agreeing to work on a date far in advance and then working the entire contract. The overview, however, simply describes in broad-brush fashion the regulatory provisions that are discussed in detail later in the NPRM, and in and of itself has no legal effect. These concerns will be addressed in the context of the specific regulatory provision rather than in the overview. The overview has also been edited for general clarity and to reflect changes made throughout the regulatory text.

b. Definitions [655.100]

Definition of “agent,” “attorney,” and “representative”

The Department did not propose any changes to the definition of “agent” from existing regulations but added definitions for “attorney” and “representative” in the proposed rule. A major trade association commented that the definitions of, and references to, the terms “agent,” “attorney” and “representative” are confusing. The

association found the definitions of agent and representative to be duplicative and the distinctions between these two terms, both of which encompass the authority to act on behalf of an employer, unclear. The association also commented that the definition of "attorney" is self-evident and appears to be a vehicle for permitting attorneys to act as "agents" or "representatives." Further, according to the commenter, the term "representative" is also problematic and the Department should consider revising it or eliminating it entirely. The association believes the main purpose of the definition is to deem the person who makes the attestations on behalf of the employer a "representative," but the association believes it is not clear whether the intent of the definition of "representative" is to also make the representative liable for any misrepresentations made in an attestation on behalf of an employer. The association recommended the proposed rule should clarify the intent of the definition of "representative" and also under what circumstances an agent will be liable for activities undertaken on behalf of an employer. The association recommended a clear set of standards for liability and suggested such standards should not deviate from the current standards where agents, attorneys, and representatives (under the proposed rule) are not liable if they perform the administrative tasks necessary to file labor certification applications and petitions for visas and do not make attestations that are factually based. In addition, the association recommended that the agents, attorneys, or representatives should not be liable for program violations by the employer.

The Department understands the need for clarity in determining who qualifies as a representative before the Department and what responsibilities and liabilities attach to that role. Although the Department does distinguish between the different roles of

attorneys and agents both groups are held to the same standards of ethics and honesty under the Department's rules. Under the rules, attorneys can function as agents and either can be held to be a representative of the employer. The Department has clarified the definition of representative accordingly.

However, 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 imposing 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 their 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.

The same association also questioned why the Department is "singling out attorneys" in the definition of "representative" by including language which requires an attorney who acts as an employer's representative and interviews and/or considers U.S. workers for the job offered to the foreign worker(s) also be the person who normally considers applicants for job opportunities not involving labor certifications. The association found no apparent rationale justifying why the Department should dictate who and under what circumstances an attorney or any other person should interview U.S. job applicants. It further recommended that the rule eliminate the reference to attorneys or, at a minimum, clarify that the rule does not reach attorneys who merely advise and guide employers through the H-2A program.

As mentioned above, the Department has clarified the definition of representative to avoid confusion between the other terms. We also have further clarified the definitions for both agents and attorneys to ensure that such actors who interpose themselves in the H-2A hiring process are not merely "advising and guiding" employers but are in fact engaged in farm labor contracting activities.

A specialty bar association urged that the definition of "agent" be changed in order to prevent abuses related to foreign nationals paying recruiters' fees. The association suggested that the Department limit representation of employers to attorneys duly licensed and in good standing; law students and law graduates not yet licensed who are working under the direct supervision of an attorney licensed in the United States or a certified representative; a reputable individual of good moral character who is assisting without direct or indirect remuneration and who has a pre-existing relationship with the person or entity being represented; and accredited representatives, who are persons

representing a nonprofit organization who has been accredited by the Board of Immigration Appeals.

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 H-2A program. 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.

Definition of "adverse effect wage rate"

The Department proposed a revised definition of "adverse effect wage rate," limiting its application only to H-2A workers. A law firm commented that the proposed definition of "adverse effect wage rate" appears to apply only to H-2A workers and not to U.S. workers who are employed in "corresponding employment." The Department has clarified the definition to make clear that those hired into corresponding employment during the recruitment period will also receive the highest of the AEWR, prevailing wage, or minimum wage, as applicable. The firm also requested the same revision to 29 CFR Part 501 regulations. The Department believes that this requirement is adequately explained in the text of the regulations at §655.104(i) and § 655.105(g).

Definition of "agricultural association"

The Department added a definition for "agricultural association" in the proposed regulation. A major trade association commented that the proposed definition does not acknowledge that associations may be joint employers and states that it could cause confusion because other sections of the proposed regulation acknowledge that associations may have joint employer status. The association recommended the definition clarify that agricultural associations may serve as agents or joint employers and

define the circumstances under which joint employer arrangements may be utilized. A professional association further commented that associations should not be exempt from Farm Labor Contractor provisions if the associations are performing the same activities as Farm Labor Contractors.

The Department agrees that agricultural associations play a vital role in the H-2A program, and seeks to minimize potential confusion about their role and responsibilities. The regulation has been revised to clarify that agricultural associations may indeed serve as joint employers, or as agents, but that they cannot perform the functions of and are thus not subject to the requirements attaching to H-2A Labor Contractors.

Debarment

The Department's proposal included a debarment provision allowing for debarment of a successor in interest to ensure that violators are not able to re-incorporate to circumvent the effect of the debarment provisions. A national agricultural association commented that this could result in an innocent third party buying the farm of a debarred farmer and being subject to debarment, even though the successor is free of any wrongdoing, and thus the rule would place roadblocks on the sale of assets to innocent parties.

The Department agrees with this commenter. We have addressed this issue by changing a definition of "successor in interest" to make clear that the Department will consider whether the successor and its agents were personally involved in the violations that led to debarment in determining whether the successor constitutes a "successor in interest" for purposes of the rule.

In addition, the Department has made several edits to the Definitions section of the NPRM to provide consistency with other changes to the regulatory text. For example, the definition of an Application for Temporary Employment Certification has been amended to ensure the public has a clear idea of what this regulation entails. We have also made non-substantive changes to provide clarity and to comport with plain English language requirements.

Definition of "employ"

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-2A program. The association believes the status of an employer under the H-2A program is defined by the labor certification and visa petition processes and that the incorporation of the broad FLSA and MSPA definitions of "employ" insinuate broad legal concepts which add unnecessary confusion. The association further recommended that the Department eliminate the fourth criterion related to joint employment status in its proposed definition of "employer" and, instead, provide a separate definition of joint employer associations and the respective liabilities of the association and its joint employer members.

The Department agrees with these comments and has, accordingly, removed the definition of "employ" as superfluous and created a separate definition of joint employer (using that portion of the definition of employer which discussed joint employers) to eliminate any confusion. The definition of "employer" is revised slightly by reformatting

it and deleting the sentence that provided that FLCs (now H-2A Labor Contractors) are considered employers.

Definition of "farm labor contracting activity"

In addition, the Department added definitions for "farm labor contracting activity" and "Farm Labor Contractor (FLC)" to Part 655 of the proposed regulation. The Department has, in response to comments received, eliminated the definition for "farm labor contracting activity" and revised the definition for "Farm Labor Contractor." The revised definition is now contained under the heading "H-2A Labor Contractor."

A law firm commented that neither agents nor attorneys should be required to register as H-2A Labor Contractors. The commenter did not specifically address why it believed agents and attorneys would be required to register under the proposed definitions so the Department is unable to respond to this point. As a general matter, however, an agent or attorney, if performing farm labor contracting activities as they appear in the revised definition of an H-2A Labor Contractor, would most certainly be required to register as, and be upheld to the standards of, an H-2A Labor Contractor.

A group of farmworker advocacy organizations commented that the definitions proposed for Farm Labor Contractor would exclude recruiters of foreign temporary workers from the scope of the rule, making enforcement impossible. This organization pointed out that under the Migrant and Seasonal Agricultural Workers Protection Act (MSPA), H-2A workers are not migrant or seasonal agricultural workers and therefore, a contractor recruiting workers to become H-2A visa holders would not fit within the regulatory definition. The organization also commented that the "fixed-site" employer language could present problems in some employment situations, such as employment for

a custom harvester, where the employer would not have a fixed site. An association of growers/producers suggested the MSPA definitions for "farm labor contracting activity" and "Farm Labor Contractor" should be used.

In response to the comments, the Department has deleted the definition of "agricultural employer" refining this in the definition of "fixed-site employer" and has deleted the definition of "Farm Labor Contractor" in the final regulation replacing it with the definition "H-2A Labor Contractor." This will differentiate the two since the definition of an "H-2A Labor Contractor" no longer exactly matches the definition of a "Farm Labor Contractor" as used in MSPA. The definition of "farm labor contracting activity" has been deleted for redundancy since the activities have been made part of the definitions of "fixed-site employer" and "H-2A Labor Contractor."

Definition of "joint employment"

The Department received one comment regarding the inclusion of the definition of "joint employment" within the definition of "employment" as confusing. The Department has accordingly removed its definition and given it a separate place in the body of the definitional text.

Definition of "prevailing"

The Department proposed a revision to the definition of "prevailing" to include, "with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that practice or benefit which is most commonly provided by employers (including H-2A and non-H-2A employers) for the occupation in the area of intended employment." This represented a change from the current rule, which does not refer to "commonly provided" practices or benefits but instead uses a

percentage test (50 percent or more of employers in an area and for an occupation must engage in the practice or offer the benefit for it to be considered "prevailing," and the 50 percent or more of employers must also employ in aggregate 50 percent or more of U.S. workers in the occupation and area"). The Department received comments on the change, specifically inquiring whether the SWAs would continue to conduct prevailing wage and practice surveys, and requesting that if it is the Department's intent to no longer require SWAs to conduct prevailing wage surveys, that the change should be covered in the preamble.

The Department has determined that, to provide greater clarity, and for ease of administration the definition of "prevailing" will revert to the definition in the current regulation that requires that 50 percent or more of employers in an area and for an occupation engage in the practice or offer the benefit and that the 50 percent or more of the employers in an area must also employ in aggregate 50 percent or more of U.S. workers in the occupation and area. The Department notes it does not intend to change the provision of prevailing wage surveys currently undertaken by SWAs.

c. Definition of "agricultural labor or services" – packing and processing

The Department proposed, in the NPRM, a set of definitions of terms used in Subpart B and the accompanying text of 29 CFR 501 et seq. The Department received several comments in response to its proposed definitions. The Department proposed changes to the definition of "agricultural labor or services" to clarify that an activity that meets either the Internal Revenue Code (IRC) or the Fair Labor Standards Act (FLSA) definition of agriculture is considered agricultural labor or services for H-2A program

purposes and to remove limitations on the performance of certain traditional agricultural activities which, when performed for more than one farmer, are not considered agricultural labor or services under the IRC or the FLSA. The Department received several comments supporting these changes. A major trade association complimented the Department on providing "bright line" definitional guidance regarding the activities that constitute agricultural work to be covered by the H-2A program as distinct from the H-2B program. A number of these commenters mentioned that the inclusion of packing and processing activities in work considered as agricultural provides an option for obtaining legal workers, especially in light of the numerical limitations on H-2B visas. One association of growers/producers supported the expansion of the definition to include packing and processing but suggested that agricultural employers who have previously used the H-2B program for packing or processing operations be allowed to continue using the H-2B program. Another association of growers/producers suggested that the definition be changed to allow product that is moving from on-farm production directly to the end consumer be included as permissible work for H-2A workers, and suggested that the definition provide that it is a permissible activity for H-2A workers to work on production of a purchased crop when the crop is purchased by a farm because of weather damage to that farm's crops in a particular year.

The Department appreciates the support for the proposed changes and has retained them without alteration in the final regulation. Regarding packing and processing activities, the proposed definition includes as agricultural activities "handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured

state, any agricultural or horticultural commodity while in the employ of the operator of a farm." In response to the request to allow employers who have used the H-2B program for packing or processing operations to continue using the H-2B program, the Department cannot allow H-2A workers and H-2B workers to perform the same work at the same time. Activities are either agricultural or they are not, pursuant to the applicable definitions.

Incidental activities

The Department also proposed clarifications to reflect that work activity of the type typically performed on a farm and incident to the agricultural labor or services for which an H-2A labor certification was approved may be performed by an H-2A worker. A number of commenters, including a professional association, a major trade association, and several associations of growers/producers supported this change, stating that it was positive and would provide more flexibility for employers. A major trade association commented this change would allow employers to include duties in H-2A certified job opportunities that reflect the actual duties performed by farm workers and further commented that, "[p]resumably the provision will cover a farm worker who engages in incidental employment in the farm's roadside retail stand, a farm worker who assists in managing 'pick your own' activities, and a farm worker who occasionally drives a tractor pulling a hay wagon for a hay ride, to cite a few examples of incidental activities customarily performed by farm workers that have been disallowed in the past." This commenter's understanding of the Department's interpretation is correct.

This association also commented that the inclusion of these incidental activities will enable and require H-2A workers to be employed in performing these activities

rather than H-2B workers and viewed this as a positive outcome because "the H-2B program has been rendered virtually useless because of unrealistic cap limitations." One association of growers/producers commented that allowing H-2A workers to perform duties typically performed on a farm benefits the employee as well as the employer. A trade association commented that being able to use workers in other jobs not listed on the contract is needed, particularly when weather prevents field work.

In revising the definition of agricultural labor or services to include incidental work, the Department is recognizing that, due to the unpredictable nature of weather conditions and agricultural work itself, employers need some flexibility in assigning tasks. However, employers must be cognizant of the definition which limits such additional tasks to only those which are occasional and incidental to the work described on the employer's application. The amendment of the definition was not intended to substitute one type of temporary foreign worker for another; rather, it was intended to ensure that an H-2A worker's performance of a minor activity does not violate the terms and conditions of the visa status.

Inclusion of other occupations

The Department proposed to include logging employment in its definition of "agricultural activity" for purposes of the H-2A program. Two commenters voiced their support for this inclusion; we received no comments in opposition. The Department also sought comments as to whether there are other occupations that should be included within the definition of agriculture used in the H-2A program. The Department received several suggestions of other industries that should be considered, including livestock and dairy producers, fisheries, nursery and greenhouse employers and landscape businesses,

poultry producers, wine and equine businesses, turf grass growers, mushroom producers, maple syrup producers, and employers engaging in seasonal food processing as well as growers who operate processing and packing plants.

Of those requesting expansion of the definition to include other occupations, representatives of the dairy industry submitted the most comments. A major trade association and a number of associations of growers/producers commented that the dairy industry is unable to use the H-2A agricultural worker visa program and that this exclusion is unfair. They stated dairy farmers need and deserve the same access to legal foreign workers as other sectors of the agricultural industry. The association suggested that H-2A visa for dairy workers should last at least three years rather than one. Two trade association commenters stated they understood the importance under the statutory definition of H-2A workers needing to be temporary or seasonal, but not why the jobs themselves needed to be temporary or seasonal. A farm bureau provided comments suggesting dairy and livestock operations should be allowed to designate seasonal jobs within their operations with respect to which H-2A workers could be employed. This association commented that current worker patterns suggest typical milkers stay in their positions for 9 to 10 months and then voluntarily leave, but return to seek a job after 2 to 3 months.

The Department also received comments from an association of growers/producers and from two individual employers requesting that reforestation work be considered as agricultural labor. These commenters assert that there are reforestation activities including planting, weed control, herbicide application and other unskilled tasks related to preparing the site and cultivating the soil and that workers who perform these

tasks deserve consideration for eligibility for H-2A visas, as do workers who perform the same or similar tasks in cultivating other agricultural and horticultural commodities on many of the same farms. These commenters also pointed out that workers performing reforestation tasks for farmers or on farms are clearly agricultural employees under the FLSA and, additionally, believed the Internal Revenue Code supports their position for considering reforestation work performed on a farm or for a farmer as agricultural labor or services.

Following review of the comments discussed above, the Department has decided the definition of agriculture should not be further expanded at this time and no additional activities have been selected for inclusion as agricultural activities beyond those included in the NPRM. In most cases where there was the suggestion for the inclusion of a particular industry or activity there was not strong support for the addition from representatives of that industry, as indicated by the number and source of the comments received. For example, one commenter supported adding maple syrup harvesting and ancillary activities to the definition of agricultural labor. The suggestion did not come from someone actually involved in the maple syrup industry, however, but rather from a State Workforce Agency. While the Department appreciates the input of such commenters, it would be inappropriate to impose on those industries (most of which currently qualify for the H-2B program rather than the H-2A program) changes that the industry itself did not seek.

The two exceptions to this pattern in the comments were the dairy industry and the reforestation industry, both of which, as discussed above, submitted comments evidencing industry-based support. The Department's analysis of the comments from the

dairy industry, however, indicates it is not the definition of agriculture, which already includes dairy activities, that presents a potential barrier to the industry's use of the H-2A program, but rather the requirement for the work to be temporary or seasonal in nature. In fact, the industry itself acknowledged this in several of the comments it submitted.

The H-2A program, by statute, provides a means for agricultural employers to employ foreign workers on a temporary basis. The majority of dairy occupations, as the industry itself recognizes, are almost exclusively year-round and, moreover, permanent in nature. Additionally, employers and associations confirmed consistently that not only the nature of the job duties but also the need for workers, was permanent and year-round.

While the H-2A program is specially designed for agricultural employers, that does not limit agricultural employers to using only the H-2A program. The employment-based permanent visa program is also open to agricultural employers, as is the H-2B program in some circumstances and for some types of positions. At the same time, dairy and other year-round operations are permitted to seek certification for H-2A workers for seasonal or temporary jobs within their industries when they can substantiate the temporary nature of the jobs. The Department recognizes that an employer may have both permanent and temporary jobs in the same occupation. However, employers should be aware that the Department does not approve multiple applications requesting foreign workers for the same position when, taken together, those applications would cover a continuous period of time in excess of 10 months.

The comments from the reforestation industry, while thoughtful, represented the input of only two individual employers and a single employer association who do not necessarily provide a representative sample of the entire reforestation industry. The

Department is reluctant to overturn the regulatory practices of several decades and impose the significant obligations of an H-2A employer on an entire industry without significant input from that industry. While the Department will explore further whether to include the reforestation industry in the definition of agriculture, it does not believe a final action to do so is warranted at this time.

"On a seasonal or other temporary basis"

The Department proposed a definition of the key terms "on a seasonal or other temporary basis" in the definition of agricultural labor or services in the NPRM that continued the interpretation of the current regulation. We received additional comments related to the phrase "on a seasonal or other temporary basis." A trade association suggested the rule borrow the temporary and seasonal concepts from the Migrant and Seasonal Agricultural Workers Protection Act (MSPA) definitions that are appropriate in an H-2A context without incorporating the MSPA regulations and related judicial precedent. It was the association's belief that this approach would allow an H-2A worker to be admitted for longer than a 10-month period. An association of growers/producers suggested the definition of temporary or seasonal should apply to the worker rather than the job and also that year-round farming operations/nurseries should be allowed to access a workforce to provide year-round services by rotating "shifts" of workers with different contract/visa periods. Another trade association also suggested the definition and interpretation of temporary and seasonal could be expanded.

The Department does not agree that the definition of temporary or seasonal should focus on the worker rather than the job. The INA is quite clear in that the employer must have a need for foreign labor to undertake work of a temporary or seasonal nature for

which it cannot locate U.S. workers. The Department's position has traditionally been that job opportunities that are permanent in nature do not qualify for the H-2A program. The controlling factor is the employer's temporary need and not the nature of the job duties. Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982); Global Horizons, Inc. v. DOL, 2007-TLC-1 (November 30, 2006)(upheld the Department's position that a failure to prove a specific temporary need precludes acceptance of temporary H-2A application); see also 11 U.S. Op. Off. Legal Counsel 39 (1987).

3. Section 101--Applications for Temporary Employment Certification in Agriculture

a. Instituting an Attestation-Based Process

The Department proposed instituting an application requiring employers to attest to their adherence to the obligations of the H-2A program. The Department received several comments in favor of the new process, several opposed, and others generally in favor but suggesting changes to the process as outlined in the Department's proposal.

Some commenters believed that attestations to future events should not be required, and that attestations should be made under the "applicant's best knowledge and belief" standard and not "under penalty of perjury" standard because applicants cannot know what will happen in the future.

The Department believes those attestations it will require concerning future events are actually promises to comply with program requirements. Such compliance is fully in the control of the employer and is limited in nature (i.e., are properly worded to reference future behavior). It is, therefore, not necessary to delete or modify the manner in which the truth of the attestations is acknowledged.

1.) Support for an Attestation-Based Process

Those commenters who favored the shift to an attestation-based process generally believed the new process would make the H-2A application more efficient and less burdensome for employers. One State government agency commented that the process would enable the SWAs to focus on job orders, referrals, and housing inspections while relieving them of the burden to review the applications themselves. Another commenter supported the shift but encouraged the Department to ensure the "Administrator . . . acquires the agricultural expertise necessary to provide training and guidance to those who are reviewing and overseeing the operating of a program that is critical to future U.S. agricultural production."

The Department appreciates support for its proposed process. As of June 1, 2008, the Department has centralized the Federal processing of all applications for H-2A temporary foreign workers in the Chicago National Processing Center. This centralization will enhance the Department's ability to handle the expected increases in the usage of the H-2A Program without a significant increase in Federal resources. The Department recognizes the unique needs and timeframes associated with this program and anticipates that centralization will lead to the development of greater expertise to meet those needs and timeframes. It also believes that centralized processing of applications will facilitate the identification of areas where program training should be enhanced and that the centralized environment will maximize the effectiveness of such training.

An association of growers/producers supported the attestation-based process but found the process, as described in the proposed regulation, confusing and duplicative. This commenter requested that all of the attestation requirements be consolidated into one rule clearly stating which facts are to be verified.

The Department appreciates the commenter's suggestion about consolidation of the attestation requirements and, as provided in the proposal, has retained the comprehensive listings of the requirements in § 655.105, "Assurances and obligations of H-2A employers" and § 655.106, "Assurances and obligations of H-2A Labor Contractors." It was not clear if this commenter was requesting a consolidated listing of the attestations required by both the Departments of Labor and Homeland Security. The Department of Labor is limited, of course, to including only those attestations it requires and has no authority to include the requirements of another agency. The commenter did not include specific examples of duplication or confusing information and the Department, therefore, is unable to provide a further response.

2.) Legality of the Attestation Process

Several of the commenters who opposed the change asserted an attestation-based process conflicts with the statutory mandate provided in Section 218 of the INA (8 U.S.C 1188). These commenters interpreted the INA to require the Department to make a determination based upon an active verification of the H-2A application. One group commented that the attestation process abrogates the statute's Congressional mandate. Two organizations expressed the belief that the certification process has always been understood to require active oversight by the Department of the employer's recruitment

and hiring of U.S. workers as well as the details of the job offer. One commenter, an advocacy organization, voiced the opinion that the statutory standard is not whether the employer has made adequate assurances that it has or will meet the obligations of the H-2A program, but is whether the employer has actually met them. Another commenter opined that labor certifications were not meant to be attestation-based and that this approach will dramatically reduce government oversight of this program. These commenters believe that this regulation is contrary to the statute because the Secretary will not be able to certify that wages and working conditions have not been adversely affected.

The attestation-based system implemented by the final rule is not inconsistent with any statutory requirements, but rather is a reasonable means selected by the Department to fulfill its statutory responsibilities. The Department does not interpret 8 U.S.C. 1811 as specifying a particular methodology that the Department must employ to satisfy itself that all of the statutory criteria have been met, and indeed, various aspects of the Department's methodology have changed through the years. The attestation-based system, backed by audits, that is implemented by the final rule is an acceptable means, within the reasonable discretion of the Secretary, for the Department to ensure that all statutory criteria are met and all program requirements are satisfied. Similar approaches have been used by the Department in other contexts (such as approval of permanent labor certifications) with success to fulfill its statutory responsibilities. No system for review and approval of applications, of course, is foolproof, and the statute itself acknowledges, in 8 U.S.C. 1188(b)(2)(A), that approved labor certifications, may in some circumstances be violated after the time of certification, and prescribes appropriate penalties. The

Department believes that the attestation-based system fully complies with all statutory requirements and when taken in concert with a strong audit and review process, represents the best means for the Department to deploy its limited resources in a manner that ensures that statutory timelines are met while ensuring program integrity.

3.) Protections for U.S. Workers in an Attestation-Based Process

Several commenters believed the proposed attestation-based process would not provide adequate protections for U.S. and H-2A workers because it would reduce the oversight responsibilities of the Department. Some of these commenters also said the current system should be maintained to ensure that the Department oversees worker protection, especially in the area of housing and wages. An organization commented that while this change may ease the application process for employers it ignores the damage that could be caused by false attestations and a lack of active oversight of the job terms, recruitment, and hiring of U.S. workers. A farmworker advocacy organization questioned the change to an attestation-based process when there is a long history of labor abuse in agriculture and commented that when “self-inspection procedures” are implemented they are generally based upon a prior record of compliance and an accompanying determination that resources would be better utilized in another pursuit. Another farmworker advocacy organization commented that the attestation-based process, as proposed, would further remove and diminish the Department's role in assuring all reasonable efforts to locate U.S. workers had been exhausted before foreign guest workers could be certified. Another commenter voiced concern that the proposed process would eliminate the current process of follow-up correspondence that has been

instrumental in ensuring that employers have actually undertaken the required recruitment steps. A worker advocacy organization commented the proposed process, with its emphasis on meeting paper requirements, would be "ill suited to deal with the inherent disparities in bargaining power between U.S. agricultural employers and impoverished workers from the developing world."

The Department believes these commenters' concerns, while not invalid, are resolved to a certain extent by the safeguards attached to the new process. Program experience has demonstrated a history of substantial compliance by most employers with the requirements of the program. The new program model emphasizes compliance through enforcement mechanisms such as audit, revocation and debarment from the program. In light of these enforcement tools, employers will have a substantial incentive to be truthful in their representations that they cannot find U.S. workers willing to engage in agricultural work at a sustainable wage, because good-faith compliance with program obligations is necessary to maintain continued access to a legal workforce.

The Department also notes the significant conflict between the statements of many commenters who opposed the attestation-based system in this rulemaking and claim it would adversely affect U.S. workers and those same commenters' statements in other contexts supporting proposed legislation before the U.S. Congress that would in fact mandate that the Department adopt an attestation-based application system.

4.) Improvements for Employers in an Attestation-Based Process

Several commenters questioned whether the proposed process would yield a simplified process for employer applicants. These commenters believed the new process

requires the same amount of paperwork and only relieves employers of submitting documentation while at the same time imposes additional requirements including post-filing audits, increased penalties, and a five-year records retention time period. Several commenters were concerned that the attestation-based process would lead to increased liabilities for employers.

The Department does not believe that employers, attorneys, and agents wishing to comply with program obligations will be adversely affected by their participation in an attestation-based system. The system is designed to give employers specific notice of the assurances they are making to the Department and what their obligations are. Once the employer is on notice of such assurances, it is better able to understand what it must do to comply with H-2A requirements and to conform its conduct to those requirements. Also, the Department is better equipped to pursue violators as congressionally mandated in 8 U.S.C. 1188(b)(2)(A).

A trade association of agricultural employers agreed with the shift to an attestation-based process but believed the process as outlined in the proposed regulations was not a true attestation-based process and recommended the process used in the H-1B program serve as a model. Other commenters also recommended use of a process similar to the one used in the H-1B program. Several commenters also suggested that the Department combine the Application for Temporary Employment Certification with the I-129 petition for simultaneous submission to the Departments of Labor and Homeland Security.

The Department believes that the complexity of the statutory requirements for the H-2A program would make it unworkable to combine the Department's application with

the petition submitted to DHS. A proposal presented by the Department several years ago to employ such a process in the H-2B program for temporary nonagricultural workers was met with significant opposition. To attempt to undertake a similar process with the significantly more complex H-2A program does not appear feasible. As for proposals to translate the attestation process into a process modeled after the H-1B labor condition application, the statutory differences between the two programs are sufficiently substantial to make such an idea impossible. The Department is statutorily limited to reviewing the attestations made by an employer in the H-1B program for "obvious errors and inaccuracies." 8 U.S.C. 1182(n). The Department believes the absence of such a limitation in the H-2A statutory language signals Congress's intent that the Department apply less limited review in the context of the H-2A program.

Some commenters appeared not to understand the proposed attestation process. The Department received comments stating that it is not clear what should be included with the attestation. The only document that must be submitted with the Application for Temporary Labor Certification is the initial recruitment report. The employer will be required to keep all other supporting documentation in case of an audit, which means the employer should keep all records relating to compliance with the H-2A program, including advertising, job orders, recruitment logs/reports, and housing inspection requests. To eliminate any lingering confusion over document retention requirements, the Department has spelled these out in a new regulatory section (§ 655.119) in this Final Rule.

b. SWA Involvement/ Application Submission

The NPRM revised the submission requirements for applications by proposing to have employers submit applications only to the NPC rather than to both the NPC and SWA as currently required. Most of the comments received about this proposal were in favor of it, but a few commenters expressed concerns about the reduced role for SWAs. A private citizen commented that eliminating the SWA involvement would leave employers who seek assistance and guidance from the government in completing applications more disposed to making errors and would increase their potential liability. A farmworker advocacy organization commented that SWA knowledge has proved useful to workers in the past and that the advantage of SWA involvement is the detailed knowledge their experienced staff can bring to bear about local agricultural practices and the use of agricultural labor in their locales. The commenter also believed that the proposed process, which requires the employer to place a job order with the SWA, means that the SWA must take on faith that the employer's job offer is consistent with the terms of the H-2A application because the SWA will no longer receive a copy of the application. This organization recommended that applications should be filed with the SWA as well as the NPC so the SWA could advise the NPC if the application did not appear legitimate. A growers and producers association believed retaining responsibility for the substantive review by the NPC staff could remain a problem because of their lack of expertise related to agriculture.

A State governor suggested the process could be improved by eliminating the Department from the process. The governor believes the States know their agricultural industry better, can resolve issues quicker, and are in the best position to identify and enforce sanctions against fraud. Conversely, a professional association of immigration

attorneys recommended the SWA be eliminated from the recruitment process and, alternatively, the employer handle all recruitment for the positions, including accepting applications received as a result of a job order placed by the SWA in the interstate and intrastate system.

The Department remains committed to modernizing the application process and continues to believe the submission of applications directly to the NPC is the most effective way of accomplishing this goal. 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 experience in agriculture; to the contrary, NPC reviewers who have handled H-2A applications have, in some cases, more experience in such applications than many SWA staff.

The SWAs will, however, continue to play an important role in the H-2A application process. SWAs will be responsible for clearing and posting job orders, both intrastate and interstate, under § 655.102(e) and (f) and 20 CFR Part 653, thus reducing the risk for employers to make mistakes with respect to job descriptions, minimum requirements, and other application particulars. SWAs will also refer workers to employers as well as conduct housing inspections and follow up on deficiencies in the job order. Finally, SWAs will play an active role in the conducting of prevailing wage and prevailing practice surveys.

Two commenters noted potential coordination or communication issues could result when the SWA did not also receive the application. One commenter was concerned there would be no assurance that the job order posted by the SWA would be

the same as that on the application. The other commenter pointed out the proposed regulations provided that the SWA receive a copy of the notice of deficiency when one was issued, but the SWA would not have a copy of the submitted application and thus could have inadequate information to be of assistance to the involved employer. An association of growers/producers recommended the Department provide training to H-2A employers about the need to send a formal request to the SWA to request a housing inspection and also recommended the Department notify the SWA when an application was received for processing so the SWA could, in turn, contact the farmer.

The Department appreciates the concerns about the need for communication between the NPC and the SWA. There was never any intent to eliminate the SWA from all H-2A activity. Indeed, SWAs remain an integral partner in key respects: the placing of the intrastate/interstate job orders, conducting prevailing wage and practice surveys, referring eligible workers, and conducting housing inspections for which SWAs will continue to receive grants. However, SWAs will no longer process H-2A applications. The Department has accordingly removed from 655.107(a)(3) (new 655.107(b))the provision of the rule requiring SWAs to receive deficiency notices to minimize confusion about roles and responsibilities.

c. Electronic Filing

The Department invited comments on the concept of an electronic filing process for the H-2A program and received comments supporting the concept, although some included suggestions for on-line training, the establishment of a toll-free help line, and an outreach and education component. A trade association recommended a paper-based

option should also remain available. One commenter noted that the Department did not provide an effective date for the electronic filing process.

The Department appreciates the support for electronic filing and is in the process of developing a system that will include the ability to complete and submit an application form online, with sufficient security (PIN numbers, features to deter fraud and maintain system integrity, electronic notifications, etc.). The Department is aware of the need to provide outreach and training prior to the implementation of electronic filing and will involve user groups in these efforts. Additionally, the Department will ensure an adequate notice process and timeframe for transitioning to a new or revised filing system.

d. Master Applications

Both the current and proposed regulations require an association of agricultural producers filing an application to identify whether the association is the sole employer, a joint employer with its employer-members, or the agent of its employer-members. Although the current regulations do not specifically describe a “master application” that can be filed by associations, guidance provided in ETA Handbook No. 398 states, “Employers' agents and joint employer associations may submit 'master' applications covering virtually identical job opportunities available with a number of employers. Identical job components would normally include such items as description of work to be performed, hours of work, pay, and benefits. Job components which normally differ would include such items as employer's name, address and phone number, number of workers needed, and description of housing. Each job component which differs for each employer must be clearly identified as such in the 'master' application package. Although

'master' applications may be submitted and accepted by the R[egional] A[dministrator] under these circumstances, certifications must still be issued to individual employers, and such employers must be billed individually." Additionally, the preamble for the interim final rule published in June, 1987, included the following guidance: "Employers' agents and joint employer associations may submit 'master' applications for temporary alien agricultural labor certification covering virtually identical job opportunities with the certification fee charged for a certification, not an application, however." 52 FR 20498 (Jun. 1, 1987).

Even though a "master" application is not specifically provided for in the current regulations, the Department received several comments objecting to the omission of a provision in the NPRM for the filing of master applications (presumably assuming an intent on the part of the Department to eliminate the practice). An association of growers/producers commented that the Department should encourage agricultural employers in small commodity groups or large associations of employers to jointly participate in the H-2A program, as this will make processing more efficient for both the Department and farmers. Another association of growers/producers stated that using an association application is the only possible solution for the H-2A program to accommodate growers who need harvest workers for a short period of time (one month or less). A major trade association also commented that the master application significantly reduces the paperwork and bureaucratic burden for the associations and its members, as well as for the Department. A professional association of employers and workers was in favor of the elimination of master applications to help eliminate bad actors but believed elimination solely because of bad actors would harm small growers.

A major trade association and other associations of growers/producers recommended that the Department retain and improve the master application process and fully incorporate it into the H-2A regulatory structure. The association recommended the master application also be streamlined as part of the overall H-2A streamlining process. It recommended the streamlining include the essential components of the original master application process, including one application on behalf of multiple employers seeking workers in virtually the same occupation, permitting the association to place the required advertisements and conduct the required positive recruitment on behalf of all participants but without the listing of every individual employer in the advertisement as currently required, permitting referral of workers to the association, and allowing the association to place workers in the job opportunities. The association further recommended the master application process also apply to applications filed by associations acting as agents.

The Department acknowledges that master applications have been a longstanding practice under the current regulations and the accompanying guidance, the current ETA Handbook 398. Those regulations and the related guidance will become obsolete with the publication of these final regulations. The Department has decided to continue master applications as a filing practice and has included provisions for the filing of master applications in regulatory text.

e. Timeliness of Filing Application

As required by statute, the provision stating a completed application is not required to be filed more than 45 calendar days before the date of need is retained in the proposed rule. The Department continued that requirement in 655.101(c). The

Department received some suggestions for changes to the proposed timeframes for submitting applications. Two commenters suggested the Department should at least provide the employer with the option of applying not more than 45 days before the date of need, undertaking the recruitment after the application has been accepted, and continuing to accept referrals under the 50 percent rule.

The Department may not require an application to be filed more than 45 calendar days before the date of need under 8 U.S.C. 1188(c). The Department does not agree with the suggestion for offering employers the option of applying not more than 45 days prior to the date of need, doing post-acceptance recruitment, and continuing to accept referrals under the 50 percent rule. Given the need to maintain consistency in the program's requirements, the Department cannot offer varying options for recruitment timeframes.

f. Emergency Situations

The NPRM did not contain the current regulatory provision allowing the OFLC Administrator to waive the required timeframe for application submission for employers who did not use the H-2A program during the prior agricultural season or for any employer for good and substantial cause. The Department received a number of comments objecting to the elimination. A major trade association stated the elimination would preclude many employers from the opportunity to legalize their workforce simply because their decision to join the program was made too late to meet the required timeframes. Another major trade association commented that a provision allowing filing after the deadline is even more essential because the de facto deadline for meeting

requirements under the final regulation is further in advance of the date of need than the current requirement. One association of growers/producers cited the situation following Hurricane Katrina when many employers needed to secure additional H-2A workers as an example of the need for an emergency application process.

Most of those requesting that the provision for an emergency application be reinstated also commented that if an emergency application is filed in an area of intended employment and for a job opportunity for which other employers have previously been certified for the same time frame, the emergency application should be certified immediately. These commenters also suggested that post-application recruitment could be extended for emergency applications to ensure that their availability would not create an incentive to avoid the pre-filing recruitment efforts.

The Department agrees that a provision allowing the Certifying Officer to waive the required timeframe for submission of applications in emergency situations is necessary and has included such a provision in § 655.101(d). The provision requires submission of a completed application, except for the standard recruitment report, and a statement of the reason for the waiver request. The application must include all of the assurances and obligations. The request for a waiver may be based on lack of experience with the H-2A program obligations, housing and transportation requirements, etc. or for other good and substantial cause. The Department anticipates that employers who are new to the program may fail to meet the filing deadline due to miscalculation of the time needed to complete the application. The Department will entertain waiver requests from employers in this situation but will consider them only after first verifying that the employer did not use the program during the prior year.

The Department is not providing an explicit definition of good and substantial cause in order to give employers flexibility when faced with unanticipated situations or conditions. We have provided some examples in the regulatory text to assist employers in determining what might constitute sufficient cause to entertain a waiver. One example provided is a dramatic change in the weather conditions resulting in a substantial change to the anticipated date of need for H-2A workers with significant attendant crop loss unless the waiver is granted. However, the employer must be able to demonstrate that the situation or condition leading to the request for a waiver was genuinely outside of the control of the employer. In requesting a waiver based on good and substantial cause, the employer should be able to show that it would have met the required timeframes but for the unanticipated cause.

The Department is requiring, in the Final Rule, that the employer who requests a waiver must conduct some recruitment as a condition for obtaining that waiver. The employer will be required to submit and clear a job order with the relevant SWA(s) and conduct positive recruitment from the time of filing the application until the date that is 30 days after the employer's date of need. Moreover, that 30 days may be extended at the CO's discretion.

The Department recognizes that the suggestions for approving waivers of the required timeframes, if applications for similar occupations and dates of need in the same geographic locations have been previously certified, are intended to expedite the process. However, each application is unique and the Department must consider each request on its own merits and does not believe it makes sense to commit to approving requests

merely because there have been prior approvals for employers with similar job opportunities and dates of need in the same area.

Finally, the Department has made other text changes in § 101 to conform to other changes made to the rule. Such changes include, but are not limited to, changes to clarify a potential electronic filing of future applications. In addition, the Department has made non-substantive changes to provide readability.

4. Section 655.102 --Required Pre-filing Activity

The Department has changed the title of this section from "Required Pre-filing Recruitment" to "Required Pre-filing Activity" to describe more accurately the activity that is beyond recruitment that is encompassed in this section.

a. Section 655.102(a)--Time of Filing of Application

The NPRM proposed requiring that applications be filed at least 45 days before the employer's date of need (as established by statute) with a pre-filing recruitment period commencing at least 120 days prior to the date of need and not less than 60 days prior to the date of need. The Department received a number of comments on the change to a pre-filing recruitment framework and the timing of that recruitment.

The Department received multiple comments opposing this proposed timeframe; several commenters were generally opposed to the expanded timeframe and others raised more specific concerns. The Department received comments arguing that the proposed pre-filing recruitment requirement in effect moves the deadline for filing an application. Several commenters questioned the Department's legal authority for a shift to pre-filing

recruitment. Several commenters argued that a requirement that employers begin recruitment earlier than they are required to file applications would be inconsistent with the Congressionally-set time frames and thus beyond the Department's statutory authority.

The Department disagrees strongly that its revised recruitment steps are a violation of the statute. The INA is quite clear that the Department may not require an application for labor certification be filed more than 45 days prior to the date of need. 8 U.S.C. 1188(c)(1). It is silent on how the Department implements the certification process: it contains no requirements about when the recruitment of U.S. workers must take place, whether prior to or subsequent to filing. The statute clearly contemplates recruitment as a separate activity from the filing and consideration of applications, and its silence on the timing of recruitment enables the Department to require employers to recruit at an earlier point in time much as it requires that recruitment be conducted prior to the filing of an application in other immigration programs.

Several commenters opined that it was not feasible for employers to make accurate assessments of timeframes and the number of workers needed so far in advance and many questioned how effective an early recruitment period would be in helping employers to locate U.S. workers who would still be available at the time the work actually began. Additionally, many commenters believed the earlier recruitment would not benefit U.S. agricultural workers seeking employment because it is inconsistent with the traditional job seeking patterns of these workers.

Some commenters expressed concern that extending the recruitment time could either not increase the pool of domestic worker applicants at all, or would increase the

number of domestic workers who applied for a position but would not translate into more actual workers taking the jobs, as many would not report to work. A trade association also commented that the employer is put at risk because, by the time the jobs begin, domestic applicants may have long since changed their minds or accepted other employment. A State government agency also commented that most agricultural workers cannot make a commitment to a job that far in advance of the start date. An employer association recommended the final regulation should specifically permit employers to ask workers identified during the recruitment process to attest or affirm their intentions to actually take the jobs. One individual employer believed the proposed pre-filing recruitment would actually have an effect opposite to the one the Department anticipates because U.S. workers would be deterred from making a commitment so far in advance.

An association of growers/producers shared its data from the 2006-2007 season which shows only 9% of U.S. applicants applied during the first 15 days of the current recruitment period and, therefore, questioned whether a longer timeframe would yield additional applicants. The association also reported 83% of the applicants who applied during the initial 15-day period failed to report, as compared to 60% failing to report when they applied 30 days in advance.

Some commenters stated that the current recruitment timeframes are adequate for identifying and hiring U.S. workers, or advocated alternate time frames. Commenters presented a number of options for the recruitment timeframe, including the current time frame, and ranging between 90 to 75 days prior to the date of need and 60 to 45 days prior to the date of need. In the words of one trade association, which was representative of the comments received on this point: "For the sector for which H-2A is predominantly

applicable—fruits and vegetables—the ability to predict months in advance when labor will be required is simply impossible."

The Department takes seriously its obligation to ensure an adequate workforce is available to U.S. agricultural producers pursuant to H-2A statutory requirements. The Department believes it is fulfilling its statutory responsibility by requiring employers to recruit in advance of filing, which permits them to recruit at a more flexible pace and process than the current regulations permit. The current pattern of forced positive recruitment within a substantially narrow window of only 15 frantic days, however, is inadequate to address these workforce needs (in fact, one commenter expressed concern that the timeline proposed in the NPRM meant that as little as 15 days of positive recruitment efforts could be undertaken by employers prior to completing their recruitment reports)—which is the current procedure. The Department recognizes, however, that the comments that the 120 day length of recruitment is too far in advance of the date of need raise valid concerns. The Final Rule accordingly shortens the pre-filing recruitment period. Employers will be required to initiate recruitment no earlier than 75 days prior and no later than 60 days prior to the anticipated date of need. Reducing the prefiling recruitment in this manner from the time period that was proposed, while simultaneously adjusting the Department's proposal by extending the referral period beyond the date of need (discussed further below), will enable employers to recruit effectively for U.S. workers without unduly burdening themselves or adversely affecting planting and harvesting schedules. This revised schedule, which is closer in time to the actual date of need and when read in conjunction with the extension of the SWA referral period to 30 days beyond the date of need, also addresses the commenters'

concerns about the job search patterns of likely U.S. workers. The Department declines, at this time, to implement any requirement that U.S. workers affirm in writing their intent to show up for work when needed, as that is a contractual matter between the worker and the employer. The Department notes that it has afforded employers some flexibility in the final rule for emergencies where U.S. workers have failed to appear as promised.

b. Section 655.102(b)--General Attestation Obligation

1) . General Comments Regarding the Attestations

A group of farmworker advocacy organizations commented on the language in the proposed regulation that states "the employer shall attest that it will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply." The organization stated it is the employer's duty to hire all qualified U.S. workers who apply and believed the proposed language did not make this clear.

A trade association (an association of growers) requested the language describing the time period for acceptance of referrals be modified by adding the word "first" before "begin to depart" because not all foreign workers depart on the same date. A professional association requested the regulation be changed to permit employers to stop local recruitment efforts no earlier than five days prior to the date of need rather than three days as proposed. This change was requested to accommodate the actual transit time required. As discussed in more detail below, the points made by these commenters have been rendered moot by changes made to this provision.

2). The "50 Percent Rule" and the Cessation of Recruitment

The Department sought comments on program users' experience with the "50 percent rule," which requires employers of H-2A workers to hire any qualified U.S. worker who applies to the employer during the first 50 percent of the period of the H-2A work contract. We received numerous comments and several commenters offered alternative approaches.

Several commenters questioned the Department's authority to make changes to the 50 percent rule, citing the 1986 IRCA amendments which added the 50 percent rule to the INA as a temporary 3-year statutory requirement, pending the findings of a study that the Department was required to conduct regarding its continuation. In 1990, pursuant to what is now INA § 218(c)(3)(B)(iii), ETA published an interim final rule to continue the 50 percent requirement. 55 FR 29356, July19, 1990. That rule was never finalized.

As the Department stated in the NPRM, since the 1990 publication of the interim final rule continuing the 50 percent rule, it has gained substantial experience and additional perspective calling into question whether the Department's 1990 decision was in fact supported by the data contained in the 1990 study; and whether the rule is in fact a necessary, efficient and effective means of protecting U.S. workers from potential adverse impact resulting from the employment of foreign workers.

The Department received numerous comments in support of retaining the 50 percent rule as it is currently administered. Commenters asserted that the rule is an important method for granting U.S. workers job preference over imported temporary workers and creates an incentive for pre-season recruitment of U.S. workers. Some commenters stated that many U.S. workers gain jobs under the 50% rule and its

elimination will deprive many U.S. workers of jobs unfairly although these commenters provided no data to support their assertion.

Several commenters observed that few employers have had to lay off H-2A workers under the 50 percent rule while many American workers have gained jobs, and stated that elimination of the rule would unfairly deprive them of those jobs. They warned that by eliminating this rule, the Department may keep U.S. farmworkers from applying for jobs they would otherwise be able to take. Other commenters added that for those U.S. workers who do manage to learn of an H-2A job, the proposal would eliminate the protections that safeguard against employers rejecting qualified U.S. workers.

One commenter argued that the 50 percent rule provides an incentive that should be maintained to create an attractive working environment, and that it is critical to the integrity of the H-2A program. The commenter asserted that it prevents growers from engaging in practices that are tolerated by H-2A workers only because of their greater economic vulnerability and in turn ensures that labor standards are not driven down by U.S. workers being able to compete with H-2A workers who have no choice but to endure such conditions.

Other commenters made the case that the 50 percent rule reduces the risk to workers caused by crop loss. Growers frequently refer to the uncertainty of agriculture. It is common for weather conditions to ruin a crop. Growers obtain insurance, seek government financial assistance, or hedge their investment in the market. Crop failure affects not only growers, but also the workers who lose their crop-related jobs. One of the commenters believed that if the 50 percent rule is eliminated, the displaced workers will have fewer alternative options and will bear the risk of crop loss without recourse.

While one commenter admitted that they could not provide data regarding the cost and benefits of the 50 percent rule, they were certain that employers will hire fewer domestic workers without it, producing an adverse effect to an already vulnerable population. A number of commenters noted that the elimination of the 50 percent rule would make it more difficult for traditional farm workers who move with crops along the traditional migrant streams to secure jobs. The commenter believed that U.S. workers will be "absolutely foreclosed" from much if not most H-2A related employment if they cannot be hired just before, at, and past the date of need. An obligation to continue to hire U.S. workers after the departure of any foreign workers to the U.S. for employment was viewed by the commenter as critical to maintaining and developing a U.S. agricultural workforce.

Finally, another commenter observed that the 50 percent rule has served as an important tool for ensuring that the H-2A program does not adversely affect U.S. workers, and that at a time of increasing unemployment, the Department should not choose this particular moment to abandon these long-standing labor protections for U.S. workers.

Many other commenters argued the 50 percent rule should be abolished. These commenters argued that H-2A users have long considered the 50 percent rule as unfair and unreasonable. They observed that no other temporary or permanent worker program has an even remotely corresponding requirement. Commenters also observed that the 50 percent rule was purportedly designed to enable domestic workers to accept agricultural employment opportunities, but that its costs outweigh its benefits. Commenters shared experiences that indicated to them that many of the domestic workers who apply under

the 50 percent rule do so to maintain government benefits under the Unemployment Insurance program (the UI program requires unemployed workers to show that they have actively sought employment each week in order to continue benefits). They also found that while the rule does not actually provide substantial additional employment to domestic workers, it creates needless insecurity and uncertainty for H-2A workers who are employed under H-2A contract.

A commenter from a state agency asserted that the elimination of the rule would relieve the SWA from having to track these H-2A job orders and would remove unnecessary burdens on employers. The commenter believed that there is no tangible evidence that the rule produces the desired results of increasing employment of domestic workers:

> My experience is that it is rare for [state] workers to search our Internet postings for agricultural positions in the middle of a growing season. Employers find this requirement confusing and worrisome. Smaller employers have expressed concern that they could lose their fully trained and settled foreign worker(s), suddenly disrupting their operation. Unfortunately, their experience is that U.S. workers who drop in during a season have a tendency to not stay till the end of the contract period. If this practice had historically produced significant results, the government-mandated grower investment of time and money might be justifiable, but it has not.

One commenter stated that there is no need to implement the 50 percent rule where recruiting indicates that there are no or few local workers. The commenter also found no need for the rule in situations where the employers typically hire a large number

of local workers. The commenter went on to argue that if the Department wants to retain the rule, it should do so only as a condition of approval of an application where there is evidence indicating that there are a relatively large number of local workers, but that the employer has indicated that it intends to hire few if any local workers.

A number of commenters observed that all available data supports the view that relatively few U.S. workers desire employment in agriculture. They argued that it necessarily follows from this fact that the 50 percent rule provides virtually no benefit whatsoever to U.S. workers, yet its presence is a disincentive to program participation. These commenters concluded that the rule should be abandoned. One commenter believed that if the Department wished to retain the rule, it should reserve the right to do so on a case by case basis, as a condition of approval for an application where the CO and SWA believed that insufficient local recruiting has been accomplished. The Department considered this option, but found it to be impossible to operationalize.

A number of agricultural employers commented that the rule requiring H-2A employers to hire any qualified domestic worker during the first 50 percent of the H-2A work contract makes it very difficult for a producer to manage labor supply and costs over the life of the contract. Commenters from state agencies found that the features of the rule are seldom completely understood by the growers who need the H-2A program and the process is viewed as complicated and rife with red tape. Another State commenter found the rule to be antiquated and ineffective. This commenter found that "farmworkers and employers alike agree this rule is often not followed and is not enforced appropriately to afford any domestic workers protections."

Another commenter observed that the rule has been disruptive and non-productive for both workers and employers and that its elimination will provide much-needed stability in the workforce obtained by the employer. A commenter found that a cost-benefit analysis of the situation indicates that continuing to recruit U.S. workers beyond the date of need results in no corresponding benefit. One farmer observed,

> It's just not right that after I have made the best attempt to hire domestic workers that one halfway though the season I be forced to replace a trained H-2A worker. I really would prefer to hire local workers and keep that wage money at home, if I could find them.

Commenters from various farm bureaus around the country argued that under current conditions, the 50 percent rule is without foundation. It has been shown that few, if any, available or referred employees even apply for or maintain their work status once the work period begins. They believed that agricultural employers must be able to operate with greater certainty, especially those with perishable crops. Once an operation begins, the success of the work effort is the product of coordinated teamwork. Employers are willing to make strong recruitment efforts before the date of need, but they seek certainty and continuity once the work period has begun.

A commenter from a farming association found that the actual benefits of the 50 percent rule for domestic workers are, to all practical intent, illusory. The commenter strongly supported eliminating the rule entirely, arguing that such an approach would result in a substantial improvement in program operations. The commenter argued that while the Department has a statutory obligation to protect the rights of U.S. workers when implementing the program, it is necessary to strike a balance between the priority

given to U.S. workers and the rights of employers, who have met all of the legal obligations that attach to employing H-2A workers. It went on to argue:

> The current 50 percent rule, while seemingly a provision to protect U.S. workers, is more disruptive to farm operations and a disincentive to program participation than it is a true protection for workers. There is no reason to mandate that a grower's obligations to find and recruit eligible U.S. workers should extend past the recruitment period; imposing such an obligation serves only to disrupt operations of the producer and does little to protect U.S. workers… The fact is, and all available data support this view, relatively few U.S. workers desire employment in agriculture…The work is arduous, episodic, taxing, requires relatively little skill and virtually no education. Within the U.S. economy the pay — while increasing — is relatively low. These jobs provide tremendous economic opportunity for migrant workers but are not perceived as offering the same benefit to U.S. workers. In fact, approximately 10 million individuals in the U.S. economy today choose to work in jobs which pay them less than they could earn in agriculture. The 50 percent rule provides virtually no benefit to U.S. workers yet its presence has clearly been a disincentive to program participation. It should be abandoned.

Other commenters offered alternatives to the 50 percent rule including a 25 percent rule, recognizing that referrals after the date of need may serve a useful purpose but extending through 50 percent of the contract completion might be too long. One farming association suggested that the obligation to accept domestic referrals should terminate not later than three days before the date of need.

A number of state agencies suggested that SWAs should leave job orders open for 30 days after the date of need and employers should be required to offer employment to any qualified and eligible U.S. workers who are referred during that time frame, also recognizing that the current 50 percent of the contract period is too long and perhaps too uncertain to manage.

Another commenter similarly recommended that employers be required to begin recruitment no earlier than 60 days prior to the date of need and continue until up to 1 to 30 days after the date of need, with adjustments made according to the expected duration of the job opportunity. Under this commenter's proposal, the determination of the end date for recruitment should be no earlier than the date of need, but the 50 percent rule should be revisited and adjusted to lessen its potential negative impact on the agricultural employer's workforce. Finally, another commenter suggested a continued obligation of 50 percent of the work period or 30 days, whichever is longer.

The Department acknowledges that the current 50 percent rule is viewed by many as containing burdensome requirements that do not provide a corresponding benefit to U.S. workers. The Department also recognizes that the rule sometimes benefits domestic workers. The Department acknowledges the comments that while there may be some benefits to U.S. workers, the current 50 percent rule can create substantial uncertainty for the employer in terms of managing their labor supply and labor costs during the life of the contract.

Since the publication of the NPRM, the Department commissioned a survey of stakeholder representatives to evaluate the effectiveness of the 50 percent rule as a mechanism to minimize adverse impacts of the H-2A program on domestic farm workers.

This survey was intended to survey a more representative population and update the original 1990 study of the rule, which is out of date and covered only two states – Virginia and Idaho. The surveyors conducted interviews with a number of stakeholders to gather information on the impact of the rule and how it is currently working. While the study identified a diversity of opinion about the value and effectiveness of the current 50 percent rule, the researchers found that the rule "plays an insignificant role in the program overall, hiring-wise, and has not contributed in a meaningful way to protecting employment for domestic agricultural workers."[2] The researchers estimated that the referrals made by respondents represented at most two percent of the estimated domestic labor force. They found the number of hires resulting from these referrals to be small, with employers hiring less than 0.1% of the domestic workforce under the 50 percent rule. All of the surveyed stakeholders from employers, state agency, and farm worker assistance organizations and advocates reported that domestic workers hired under the 50 percent rule typically do not stay on the job when hired, and frequently lose interest in the work when they learn about the requirements of the job. A large proportion of the survey respondents from all three groups suggested that the rule should be eliminated or modified.

Based on the comments it received, the Department has decided to modify the rule. On balance, on the basis of its own experience, the experience of its SWA agents, and data collected in the new study commissioned by the Department, the Department agrees with those commenters who argued that the costs of the 50 percent rule outweigh any of its associated benefits. No other program contains such a requirement, and it is

[2] "Findings from Survey of Key Stakeholders on the H-2A '50 Percent Rule'," HeiTech Services, Inc. Contract Number: DOLJ069A20380, April 11, 2008.

beyond dispute that the obligation to hire additional workers mid-way through a season is disruptive to agricultural operation. Nevertheless, the Department is concerned that the sudden elimination of the rule might itself prove disruptive to the access of U.S. workers to these employment opportunities. The Department also believes that it would be wise to collect data over a period of some years to make sure that no strong data trend emerges calling into question the Department's initial conclusion.

For these reasons, the Department is persuaded that at this time there is a purpose to be served by maintaining some time period for mandatory hiring of domestic workers to protect U.S. worker access to job opportunities while minimizing uncertainty and competitive disadvantage for employers. The Department considered the options presented by the commenters for shorter periods of time and has decided to adopt the suggested 30-day period after the date of need as a transitional time period during which employers will, for the next five years, be required to continue the hiring of domestic workers. The Department believes that this five-year period will allow a smooth transition for the expectations of U.S. workers, and will provide the Department additional time to collect data on the effect of the rule so that it can assure itself that its initial conclusion that the rule is on balance more harmful than helpful is correct. The Department intends to conduct a study of the effect of this transitional 30-day rule, and reserves the right to indefinitely extend the 30-day rule by notice published in the Federal Register should the Department's study conclude that the rule's benefits outweigh its costs. We believe this addresses the concerns of many of the commenters, both for and against continuation of the rule, and strikes an appropriate balance between addressing the concerns of agricultural employers as well as continuing to protect U.S. workers'

access to the employment opportunities under the H-2A program. Having a set period of time, not tied to a percentage of the contract, will provide employers a more operational and predictable period of time during the transitional period and will provide more clarity and be easier to administer for employer, workers and the SWA making the referrals.

c. Section 655.102(c)--Retention of Documentation

The Department proposed a five-year document retention requirement for all H-2A applications and their supporting documents. The vast majority of commenters who provided observations on this provision voiced concern with the proposed 5 year document retention period and recommended 3 years stating that they did not have adequate staff to comply with the requirement or that it is not an industry standard and not legally consistent with other regulations and might even discourage use of the H-2A program. The Department has reconsidered its position and has changed the retention requirement to three years.

One commenter suggested that all record retention requirements and periods be combined into one section of the amended regulations to provide program participants with clearer guidance for these obligations. The Department agrees and has added a new § 655.119 to the regulatory text. The new section lists all the document retention requirements.

Another commenter requested that the Department add a sentence to the rule indicating that employer is not liable for eliminating records after the retention period expires. The Department declines to add such a provision, as we believe the cessation of this responsibility is self-evident.

One commenter requested that the Department allow organizations who were denied certification to discard records 180 days after denial. The Department has decided to eliminate this requirement in its entirety, therefore, any employer who has been denied can discard the records immediately upon receiving the denial notice or whenever the decision becomes final if the employer appeals the decision.

A SWA requested that we define who is responsible for monitoring the documentation and ensuring compliance. This Final Rule places responsibility squarely with the employer to maintain the documentation. The NPC, through the audit function as well as the other enforcement tools at its disposal, will ensure compliance. SWAs will no longer be responsible for monitoring documentation or ensuring compliance with this provision.

d. Section 655.102(d)--Positive Recruitment Steps

The Department proposed "positive recruitment" steps including posting a job order with the SWA serving the area of intended employment; running three print advertisements; contacting former U.S. employees who were employed within the last year; and recruiting in additional States designated by the Secretary as States of traditional or expected labor supply.

Many commenters, primarily employers and employer associations, expressed concern with the specific proposed pre-filing recruitment steps. Many argued that the increased recruitment period and advertising will simply increase the cost of the recruiting effort without increasing the benefits; and that the increased steps were duplicative. These commenters believe that their workforce shortage problem is not due

to a lack of awareness of available jobs, but rather is because of a lack of willing and available U.S. workers. They suggested that rules be promulgated to use only the current state employment service system, and not require agricultural employers to perform a substantial prolonged search for U.S. workers before being able to apply for an H-2A labor certification. According to these comments, the time required in the current rules is sufficient to identify and notify the U.S. work force of the availability of particular jobs.

Requiring a pre-filing recruitment is, in the Department's view, essential to the integrity of an attestation-based system. Only with sufficient time for adequate recruitment can the Department ensure that the potential U.S. worker pool is apprised of the job opportunity in time to access that opportunity. The current 15 day time frame, in which employers file applications 45 days prior to the date of need, recruit for 15 days thereafter, and in which a CO must adjudicate the application no later than 30 days prior to need, has proven unworkable. COs are today certifying the absence of U.S. workers based on, at best, a handful of days of recruitment activity, which is insufficient to apprise U.S. workers through either the SWA employment service system or other positive recruitment activities.

The belief of some commenters that the current time allotted in the present regulatory scheme for recruiting is sufficient to canvass the potential U.S. workforce is, in the Department's view, not well placed. The Department has heard significant concerns voiced by the farmworker advocate community that there is an inability to access job opportunities given the incredibly short time frame in the current system. The Department takes seriously these concerns about the length of the recruitment, particularly with respect to the Department's modification of the 50 percent rule

(discussed above in section 655.102(b)). The movement of the recruitment period to a time prior to the filing of the application provides a clear and well-defined time to both communities – the employer and the U.S. farmworker -- to access job opportunities, and provides the Department with better information with which to make its certification determination. The reinstatement of a 30-day post-date-of-need referral period for the next fives years further ensures that the expectations of workers will not be unduly disrupted.

A trade association recommended SWAs be removed from the recruitment process altogether, and only be involved in the inspection of worker housing and workplace conditions after approval of the labor certification and visa and the commencement of work. A State agency representative recommended the SWAs receive copies of the ETA 750 (Application for Temporary Employment Certification) and 790 not for review but to ensure the SWA would have access to accurate information.

The Department notes that it is statutorily prohibited at this time from amending the Wagner-Peyser regulations to remove SWAs from the H-2A process. Nor does it believe such a step would be beneficial. SWAs are the most effective means of completing required activities such as inspections of owner-provided housing. SWAs are also integral to the process of receiving and clearing agricultural clearance orders. The Department declines to require SWAs to receive the new application form, as it will be receiving far more significant information in the ETA-790 job clearance order request.

A farmworker/community advocacy organization also claimed that the proposed changes to the recruitment process were inconsistent with the INA requirements and also portions of the Wagner-Peyser Act and the Migrant Seasonal Agricultural Worker Act

(MSPA). The organization believed the proposed regulations changed the standards for employer recruitment efforts to the detriment of U.S. workers and did not address recruitment violations that had been uncovered in the past. Specifically, the organization objected to the elimination of the standard for positive recruitment based on comparable efforts of other employers and the H-2A applicant employer as found in the current regulation at 655.105(a). This organization was also concerned about the elimination of the provision requiring that "[w]hen it is the prevailing practice in the area of employment and for the occupation for non-H-2A agricultural employers to secure U.S. workers through farm labor contractors and to compensate farm labor contractors with an override for their services, the employer shall describe how it will make the same level of effort as non-H-2A agricultural employers and provide an override which is no less than that being provided by non-H-2A agricultural employers." 20 CFR 655.102(f). The organization made several recommendations for revisions regarding recruitment including preserving the burden on the employer (under Departmental review) to identify and positively recruit in locations with potential sources of labor, and its obligation to work with the SWA to do so; retaining current regulatory provisions requiring that employers engage in the same kind and degree of recruitment for U.S. workers as they utilize for foreign workers, and requiring adequate compensation of farm labor contractors who find U.S. workers. Additionally, it recommended preserving the role of SWAs as contained in the current regulations, and detailed in the H-2A Program Handbook.

Other commenters expressed concern that the Department has reduced the formats in which recruitment is required while increasing the length of time to perform the

recruitment in an effort to streamline the program, but that doing so will not benefit U.S. workers. These commenters disagree with the proposed rule's elimination of the current regulatory requirement to contact farm labor contractors, labor organizations, nonprofits and similar organizations to recruit domestic employees. If the Department seeks to revise the current recruitment practices, in the opinion of these commenters, it would be more effective to maintain or increase current recruitment standards, while giving agricultural employers additional time within which to meet their obligations; otherwise the Department is reducing opportunities for U.S. workers and promoting the kind of foreign recruitment that has been demonstrated to result in the exploitation of H-2A workers.

While the Department appreciates the concerns expressed, it believes these concerns are misplaced given the Department's choice of recruitment requirements. The Department's re-engineering of recruitment is expressly designed to place recruitment where it is believed to be the most effective—in the hands of the entity who stands to gain the most from recruiting eligible U.S. workers at its (literal or virtual) front door rather than incurring the time and expense to recruit thousands of miles away. The Department's program experience has not found most of the deselected recruitment methods cited by commenters – radio ads, for example – to be any more effective in enabling U.S. workers to locate agricultural jobs than those the Department has required in this Final Rule, although they do add substantially to the burden of using the program. The Department takes seriously its statutory obligation to determine whether there are sufficient workers who are able, available, willing, and qualified to perform the labor or services involved in the petition and to ensure that U.S. workers' wages and working

conditions are not adversely affected by the hiring of H-2A workers. The Department believes that those vehicles selected – the use of newspaper advertisements, the state employment service system, contact with former workers, and recruitment in traditional or expected labor supply States -- provide notice of job opportunities to the broadest group in an efficient and cost-effective manner, while avoiding burdening employers with requirements that have proven costly and at times difficult to administer without yielding any clear benefits.

e. Section 655.102(e)--Job Order

Proposed § 655.102(e) required that the employer must place, prior to filing, a job order, consistent with 20 CFR part 653, with the SWA serving the area of intended employment at least 75 but no more than 120 days prior to the anticipated need. This job order must be placed into intrastate and interstate recruitment (discussed further below).

Several commenters focused on the placement of the job order. Three commenters posited that the rule would create problems for program users by establishing requirements for acceptable job offers that are subjective and subject to the Department's discretion, while requiring the employers to conduct the required recruitment before the terms and conditions of the employer's job offer are approved by the Department. According to these commenters, the rule is silent on what happens if, after the employer conducts the pre-employment recruitment, the Department does not approve the employer's job offer. Current program practice would suggest that the rejected recruitment would be considered invalid, and that the employer would be required to revise and repeat it. This circumstance, according to these commenters,

introduces an unacceptable degree of uncertainty and risk into the process. A trade association further commented that, as a result of no prior approval of the job offer, all 50 SWAs would be interpreting and making decisions about the job offers and believed the process would lead to inconsistencies among SWAs. The association was also concerned there would be inconsistency between what a local SWA employee would accept and what the CO would later find acceptable. The association was also concerned there would be inconsistency between what a local SWA employee would accept and what the CO would later find acceptable. The association recommended retaining the existing process as an option for employers.

The Department's requirement that the employer submit an acceptable job order to the SWA for posting in the intrastate and interstate clearance system mandates that the employer complete and submit the agricultural clearance form, ETA-790. This form contains all the job duties and required recruitment as well as any conditions for employment, special procedures, etc. Contrary to some comments, this form is submitted and approved prior to the employer's positive recruitment; so 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. Thus, acceptance of the ETA-790 by the SWA will virtually eliminate any chance that recruitment will later be disapproved by the NPC. Any employer desiring certainty can place advertisements after the job order has been accepted for intrastate/interstate clearance, or submit it early to the SWA to ensure any issues are worked out in advance.

One trade association noted that the job order must be filed in compliance with part 653, and that Section 653.501 requires that the employer give an assurance of

available housing as part of the job offer. This commenter opined that this would be impossible to do since employers cannot guarantee the availability of housing that far in advance (for purposes of using the proposed housing voucher). Also this section requires that the SWA staff determine whether the housing assured by the employer meets all of the required standards which will be an impossible task so far before the actual date of need.

The Department has amended both the time frame for filing (moving the first date for advertising and placement of the job order to 75 days, and not later than 60 days) prior to the date of need. In addition, as discussed below, it has eliminated the housing voucher option. Finally, the Department is specifying in the Final Rule that job orders should be placed by SWAs prior to the completion of the housing inspections required by 20 CFR 653.501(a)(6) where necessary to meet the timeframes required by statute and regulations. This will maximize the time that job orders are posted, providing better information to workers. The Department directs SWAs that post job orders prior to completion of the housing inspection to complete them as expeditiously as possible thereafter. Where a SWA determines that no acceptable housing is in fact available the job order may be revoked. With these amendments, the Department believes it has adequately addressed the concerns contained in this comment.

In addition, a group of farmworker organizations objected to the use of the language “place where the work is contemplated to begin” in describing which SWA should receive a job order when there are multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State. It believed this language would allow employers to choose where they wanted to

recruit U.S. workers by "contemplating" work would begin in an area unlikely to have U.S. workers. The Department also received comments in support of this requirement. This provision does not allow employers to arbitrarily assign themselves non-existent places where work is expected to begin in hopes of avoiding effective U.S. worker recruitment. For example, an employer's choice of a location in northern Alaska in March for planting activities would be questioned by the SWA and would likely be flagged for an audit by the NPC, with any appropriate corrective or deterrent action taken. In light of these comments, the Department has changed "contemplating" to "expected."

f. Section 655.102(f)--Intrastate/Interstate Recruitment

The proposed regulation instructs the SWA receiving an employer's job order to transmit a copy to all States listed as anticipated worksites and, if the worksite is in one State, to no fewer than 3 States. Each SWA receiving the order must then place the order in its intrastate clearance system and begin recruitment of eligible U.S. workers.

There were some general comments regarding the referral process. One group of farmworker advocacy organizations expressed concern about the lack of referrals by SWAs to H-2A employers in the past and believed the proposed regulation would not cure this deficiency. One association of agricultural employers expressed concern regarding the ability of the SWAs to adequately handle the referral process.

The Department believes these concerns are misplaced, especially under a modernized system in which SWA responsibilities with respect to H-2A job orders are reduced. A core function of the agencies that make up the SWA system is the clearance

and placement of job orders and the referral of workers to those job orders. Program experience demonstrates the presence of referrals sufficient to sustain this requirement. Farmworker advocates concerned with referrals through SWAs are encouraged to continue to work through the network of State monitor advocates to move referrals through to employers.

One State Workforce Agency commented that although the NPRM states the purpose of removing the SWA is to remove duplication of effort, one important duplicative effort is retained—the requirement for sending job orders to other labor supply States and neighboring States. This agency suggested that if the job orders are uploaded to the national labor exchange program, then the transmittal of job orders to other States is unnecessarily duplicative. Other commenters recommended all agricultural job orders be posted in an automated common national job bank such as JobCentral.

The Department acknowledges the potential benefits of a national online system. However, automating job clearance would require regulatory reforms that the Department is currently constrained from undertaking by Congress. See Pub. L. 110-161, Division G, Title I, Section 110. In addition, there is currently no online national exchange organized under the auspices of the Department to which such jobs could be posted, even if it were determined that the Congress's prohibition on expending funds to amend the Wagner-Peyser regulations did not prohibit the creation of a national online clearance system. The Department's former internet-based labor exchange system, America's Job Bank, was disbanded in 2007 and no replacement has yet been funded. The Department notes there are privately-operated or funded options for a national labor exchange, but it does

not wish to impose on SWAs the requirement and attendant expense of mandatory participation in such an exchange. Because the Department already has an existing system in place for handling interstate job orders, and given the current legal and operational constraints of changing that system, the Department has determined that the only feasible and prudent approach is to continue to require SWAs to process the interstate job orders in accordance with 20 CFR Part 653.

An association of growers/producers opposed the requirement for transmitting job orders to additional States and recommended the job orders be circulated only in the State where the job is located. This association also suggested that any out of State notifications should list only the location of the job offer and never list the employer's name.

The Department's circulation of the job order fulfills a statutory requirement. Section 218(b)(4) prohibits the Secretary from issuing a labor certification after determining that the employer has not "made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed." The interstate recruitment must be conducted "in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer." Id. (emphasis supplied). The Department may not eliminate or alter the requirement absent Congressional amendment.

A group of farmworker advocate organizations pointed out that the proposed regulations do not provide a timeframe for how long the local SWA can wait to place the

H-2A job order into interstate clearance, and only require the SWA to "promptly transmit" the job offer. The Department does not believe that its requirement of "prompt" transmission requires further clarification. It is the SWAs' central function to clear and post job orders, including interstate job orders and the Department is unaware of any problems with prompt transmission in the past.

The organization was also concerned about the process to be followed by SWAs for circulating job orders among other States. The proposed regulations require the SWA to transmit a copy of the open job order to all States listed in the employer's application as anticipated worksites or, if the employer's anticipated worksite is within a single State, to no fewer than 3 States, including those designated as traditional or expected labor supply States. However, the organization believed the proposed regulation would be read not to require any additional job order circulation by the SWA if the employer has anticipated worksites in two States, and thus would provide less circulation of job orders and no contact of labor supply States in such situations. The Department agrees and has clarified the language of 655.106(f)(1) by removing the phrase, "If the employer's anticipated worksite location(s) is contained within the jurisdiction of a single State" to make clear that job orders with locations in more than one State must be circulated to any traditional or expected labor supply States designated by the Secretary.

An attorney for an association of growers/producers suggested the H-2A process could be further streamlined by allowing State officials to affirm that employers need agricultural workers in their State. The Department cannot implement such an affirmation process at this time but will explore ways to make it work in the future.

A public legal service firm recommended that the Department require employers to circulate all job orders in Texas, a traditional labor surplus state. The Department anticipates that, if the commenter's factual assertions about labor availability in Texas are correct, Texas will frequently be designated as a labor supply State. The Department is cognizant of the changeable nature of worker flows, however, and therefore does not wish to require the mandatory inclusion of one or more specific States in the designation process. Rather, the Department will rely on annually updated information in designating labor supply States to ensure the accuracy of the assertions that farm laborers are indeed available and that out-of-State recruitment there would not take them from a jurisdiction in which they are needed. As a result of such concerns, however, the Department notes it will announce, at least 120 days in advance of the Secretary's annual designation, an opportunity for the public to offer information regarding States to be designated.

One commenter suggested that the Department bolster word-of-mouth recruitment because it is, in the commenter's opinion, the only way that U.S. workers find out about jobs in the agricultural sector and it encourages free-market competition as long as the information is accurate. This commenter believes too many H-2A employers do not provide accurate information to U.S. workers because it is in their best interests to hire H-2A workers who must stay tied to that employer for the entire agricultural season. .

g. Section 655.102(g)--Newspaper advertisements

The Department proposed that in addition to the placement of a job order, employers be required to place three advertisements (rather than the current two) with a

newspaper or other appropriate print medium. Most who commented on this suggestion believed the additional advertising would result in additional costs without any additional benefits. An association of growers/producers stated: "Additional newspaper advertising is a very expensive alternative of recruiting workers in today's world and should not be the only method allowed." An association of growers/producers expressed the opinion that "[a]dding the requirement of expanding the period of advertising to include more days as well as adding the requirement of placing more advertisements in print does not streamline the program." A trade association also questioned the expansion of the advertising requirements in the proposed regulations and commented that newspapers are not a usual or even occasional source of labor market information for farm workers. The association and other commenters referenced the National Agricultural Worker Survey (NAWS) which reported that 95% of seasonal crop workers (both legal and illegal) learn about jobs from a friend or relative or already know about the existence of the job (although how such knowledge is attained was not reported). The association further commented that the proportion of workers who learn about their jobs from a help wanted ad was apparently too small even to warrant inclusion in the report. Several of these commenters suggested it would be more efficient to simply allow for posting to the SWA's job bank which is more practical, less expensive, and reaches applicants more readily.

Several commenters, however, were in favor of the proposal to increase advertising and expressed support for the additional ad in the expectation it would provide additional notice to the target population. An association of growers/producers supported the increase in advertisements from two to three, believing it would enhance

the ability of an eligible U.S. worker to identify and apply for agricultural job openings before they begin. A farmworker/community advocacy organization agreed that requiring three instead of two advertisements would be a step toward improving the recruitment of U.S. workers.

An association of growers/producers stated that increasing the advertising requirements, when coupled with the new timeframe, was inefficient. This association also mentioned that "this wastefulness is often compounded by the fact that numerous virtually identical ads are appearing at the same time in the same area of intended employment." Another association suggested that employers be allowed to advertise jobs by simply referencing the job order placed with the SWA, and suggested that employers should not be required to include all of the detailed information contained in the proposed regulation. Another association suggested that if more than one grower is simultaneously recruiting in an area covered by only one newspaper, their ads should be combined and placed by the SWA. The names of the growers could be provided in the ad but applicants would be directed to the SWA to get additional information about the jobs and referrals to the employers.

The Department acknowledges that word-of-mouth recruitment takes place in the agricultural sector. The Department itself conducted the study that suggests most referrals in the agricultural sector take place through word of mouth rather than through newspaper advertisements. However, the Department's ability to monitor word-of-mouth recruitment, which is at the heart of compliance, is inadequate at best, risking arbitrary application of any such requirements. The Department believes the combination of job orders and required newspaper advertisements will make job information available in

ways that will result in word of mouth referrals directly to employers as well as through SWAs, and notes that referral and resulting passage through the Employment Service system is trackable activity.

Advertisements are but one source of information that fosters word of mouth recruitment. Although it may be true that few farm workers themselves read such advertisements, others do read them, including farm labor advocacy organizations, community organizations, faith-based organizations, and others who seek out such opportunities on behalf of their constituents. The newspaper becomes a very visible source of information for such organizations, which are in turn able to spread the word. Through publication to this wide audience, the information ultimately reaches those for whom it is intended.

Many commenters were particularly concerned that increasing the number of ads from two to three and requiring that one be placed in a Sunday edition would greatly increase employer costs. One trade association commented that it is likely that in the typical situation an employer's advertising costs would increase by three to four times under the proposed regulations, adding hundreds to thousands of dollars to the employers' application costs. That commenter did not provide data supporting this conclusion, however.

One commenter suggested a better alternative to employer-placed advertisements would be for the Department to maintain an up-to-date database listing advertisements for farming and ranching jobs and direct interested workers to contact the SWA in the States where the jobs were located. The commenter believed this approach would expand the ability of domestic workers to select more varied jobs in a larger geographic area. The

Department does not disagree; however, as noted above, amending the current job order clearance process is not an option at this time.

A private citizen commented that the SWA, not the employer, is in a better position to know which newspaper is most likely to reach U.S. workers, and that the SWA should, therefore, continue to have a role in determining where advertising is conducted. Nothing, of course, prevents an employer from consulting with the SWA regarding the most appropriate publication in which to place advertising and thus ensure compliance with the regulations, particularly in instances in which a professional, trade or ethnic publication is more appropriate than a newspaper of general circulation. In fact, a representative of a State government agency suggested the advertising requirements should be limited to local area media and trade publications where available and that the specific publications should be agreed to by the employer and the SWA based on the potential for attracting candidates and historical experience. While we are not incorporating this suggestion for coordination into the regulation as a requirement, we note that the regulation at 655.102(g)(1) already requires the ads to be placed 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." Failure to place the advertisement in such a newspaper would be a ground for finding a violation of the regulations.

h. Section 655.102(h)--Contact with Former U.S. Workers

The Department proposed that employers be required to contact by mail former U.S. workers as part of the recruitment process. A group of farmworker organizations

objected to the requirement and commented: "if DOL had intended to come up with the least effective way of contacting former employees, it could not have selected a better method than by mail." This organization was concerned because the majority of farm workers are not literate in English or their primary language and, therefore, might not understand the written communication. The organization was also concerned because the regulation does not require the written communication to be in any language other than English and recommended contact either by telephone or through crew leaders or foremen. Additionally, this organization believes many workers would be missed because the proposed regulation limits the requirement to contacting former workers "employed by the employer in the occupation at the place of employment, during the previous year" and does not require that FLCs contact a growers' former workers who may have switched to an FLC or workers who did not work at the same location for which the FLC is seeking H-2A workers.

One association of growers/producers suggested the proposed rule be modified to allow employers the ability to deny work to employees hired in previous years who demonstrated an unsatisfactory work history/ethic even if the worker was not terminated for cause. A trade association and other commenters expressed concern about former employees who were the subject of no-match letters from the Social Security Administration and requested a safe harbor or common sense exception in such situations.

The Department is concerned that an employer seeking to deny work to an employee hired previously who has a poor work history would have a difficult burden to demonstrate that poor performance. While the Department is sympathetic to the dilemma

faced by employers in resurrecting a work contract with such employees, employers who do not remove such workers from their payroll would need to provide documentation of their poor performance that would exceed the documentation required to demonstrate the simple contact required by this program. Employers may risk non-contact in such situations, and the Department will review the propriety of the employer's actions on a case-by-case basis. As for no-match letters, we note that employers are not required to hire workers who are not legally authorized to work. Receipt of a no-match letter may give rise to a duty on the employer's part to inquire about work eligibility, but is not in and of itself legal justification to refuse to hire a U.S. workers.

One trade association expressed concern about the related requirement for documenting contact with former employees and stated, "This requirement could reasonably be interpreted to mean that the employer must maintain a copy of its correspondence with each former employee demonstrating that it had been mailed. The only practical way to do this would be to send each letter by certified mail or some other means providing evidence of attempt to deliver. Such a requirement would be unnecessarily burdensome and costly." The association recommended this be simplified by requiring the employer to keep a copy of the form of the letter sent and a statement attesting to the date on which it was sent and to whom. Additionally, the association questioned what kind of documentation would demonstrate that the employee "was non-responsive to the employer's request." The association suggested the employer's recruitment report should be sufficient to document which employees were responsive and requiring documentation of non-responsiveness is unreasonable.

The Department does not intend this requirement to be overly burdensome to employers. Copies of form letters and list of employees, with documentation attesting to the dates such letters were sent, would be sufficient to meet the requirements of this provision. However, the Department does not agree that requiring documentation of non-responsiveness is unreasonable. The Department agrees that the recruitment report can be used to attest to those employees who were non-responsive.

i. Section 655.102(i)--Additional positive recruitment

1) Designation of Traditional or Expected Labor Supply States

In the NPRM, the Department continued to impose on employers the statutory requirement that the employer make "positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed," as mandated by 8 U.S.C. 1188(b)(4). The Department proposed that each year the Secretary would make a determination for each State whether there are other States in which there are located a significant number of able and qualified workers who, if recruited, would be willing to make themselves available for work in that State. The Department also proposed that the Secretary would not designate a State as a State of traditional or expected labor supply if the State had a significant number of local employers recruiting for U.S. workers for the same types of occupations. The Department proposed to provide for a published annual determination of labor supply states to enable employers to conduct such recruitment

prior to filing the application. The Department received several comments on this provision.

A group of farmworker advocacy organizations opined that the Department's proposal contravenes the H-2A statutory requirements regarding positive recruitment. The organization believes the Department's proposal will result in employers not competing with one another for migrant workers and workers not receiving job information even though a particular job in another State may offer a longer season, a higher wage, or better work environment. Another farmworker advocacy organization commented that it makes no sense in a market economy which recognizes competition as good to stop requiring employers to recruit for farmworkers in areas where other employers are seeking farmworkers. A labor organization commented that this provision demonstrates a lack of understanding of farmworker recruitment and what it believes is an inappropriate desire to ease the recruitment obligations for growers at the expense of U.S. farmworkers. This organization recommended the current positive recruitment rules should be retained and enforced. A United States Senator was concerned that the NPRM would cost American workers jobs because they would not have access to information about jobs in other areas.

Employers seeking farmworkers are statutorily required to recruit in out-of-State areas if the Secretary has found and determined that such areas contain a significant number of workers who, if recruited, would be willing to perform the work advertised in accordance with all of its specifications. The commenters are incorrect that the Secretary's determination that workers in areas where they are already being heavily recruited for jobs close to home are unlikely to respond to out-of-State advertising is a

new one. The current regulations at 20 CFR 655.105(a) already specify that RAs should "attempt to avoid requiring employers to futilely recruit in areas where there are a significant number of local employers recruiting for U.S. workers for the same types of occupations." The Department's program experience in applying this limitation over a long period of time leads it to believe that it is a good rule that aids program administration and avoids the imposition of unnecessary program expense. The Department notes that this limitation does not by any means eliminate out-of-state recruitment in States where workers are being locally recruited, since SWAs will continue to have discretion to post job orders there. Moreover, the Department notes that some of the commenters that opposed this limitation were the same commenters that argued that newspaper advertising is not an effective means to reach the farmworker population. The Department believes that its traditional limitation achieves an appropriate balance and is fully consistent with the statutory mandate.

Several commenters sought more information on the methodology that would be used in making the determinations about labor supply States. A major farmworker/community advocacy organization voiced its concern that "The annual survey is flawed in many respects and not designed to identify sources of labor at the time of need." The organization was also concerned about the timing and specificity of the survey to be used. A representative of a State Workforce Agency requested additional information about the designation of labor supply States for the logging industry in her State. A trade association commented that "the same types of occupations" should mean something more than merely agricultural work. A private citizen believed that because an employer in a State may request H-2A workers for a

certain crop activity for a certain time period should not mean that State should not be considered as a supply State for other crop activities and time periods.

The Department has addressed many of these concerns by modifying the provision to allow for notice, to be published in the Federal Register, to allow anyone to provide input as to the annual determination, at least 120 days before the announcement of the determination. The Department will consider all submissions received under this notice. In addition to the information presented by the public, the Department expects that it will continue to make the determination by consulting SWAs, farmworker organizations, farm employers and employer associations, and other appropriate interested entities.

2) Required Advertising

The Department proposed that each employer would be required to engage in positive recruitment efforts in the States, if any, designated as out-of-state recruitment States for the State in which the employer's work would be performed. This recruitment obligation would consist of one newspaper advertisement in each designated State.

Several commenters felt the newspaper requirements were too burdensome on employers and that the additional time and expense of recruiting in traditional or expected labor supply States should be borne by the Department rather than the employer. An association of growers/producers recommended the regulation only require SWAs to clear the job orders to those States designated as labor supply States as they do now. A United States Senator recommended that after the employer has satisfied the intrastate recruitment requirements and has attested that insufficient domestic workers

are available, the burden of proof that no U.S. workers are available should shift to the Department.

The Department does not agree that this is an expense the Department should bear, beyond the expense of the interstate agricultural clearance system that the Department already finances. The relevant statute is clear that it is an employer who must engage in such out-of-state positive recruitment, not the Department. The Department does consider a requirement to place a single out-of-state advertisement in each designated state to be particularly onerous on employers, and is of the opinion that the benefit to be gained (willing and available U.S. workers) outweighs the cost. This is required in the current program and the Department has received little credible negative feedback on the burden of such advertising.

Several commenters discussed the placement of the advertisements. At least three associations of growers/producers commented that placing newspaper advertisements should be limited to no more than 3 States, to avoid the possibility that the Department could require recruitment in 50 States and the additional territories because the language in the companion recruitment provision for SWAs at 655.102(f) reads "no fewer than 3 States." A United States Senator also endorsed a limit on the number of States in which an employer is required to recruit and suggested the Department should provide a means of indemnifying employers from liability associated with mandatory out-of-state advertising.

The Department anticipates the number of States to be so designated will be no more than three for any one State and will vary by State. In some cases, no State or only one or two States may meet the relevant criteria. However, to provide for flexibility in

the event of weather disasters or crop shifts, the Department declines to limit its designation to no more than three States. While unlikely, it is possible that additional states might meet the relevant criteria and thus be required to be designated, and the Department wishes to leave that option available in the event needed. The Department has never designated more than three or four States as traditional or expected labor supply States throughout the history of the H-2A program, and suggestions that all 50 States plus territories would be designated are unfounded.

A farmworker advocacy organization believed the requirement should be for three advertisements, not one, in each designated State and also recommended a requirement that the language predominant among agricultural workers in the region be required to be used. A representative of a State government agency commented that the proposed regulations were not clear as to how an employer's ad in another State would be handled. The individual commented that the advertising instructions indicate interested applicants should contact the SWA, but believed this procedure would not work well for an ad placed out of State and recommended the ads placed out of State should advise applicants to contact the employer directly. Another commenter recommended the newspaper ads in other States should direct all applicants to the SWA and the SWA should then refer them to the employer's SWA. An association of growers/producers recommended the required newspaper advertisements should contain only the job specifications and the SWA contact information.

The Department agrees that more clarity on the mechanics of out of state recruitment is appropriate. The Department has added language to the regulation to clarify that the advertisements are to be placed in each jurisdiction identified for the area

of intended employment as a traditional or expected labor supply State and that the ads must be placed in a newspaper that "is most appropriate to the occupation and the workers most likely to apply for the job opportunity." The Department declines to require more than one ad in each State. The Federal Register notice will outline the States so designated. The ads are to refer the interested employees to the SWA nearest them, in accordance with current practice under 20 CFR 653 and as is currently undertaken, and the SWA will then refer eligible individuals to the SWA of the receiving State. The Department believes these procedures provide a workable advertisement and referral system to provide farmworkers information about available jobs and to supply needed labor to prospective users of the H-2A program.

j. Section 655.102(j)--Referrals of Verified Eligible U.S. Workers

The NPRM requires SWAs to "refer for employment only those individuals whom they have verified through the completion of a Form I-9 are eligible U.S. workers." Section 655.102(f) requires the job order to disclose "that only eligible U.S. workers shall be referred[.]" These provisions are consistent with the Department's statutory mandate. Although the INA has always required that only eligible workers be referred, this rule clarifies and spells out the Department's expectations. Based upon comments received and the Department's experience with this requirement, which has been in effect administratively since the issuance of TEGL 11-07 on November 14, 2007, and with respect to which ETA has provided recent training webinars for SWAs, the Department has determined that SWAs should be required to fulfill their responsibility to verify employment eligibility by completing USCIS Form I-9 in accordance with DHS

regulations at 8 CFR §§274a.2 and 274a.6. The NPRM, ETA's written guidance, and an opinion by the Solicitor of Labor, all of which have been shared with SWAs over the course of the last several months, explain both the rationale for the SWA verification requirement and our authority to require it.

Comments on this subject were received from a national association representing state agencies, 12 individual SWAs, several civil rights and labor advocacy organizations, members of Congress, and numerous employer groups and individual employers. Commenters supporting the proposal generally cited the longstanding need for a reliable employment service system that is based on affirmative verification and refers only documented workers. Commenters opposing the proposal raised a variety of legal, programmatic, resource-related, and policy-based concerns.

Many commenters considered the employment verification requirement to be a change in policy after decades of contrary Departmental interpretation. Another argued that the requirement runs afoul of the Department's FY08 Appropriations Act, Pub. L. 110-161, Division G, Title I, Section 110, in which Congress prohibited ETA from finalizing or implementing any rule under the Wagner-Peyser or Trade Assistance Acts until each is reauthorized.

The Department has always required that SWAs fulfill the requirements of the INA to refer only eligible workers by verifying employment eligibility. Recent pronouncements by the Department have clarified the way that employment verification is required to be accomplished. To the extent that these procedural requirements may represent a shift in Departmental policy, they are now being clearly stated in the Department's regulations. The Department has not reviewed H-2A regulations

comprehensively since the current program's inception in 1986. After a top-to-bottom review of the program requested by the President in August, 2007, the Department is revising and modifying a number of established practices based on program experience, years of feedback from stakeholders and changing economic conditions. As discussed in the NPRM our clarification of SWAs' obligation to affirmatively verify employment eligibility is in direct response to longstanding concerns about the reliability of SWA referrals. The referral of workers not authorized to work can disrupt business operations and undermine the integrity of the H-2A program.

Many commenters argued that the requirement is inconsistent with INA provisions at 8 USC 1324a, and DHS regulations at 8 CFR 274a.6, which permit but do not require SWAs to verify employment eligibility for individuals they refer.

The USCIS regulations permit (do not prohibit) SWAs to verify employment eligibility of workers before making referrals. 8 CFR 274a.6. The General Counsel of DHS has issued an interpretive letter stating that while the USCIS regulations do not themselves require SWAs to verify the eligibility of workers before referring them, those regulations do not prevent other agencies having independent authority to do so from imposing such a requirement. The Department is now exercising its independent authority under the INA to require SWAs to verify eligibility. Further, to ensure the regulated community has appropriate notice of the specific requirement, and to ensure a standard process for verification remains in place consistent with the procedures already approved by Congress, we have clarified the regulatory text to require that states should use the I-9 process for purposes of verification. State agencies with inconsistent practices, such as verification through scanned documents transmitted over the Internet,

must revise their processes to ensure that agricultural referrals are made only as a result of in-person verification.

The INA requires that employers execute a Form I-9 for all new employees. Some commenters interpreted the NPRM to shift this employer responsibility to SWAs. A subset of these commenters raised concern that removing responsibility for verification from agricultural employers alone would be unfair to other, non-agricultural employers who would still be required to complete the I-9 form.

This Final Rule does not govern employer verification, nor does it seek to change, for purposes of H-2A labor certification, the basic responsibility of employers under the INA. As we strongly cautioned in the NPRM, a SWA's responsibility to perform threshold, pre-referral verification exists separate from an employer's independent obligation under the Immigration Reform and Control Act of 1986 to verify the employment eligibility of every worker to whom it has extended a job offer. However, the governing statute does provide some relief for employers by allowing them to rely on a properly executed SWA referral. The Act – at 8 USC §1324a(a)(5) – provides a "safe harbor" from legal liability to employers, regardless of industry, who unwittingly hire an unauthorized referred worker based on a SWA referral made in compliance with the DHS process established at 8 USC §1324a(b) and on appropriate documentation from the SWA certifying that verification has taken place. Employers must still verify employment eligibility for workers that they do not have a state certification that complies with all of the applicable regulatory requirements.

Some commenters were concerned that employers who hire SWA-referred workers may seek to hold SWAs responsible for referring unauthorized workers. The

Department expects that any referrals a SWA makes to individual employers will comply with the requirements established in this Final Rule and other Departmental guidance. For example, the preamble to the proposed rule directs SWAs to provide all referred employees with adequate documentation that verification of their employment has taken place, and clarifies that employers may invoke "safe harbor" protection only where the documentation complies with all statutory and regulatory requirements. However, employers have no obligation to hire a job applicant – SWA-referred or not – who does not present the appropriate, statutorily-required documentation. As stated in the NPRM, an employer will not be penalized for turning away applicants who are not authorized to work.

Many commenters raised a concern that these new procedures would have an unlawful, disparate impact on a protected class, or at least make states vulnerable to legal claims of disparate impact they would have to spend significant resources to defend. More specifically, these commenters felt that to the extent the higher standard for verification now sets up additional obstacles not applied to non-agricultural workers, and greater burdens to obtain such jobs, it would have a disparate impact on agricultural workers, many of whom are Latino, which could be perceived as unlawful discrimination on the basis of race or ethnicity. Commenters were concerned states would be forced to expend significant resources – resources they do not have, or that were targeted for other uses – to defend lawsuits. Or, alternatively, that to protect against lawsuits, states would be forced to apply the new, higher standard to all job referrals, for which states lack both the resources and the functional ability.

The requirement to verify employment eligibility does not violate constitutional prohibitions against disparate impact. The eligibility requirement is established by statute and is similar to verification requirements to gain access to other similar public benefits. As this regulation governs the H-2A foreign labor certification program, the clarification made here is limited to that program and to agricultural job referrals. However, clarifying the requirement in this regulation does not mean the Department's policy is limited only to agricultural referrals; the Department's expectation is that SWAs will not expend public resources to refer undocumented workers to any job opportunities, independent of program. The employment verification provisions included in this regulation are part of a much broader, concerted effort – one that includes regulation, written guidance, and ongoing outreach and education – to address longstanding weaknesses and strengthen the integrity of foreign labor certification activities. In addition to this proposed rule, we have included the requirement in the H-2B NPRM published on May 22, 2008, to extend the same procedural employment verification requirements to non-agricultural workers.

Some commenters opined that the requirement presents an obstacle for, and will reduce the pool of, the very U.S. workers it is designed to protect. For example, these commenters stated that States are increasingly moving toward web-based services. An in-person reporting requirement will require visits by job seekers who currently could be referred without ever visiting a workforce center, despite the considerable distance some applicants must travel to reach a center. They stated that, especially in the larger states, this will present a greater and perhaps insurmountable hurdle for a larger number of U.S. workers, who will be discouraged from travelling great distances to get a job referral.

In practice, an in-person reporting requirement will not change the operation of referrals in most States significantly. In our program experience, States often require that agricultural job applicants visit the center to receive information on the terms and conditions of the job, information that must be provided prior to referral. While we do not disagree that an in-person reporting requirement may impact the decisions of a limited number of otherwise eligible workers, at this juncture the impact is speculative and does not outweigh the significant value of verification. Moreover, it is a problem that SWAs can adjust to 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, Congress has determined that simple convenience must cede to the overarching goal of a legal workforce and the Department has drafted its regulations accordingly.

Commenters opposing the eligibility provision uniformly complained that the verification requirement would add potentially significant workload, and strain the already inadequate resources of many State Workforce Agencies. 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 serious resource constraints facing state agencies in their administration of the H-2A program and their efforts to make consistent, reliable referrals for a population of workers

that is, by definition, itinerant and often difficult to contact. 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.

In addition, notwithstanding funding limitations, there is a strong, longstanding need for a clearer verification requirement at the state government level. Verification is a statutory responsibility of the Department under the INA and the Wagner-Peyser Act, and – by extension – a logical and necessary condition for the issuance of foreign labor certification grants to states. That said, 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.

Commenters raised a number of concerns with the use of E-Verify, including potential system problems, delays and inaccuracies. The Department strongly encourages state agencies to use the system, which provides an additional layer of accuracy and security over and above the basic I-9 process, but it has not made it mandatory. SWAs can comply with this Final Rule without the use of E-Verify.

One commenter pointed out that the regulation does not describe the penalties to SWAs for non-compliance or delayed compliance with this requirement, or the implications for H-2A employers who may seek services from SWAs that are not in compliance with the requirement. For instance, the commenter inquired, whether, if the Department were to suspend Foreign Labor Certification grant funding, employers would

be required to accept referrals funded exclusively by Wagner-Peyser funding. The commenter also inquired whether the SWA in an employer's state would be required to verify the work eligibility of a worker that was referred to it by a non-compliant out-of-state SWA. As the verification requirement is implemented, the Department's guidance will evolve in response to the experience of the regulated community and our own. We do note that these problems already exist under the Department's current regulations and policies, and the Department is working through them as they arise. The problems are substantially alleviated by the fact that at least 45 states have already agreed to come into compliance with the employment eligibility verification requirements established by current Departmental policies, minimizing the chance that a State will need to be de-funded due to non-compliance or that non-compliant referrals will be made by out-of-state SWAs. Nevertheless, we do not discount the importance of the questions posed by the commenter, but see them as issues of implementation that should be addressed, as they arise, through appropriate guidance.

k. Section 655.102(k)--Recruitment Report

The Department proposed to require employers to submit a preliminary recruitment report with their applications and to then supplement that report with a final recruitment report, documenting all recruitment activities related to the job opportunity that took place subsequent to the filing of the application. The Department proposed that the initial recruitment report to be filed with the application be prepared not more than 60 days before the date of need, and that the supplemental, final report be completed within 48 hours of the date H-2A workers depart for the worksite or 3 days prior to the date of

need, whichever is later. Many individuals and members of agricultural associations expressed concern that recruitment reports will not streamline the application process and will instead inflict an undue burden on employees of small farms. Some agricultural associations argued that having two recruitment reports will double the work for employers and stated that the second report is not justified because of its limited utility in resolving compliance issues.

The Department respectfully disagrees that a second report will have limited benefit, given the Department's intended use of supplemental reports in the event of an audit. The second recruitment report will provide assurance to the Department that an employer has complied with all of its obligations with respect to the domestic workforce. Compliance throughout the program, including after filing of an application, is necessary for the appropriate enforcement of the H-2A program and its requirements.

Several commenters specifically mentioned the timing of the recruitment report as the biggest problem with the requirement. One farm association noted that since the initial application cannot be submitted without the recruitment report, and the recruitment report must be prepared not more than 60 days prior to the date of need, the application itself cannot be filed until 60 days ahead of time. In order to rectify this issue, the commenter suggests that the 60 day language on the initial recruiting report be removed. Another farm association suggests that the timeline for the recruitment report be moved up to no later than 45 days, rather than 60. The Department also received support for the supplemental recruitment reports.

The Department is cognizant of the compressed timeframe in which agricultural employers will conduct recruitment and file applications for H-2A workers if and when

insufficient U.S. workers are secured through that search. As discussed above, we have amended the timeframe for pre-filing recruitment to reflect a recruitment period closer to the date the workers are needed. Consequently, the employer will be required to update the recruitment report within 2 days of the last date it must accept referrals, that is, the date that is 30 days after the first date the employer requires the services of the H-2A worker. With respect to employers who wish to file an Application for Temporary Employment Certification prior to 50 days before the date of need, they may do so in order to initiate processing of the application, but the application will not be considered to be complete, and thus eligible for a final determination, until the initial recruitment report is submitted.

Finally, the Department has made additional clarifying edits to the regulatory text. These edits are to ensure this provision comports to other sections of this Final Rule and to clarify its requirements to the reader. These edits have also been made to ensure conformance to plain English standards.

6. Section 655.103 -- Advertising Requirements

The Department proposed detailed instructions for the content of the newspaper advertisements to be placed by employers as part of the pre-filing recruitment in proposed § 655.103. Most comments on the advertisement requirement discussed the efficacy of placing such advertisements, and those comments have already been discussed above. A few comments were received, however, on the specific contents of the ads.

A group of farmworker advocacy organizations expressed concern regarding the content of job orders placed by agricultural associations. It objected to the placement of job orders with a range of applicable wage offers with a statement that "the rate applicable to each member can be obtained from the SWA."

In promulgating this rule, the Department made no changes to current practice. An association is permitted to pay a different wage for each of its members, should it choose to do so, as long as that wage meets the criteria established in the regulations (now found at 655.108). U.S. workers seeking a job opportunity from or within an association can acquire from the SWA a list of member locations and the wages associated with each so that the worker can make a fully informed decision as to which job, if any, the worker wishes to apply for.

A few employers objected to the very concept of newspaper advertising. One employer objected to having to advertise in a newspaper, commenting that newspaper advertisement is "not only expensive, but doesn't find any hiding sheep shearers." Another employer objected to the increase in required newspaper advertising for domestic workers "when it is clear that local workers are simply not available for seasonal jobs." The Department appreciates that a newspaper ad may not always, of itself, result in significant numbers of U.S. workers approaching U.S. agricultural operations to seek employment. However, such advertising has been required for decades and remains the central mechanism by which jobs are advertised, especially to workers who have only limited access to the Internet. The ads may not necessarily be seen by farmworkers, but may and will – and indeed are – seen by those who participate in the greater farm work community and who can pass along a description of the jobs ads

through word of mouth. Newspaper advertising remains, along with the state employment service system network, an objective mechanism by which notice of upcoming farm work can be communicated to those who are interested.

7. Section 655.104--Contents of Job Offers

a. Section 655.104(a)--Preferential Treatment of Aliens

The Department's proposed regulation stated: "The employer's job offer shall offer no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers." A group of farmworker advocacy organizations opposed the removal of the words "U.S. worker" from this section of the rule. This commenter believes that the new wording allows employers to treat U.S. workers less favorably than H-2A workers.

While the Department does not agree that the new wording would have allowed employers to treat U.S. workers any less favorably than H-2A workers, the phrase has been reinserted. -

b. Section 655.104(b)--No Less Than Minimum Offered

The NPRM proposed that the "job duties and requirements specified in the job offer shall be consistent with the normal and accepted duties and requirements of non-H2A employers in the same or comparable occupations and crops in the area of intended employment and shall not require a combination of duties not normal to the occupation." Several commenters expressed concern that § 655.104(b) is unworkable and unrealistic because it now requires that the job duties and requirements be consistent with the normal

and accepted duties and requirements of non-H-2A employers in the same or comparable occupations and cannot require a combination of duties not normal to the occupation. The Department, however, notes that these caveats are statutory; the INA at section 218(c)(3)(A) instructs the Secretary to apply "the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops" in determining whether the employer's specific requirements are appropriate in the context of the job offer. The Department, in promulgating 655.104(b), is simply repeating the statutory standard.

All of the commenters who provided input on this provision suggested that the Department should not second guess an employer's business decision regarding an occupation's job duties when they are unique to that employer. The commenters believe that the Department has given itself more discretion than is statutorily mandated. One commenter reasoned that this provision should be made consistent with those in the PERM regulations at 20 CFR 656.17.

The Department does not believe that the agricultural sector with its temporary and seasonal work can properly be compared to permanent labor needs that run across all industries. At any rate, the Department is merely applying a standard mandated by Congress. To ensure that the standard is reasonably applied, under the text of the final rule the Department will assess the reasonableness of job qualifications by looking only at comparable occupations and crops located in the area of intended employment. Nevertheless, the Department has amended this language to reflect the ability of employers to demonstrate a business necessity for what appears to be an unusual or unique job duty or activity..

c. Section 655.104(c)--Minimum Benefits

A group of farmworker advocacy organizations pointed out that proposed 655.104 does not correlate exactly to current 655.102(b). Specifically, in this commenter's opinion the proposed section does not require the employer to pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period as required in the current regulation. According to this commenter, under the proposed rule, H-2A workers would have only contract law as their primary enforcement tool. With proposed section 655.104(c) stating that every job offer must include the wage provisions listed in paragraphs (d) through (i) of this section but no longer requiring precisely what the current 655.102(b)(9)(i) requires, this commenter argued that workers will be left at a disadvantage if the employer fails to specify the required wage provisions in the work contract.

The Department appreciates this commenter's analysis. However, we do not agree that the employer will no longer be bound to pay the employee the wage promised if the employer pays the employee on an hourly basis. The employer continues to be contractually bound, but under the new program it is through the employer's attestation required under 655.105(g) because the entire application becomes the work contract.

A commenter pointed out the illogical consequences of rigid rules governing wages for agricultural workers. It is the commenter's contention that the Department should add a phrase at the end of 655.104(c) that would not force employers to pay the

NPC prescribed wage until the date of need and instead would allow employers to pay U.S. workers a mutually agreed upon wage between the time they recruit the workers and the harvest in order to train the U.S. worker and retain them throughout the harvest. If they do not offer those U.S. workers employment immediately, those U.S. workers will most likely not be available when the harvest begins. The commenter believes that this employment prior to the date of need and prior to the date that foreign H-2A workers arrive should not be governed by the H-2A contract or its wage provisions.

The Department agrees that the H-2A required wage takes effect on the effective start date of the H-2A contract period. However, the Department does not believe that any changes to the regulatory text need to be made under this section because 655.105(g) provides that the requirement to pay the offered wage only exists during the valid period of the approved labor certification.

d. Section 655.104(d)--Housing

Section 218(c)(4) of the INA requires employers to furnish housing in accordance with specific regulations. The employer may fulfill this obligation by providing housing which meets the applicable Federal standards for temporary labor camps or securing housing which meets the local standards for rental and/or public accommodations or other substantially similar class of housing. In the absence of local standards, the rental and/or public accommodations or other substantially similar class of housing shall meet State standards, and in the absence of State standards, such housing must meet Federal temporary labor camp standards. By statute, the determination of whether the employer furnished housing meeting the applicable standard must be made no later than 30 days

before the date of need. The Department proposed three changes to its housing requirements.

First, the Department proposed allowing employers to request housing inspections as early as 75 days before and no later than 60 days before the date of need. The Department proposed making a conditional determination on the H-2A application in the absence of a physical inspection of the housing where the employer had requested the housing inspection within the time frame specified and the SWA failed to conduct the inspection for reasons beyond the employer's control. Employers who had been informed of deficiencies by SWAs and failed to act to correct these deficiencies would not be conditionally certified, nor would those who made untimely requests or who had not otherwise met all other criteria for certification. SWAs would have the authority to conduct housing inspections prior to or during occupancy in the event of conditional determinations. (73 FR 8554) The Department proposed these changes in part to alleviate the problems faced by SWAs in conducting housing inspections during the current 15-day window, between the time that applications are required to be filed (45 days before the date) and the time that certification is required to be made (30 days before the date of need).

The Department heard from a number of SWAs on the issue of timely housing inspections, many of which declared their ability to conduct housing inspections within the 15-day window. One SWA acknowledged that at times delays may occur in conducting housing inspections, but attributed those delays to incomplete or inaccurate information being provided to inspectors. This SWA suggested that providing a copy of the clearance order with the housing inspection request would alleviate the problem of

inspectors investigating the wrong housing. Finally, an anonymous commenter tied the delays in housing inspections to a lack of funding at the state level.

The Department recognizes that many SWAs conduct housing inspections in advance of the statutory deadline of 30 days before the date of need, but cannot ignore the fact that housing inspection delays have in many instances resulted in labor certification determinations being made by the Department outside of the statutorily required timeframes. This result is not acceptable to the Department or to employers seeking H-2A certification. A number of employers stated that:

> [u]ntimely housing inspections are one of the most common reasons for delays in making labor certification determinations. Therefore, the provision in the proposed regulations for making a pre-application housing inspection, and the provision that certification will not be delayed if a timely housing inspection is not made, and that occupancy of the housing is permitted, are important improvements in the program.

While employers and employer associations favored the proposed conditional labor certifications, several commenters representing employer interests had concerns with the requirement that the housing inspection must have been requested no later than 60 days before the date of need. Employers stated that in some parts of the U.S., housing may still be winterized 60 days before the date of need and therefore may be unavailable for inspection, or unable to pass inspection. In certain areas, inspection agencies require that the employer rent the housing before an inspection is conducted and the earlier time frame for requesting an inspection requires employers to pay an additional month or two of rent for the housing, substantially adding to the cost of providing housing. Other

growers stated that current inspection procedures prohibit the inspection of occupied housing and therefore this proposal would require that regulations be adjusted to permit inspection of occupied housing. Some said that the earlier time frame for requesting housing inspections may be before many farmers plant their crops, let alone know the dates of the harvest.

Comments representing employer interests also included questions concerning implementation of the proposal. Many argued that employers should be provided a specific and reasonable period of time for abatement of violations found in conditional determination post-occupancy inspections conducted by the SWAs and that employers who correct violations within the specified period should not be penalized for the violations. Not all employers shared this point of view, however. One employer association argued that "the fact that employers continue to face consequences for having deficient housing will prevent any adverse effects for workers." Employers also questioned the proposed requirement for written housing inspection requests and some employers recommended that the Department provide training to SWA staff on conducting housing inspections of occupied housing. Finally, one employer commented that in the state in which he operates, the state's Department of Health conducts inspections of temporary labor camps and that to require SWAs to conduct these inspections would result in confusion.

Employee advocacy organizations and State agencies expressed concern that the granting of conditional labor certification determinations could potentially result in cases where housing is not inspected prior to occupancy, which in turn could result in workers being housed in substandard conditions. Several commenters objected to this proposed

revision stating that pre-occupancy housing inspections are an effective incentive for employers to take corrective action, thus ensuring that workers are housed in safe and sanitary housing. Other commenters urged the Department to continue the requirement that housing be inspected before the arrival of workers.

A few comments from both organizations representing employer interests and from organizations representing employee interests questioned the Department's legal authority to establish a requirement housing inspections be requested more than 45 days before the date of need, which is the earliest date that the Department may under the statute require applications to be filed. One commenter asserted that the proposed changes contradicts the Department's Wagner-Peyser regulations requiring that the housing be inspected to determine compliance with applicable housing safety and health standards before the housing is occupied.

The Department has carefully considered the comments and has determined that the proposal appropriately strikes a balance between ensuring that housing meets all applicable safety and health standards; that agricultural employers are able to secure H-2A workers in a timely manner, and that the Department complies with the statutory requirement to render a decision by day 30 before the date of need. To ensure that SWAs have adequate time to complete housing inspections before the statutory deadline of 30 days before the date of need, the Department will require employers to request housing inspections no later than 60 days before the date of need. except when the emergency provisions contained in 101(d) are used. The INA requires that the Secretary of Labor make the labor certification determination no later than 30 days before the date of need. It also requires that the SWA make a determination as to whether employer furnished

housing meets the applicable standards by no later than 30 days before the date of need. Congress established the housing inspection deadline, which the Department interprets to be a duty imposed on SWAs, to ensure that employers using the H-2A program would, in light of the time-sensitive needs of agricultural work, receive their H-2A work force in a timely fashion. The provisions in this final rule ensure that both the Secretary and the SWAs have adequate time to meet the statutory deadline for making labor certification determinations and housing inspections, respectively. Where SWAS fail to comply with the statutorily established timeframe for completing housing inspections, however, the Department does not believe that Congress intended that employers be penalized by having their labor certifications delayed. Indeed, Congress established the statutory requirement that the Department issue a labor certification no later than 30 days before the date of need, and that SWAs complete housing inspections prior to that date, precisely so that H-2A employers would not have their labor certifications delayed.

Even in the case of a conditional labor certification, employers are still required to provide housing that meets the applicable standards. Employers are required to attest that they will provide housing that complies with the applicable local, State, or Federal standards and guidelines for such housing. This assurance is not dependent on the SWA conducting a pre-occupancy housing inspection. Sanctions and penalties may be imposed for violations of the attestation requirements and the housing standards, regardless of whether or not a pre-occupancy housing inspection was conducted. As to commenters who argued that the possibility that housing might be occupied before being inspected is unacceptable, the Department notes that agricultural housing is often occupied by U.S. workers before being inspected by appropriate authorities. The requirements of the INA

ensure that H-2A housing will usually be inspected prior to occupation, but in those unusual cases where that does not occur, the Department does not believe that H-2A workers will be unduly prejudiced by being afforded the same level of protection that Congress has afforded to U.S. workers.

The Department is not persuaded by employers' arguments for specific language allowing employers in all cases to abate housing violations without penalties where the housing has already been occupied. All employer-provided housing in the agricultural sector is subject to the Federal standards for temporary labor camps found at 29 CFR 1910.142 (OSHA standards) or 20 CFR 654.404 - .417 (ETA standards), regardless of whether or not the employer participates in the H-2A program. This is not a change. Penalties for failing to meet the applicable standards help ensure compliance.

As with all Department investigations determining compliance with Federal housing safety and health standards, if violations are found, the employer is provided a reasonable opportunity to correct or abate the violation. Time frames for abatement are directly related to the severity of the violation and its potential impact on the safety and health of the workers. Therefore, language in this regulation specifying an abatement period for the correction of housing violations is unnecessary. Current regulations, at 29 CFR 501.19(b) and proposed regulations at 20 CFR 655.117 and 655.118(g), address the factors considered by the Department in determining the appropriateness of penalties and sanctions. The Department will continue to ensure that the penalties assessed and sanctions imposed for violations of housing safety and health standards are appropriate to the violation.

The Department is cognizant that requiring employers to request housing inspections no fewer than 60 days before the date of need may present a challenge to some employers. However, we believe that the result will be beneficial to employers, workers and the SWAs by allowing more time for the SWAs to schedule and conduct pre-occupancy housing inspections, and more time for employers to correct any deficiencies prior to the arrival of the workers. The Department expects that SWAs will continue to work with employers on the scheduling of housing inspections and that SWAs will endeavor to schedule inspections to minimize the expense to the SWA of conducting the inspection and maximize the benefit to the employer and workers by inspecting facilities that are not winterized or otherwise unlikely to pass inspection.

The Department is retaining the proposed requirement that the employer's request for housing inspections must be in writing. This requirement provides the employer with the documentation necessary to demonstrate that their request for a housing inspection was made within the required time frame.

While the Department refers to the SWAs as the entities responsible for making housing inspections related to labor certification determinations, the Department does not intend to limit the flexibility afforded SWAs in fulfilling this requirement. For example, some SWAs have agreements with other State agencies for conducting housing inspections and it is not the Department's intention to change such arrangements. However, SWAs are instructed not to adopt rules or restrictions that would inhibit their ability to conduct inspections by 30 days before the date of need, such as requirements that rental housing already be leased before the SWA will conduct an inspection, or rules that occupied housing not be inspected. It is the employer's responsibility, however, to

ensure that the SWA has access to the housing to be inspected so that the inspection may take place.

Finally, in response to concerns that SWA staff is not sufficiently trained to conduct inspections of occupied housing, the Department anticipates that there will be additional training of SWA staff on the conduct of housing inspections.

The Department's second housing-related proposal was the use of a housing voucher as an additional option employers could use to meet the H-2A housing requirements. The Department included several safeguards in this proposal to ensure workers would be provided housing meeting the applicable safety and health standards, including requirements that the voucher could not be used in an area where the Governor of the State has certified that there is inadequate housing available in the area of intended employment. Other safeguards included the provision that the voucher could only be redeemed for cash paid by the employer to a third party, that the housing obtained with the voucher had to be within a reasonable commuting distance of the place of employment and that workers could "pool" their vouchers to secure housing (e.g., to secure a house instead of a motel room) but that such pooling may not result in a violation of the applicable safety and health standards. The Department also included as a safeguard the requirement that if acceptable housing could not be obtained with the voucher, the employer would be required to provide housing meeting the applicable safety and health standards to the worker. The Department requested comments on whether the proposed change adequately balanced the needs of employers and workers. (73 FR 8554). A number of comments from employers, employer associations, employee advocacy organizations and state agencies were received on the housing voucher option.

A number of comments from stakeholders representing both employer and employee interests led us to believe that the proposal was not well understood. Several commenters stated that "the voucher program would effectively eliminate the requirement that all housing for H-2A workers must meet health and safety standards." Some employer associations stated that they supported the concept of "using vouchers to provide housing in lieu of actually providing housing" while another commenter asserted that the housing voucher option would "undermine Congressional intent by eliminating the requirement that employers provide non-local workers with free housing that meets the basic safety and health standards."

While noting a few concerns with the proposal (e.g., employer's responsibility for violations of safety and health standards at housing obtained by the voucher), employers and employer associations generally praised the Department for the much needed flexibility afforded by this proposed change. Some commenters opined that the use of housing vouchers would "greatly stimulate H-2A participation" and "would encourage others to use legal workers." Other commenters stated that the H-2A current requirement to provide housing to workers is a serious impediment to program participation and that the implementation of a housing voucher option would make the H-2A program more usable and effective.

Comments from individuals and organizations representing employee interests criticized the voucher option, stating that the proposed safeguards were illusory and provided no substantive protections to workers. Virtually all criticism of the proposal, including from SWAs, misunderstood the Department's position and assumed health and safety standards would not apply to housing obtained with a voucher. Many of these

commenters argued that the voucher idea "ignores the reality of the situation for both U.S. and H-2A workers" in that many farmworkers, particularly H-2A workers, do not have the resources to conduct a long-distance housing search, such as access to the Internet, knowledge of the area, and language difficulties. Several found it unreasonable to expect that a worker will travel from another country, or even across the state, for employment and be able to quickly find a motel or landlord that will accept vouchers for a short-term stay.

The comments received from SWAs on the housing voucher option were generally opposed to the proposal. One SWA cited concerns that the voucher would eliminate established standards that ensure safety and healthful conditions of housing. Another SWA argued that "[t]he use of vouchers and the failure to cover the full cost of housing reflects an unrealistic understanding of the housing market for seasonal workers." Another SWA suggested that it would be impossible for the Governor to determine whether there was inadequate housing available in the area since the SWAs would not be the recipient of the labor condition applications, and therefore, would not know the number of workers in need of housing.

Some commenters criticized the Department's proposal on the grounds that many basic questions about how the voucher would function were not adequately addressed in the NPRM, including the lack of: a mechanism for determining the amount or value of the voucher; a definition of "reasonable commuting distance;" criteria to be used in determining whether the employer made a good faith effort to assist the worker in identifying, locating and securing housing in the area of intended employment; and standards to be used in the Governor's certification of insufficient housing for migrant

workers and H-2A workers in the area of intended employment. Others commenters took issue with the Department's proposal to allow workers to "pool" the vouchers, claiming that such pooling would result in workers overpaying for overcrowded and/or substandard housing. Several commenters questioned the Department on the rationale for not allowing the voucher to be redeemed for cash by the employee to a third party.

The requirement that employers furnish housing that meets applicable safety and health standards is a statutory requirement in the INA. The Department does not have authority to waive this statutory requirement, nor did the Department intend to do so in proposing a voucher option. In proposing the voucher option, the Department sought to provide some much needed flexibility to employers in fulfilling their obligation to furnish housing and, at the same time, ensure that workers are not housed in substandard conditions. After reviewing the comments received on this proposal, the Department has retained the voucher option with additional safeguards explained below to address commenters' concerns.

The Department is retaining the safeguard that the housing voucher cannot be used in an area of intended employment where the Governor of the State has certified that there is insufficient housing available to migrant farm workers and H-2A workers. This is an essential element to ensuring workers are furnished housing in accordance with the statute and regulations. However, the Department does recognize the need for guidance to States on making such a determination and commits to providing such guidance prior to implementation of this Final Rule.

The Department is also retaining, with modification, the requirement that housing meeting the applicable Federal, State or local standards is available for the period during

which the work is to be performed, within a reasonable commuting distance of the place of employment, for the amount of the voucher provided, and that the voucher is useable for that housing. The Department would like to reiterate that statute places responsibility for furnishing housing in accordance with regulations on the employer. The housing voucher option does not change this statutory responsibility. As employer who opts to furnish housing through the use of a housing voucher meet its statutory responsibilities by ensuring that the housing available to be exchanged for the voucher meets the applicable safety and health standards for the entire time the housing is occupied by the workers.

In proposing the voucher alternative, the Department expected that employers choosing to utilize the voucher would actively negotiate with owner/lessors of facilities on the acceptance of the voucher in exchange for worker housing and that the negotiated amount of the voucher would be sufficient to fully cover the costs of the housing provided. The Department has clarified this expectation in two ways. First, in sections 655.104(d)(1)(iii)(A) and (D), the Department has clarified that the owner/lessor of the housing must agree to accept the voucher as payment for the housing. Second, employers opting to use the voucher method will be required to attest in the Application for Temporary Employment Certification that the monetary amount of the voucher is sufficient to fully cover the cost of the housing plus any taxes, deposits, or other costs required by the owner/lessor of the housing and that the owner/lessor of the housing has agreed that workers will not be charged additional fees or costs for the housing. The Department believes these changes better ensure that workers receive housing at no charge as required by the statute.

The Department has decided not to include a definition of "reasonable commuting distance" in the regulatory text since the determination of whether the commuting distance is reasonable is fact-specific. A high-density area with significant traffic, for example, may result in a finding of mileage that is unreasonable that in a less-dense area would be held to be a reasonable commuting distance. Furthermore, the provision in section 655.104(h)(3) requiring employers to provide to workers transportation between the workers' living quarters and the worksite pertains to workers living in housing obtained with the voucher; the Department does not anticipate that employers will make arrangements for acceptance of the voucher with owners/lessors of housing which is outside of the reasonable commuting distance of the area of intended employment since it would go against the employers' interests to increase the cost and time associated with transporting their workers.

The Department is retaining, with modification, the safeguard requiring the employer to make a good faith effort to assist the worker in identifying, locating and securing housing in the area of intended employment upon the request of an employee. The Department agrees with commenters that some clarification is needed regarding what constitutes the employer's good faith effort to assist workers in identifying, locating and securing housing for the housing voucher. Therefore, the Department included regulatory text at 655.104(d)(1)(iii)(F) defining "good faith effort" as including, but not limited to the employer's providing to the worker the name and address of the facility or facilities at which the voucher will be accepted in exchange for housing, transportation to the facility or facilities, and providing translation services. Because the employer has already negotiated the terms of the housing voucher with the owners/lessors of the

housing, providing workers with information on facilities accepting the voucher should not be burdensome to the employer. In addition, the Department does not think it is unreasonable for an employer to provide transportation to the facility and translation services, as needed, to ensure that the worker is able to obtain housing in exchange for the voucher.

The safeguard that the housing voucher is not redeemable for cash by the employee to a third party was intended to guarantee that the voucher was only used to provide housing to the worker. The Department is aware that, given the opportunity, some agricultural workers may sell the housing voucher for cash instead of using it to obtain housing that meets safety and health standards. The Department sought to prevent this occurrence by narrowly prescribing the market value of the voucher. The Department is convinced that, with the other protections built into the housing voucher method, the limitation on redemption of the voucher by the employee to a third party is no longer necessary and has deleted this provision.

As explained in the preamble to the proposed rule, workers are not prohibited from "pooling" housing vouchers in order to secure housing provided that the pooling does not result in a violation of the applicable safety and health standards. (73 FR 8554) The Department recognizes that some workers may prefer to combine vouchers in order to secure a house instead of motel rooms and does not want to create an impediment to such arrangements. The employer will know the capacity of the facility which workers are seeking to obtain through pooled vouchers due to the employer's negotiations with the owner/lessor of the property. Because the employer is responsible for compliance with the housing safety and health provisions, the employer will determine whether, and

the extent to which, workers may pool vouchers to secure housing. Therefore, the final rule does not contain specific regulatory text on the pooling of vouchers.

To ensure that workers are afforded appropriate protections, the Department has included in the Application for Temporary Employment Certification attestations related to the provision of housing through the use of vouchers. Under this Final Rule, the employer must attest that each facility at which the voucher will be accepted meets the applicable Federal, State or local housing safety and health standards; the monetary amount of the voucher is sufficient to fully cover the cost of the housing plus any taxes, deposits, or other costs required by the owner/lessor of the housing and that the owner/lessor of the housing has agreed that workers will not be charged additional fees or costs for the housing; and the employer will furnish housing through employer-provided housing, rental or public accommodations or other substantially similar class of housing to any worker who is unable to obtain housing meeting the applicable safety and health standards with the voucher. The Department believes these requirements help guarantee workers are furnished housing, at no cost to them, which is in compliance with the applicable safety and health standards.

In addition, employers choosing to furnish housing with the voucher will be required to identify, on ETA Form 9141 Job Offer and Required Wage Request, Appendix A, each facility which has agreed to accept the housing voucher as payment for worker housing.

The final rule also requires, in section 655.104(j)(1) that employers maintain, for each worker provided housing with the housing voucher, the name and location of the facility where the worker resides. The final rule also requires, in section 655.119(c)(ix),

that employers maintain copies, if any, of agreements with housing owners/lessors for the acceptance of the housing voucher and copies, if any, of agreements with employees concerning the terms and conditions related to the use of the housing voucher.

Finally, the Department proposed to clarify and codify additional limited flexibility in regard to post-certification changes to housing. The Department's current policy[3] allows the employer to substitute rental or public accommodations for certified housing if the certified housing becomes unexpectedly unavailable for reasons outside of the employer's control. The employer is required to notify the SWA in writing of the housing change and the reason(s) for the change, and provide evidence that the substituted housing meets the applicable safety and health standards. The SWA may inspect the substitute housing to determine compliance with applicable safety and health standards. The NPRM sought to clarify and codify this policy and included a provision for the SWA to notify the CO of any housing changes and the results of housing inspections conducted on substitute housing.

Employer commenters and commenters representing employer interests universally favored the clarification in the proposal:

> The inclusion of language that permits employers to use substitute housing in the event that their approved housing becomes unavailable for reasons beyond control will be beneficial for the obvious reason that in the rare circumstances where this occurs, an employer has a housing option without being in violation.

[3] Training and Employment Guidance Letter 11–07, Change 1 (November 14, 2007)

Commenters on behalf of employees questioned the Department's authority to propose such a change and thought the proposed change would result in workers being housed in substandard housing:

> [T]his change is not permitted by the statute {INA 218(c)(4)} and would encourage potentially fraudulent "bait and switch" tactics perpetrated by H-2A employers with respect to employer-provided housing.

Commenters also questioned which standards are the applicable standards to the substitute housing.

The Department maintains that this additional limited flexibility with respect to substitute housing is the best approach in those rare circumstances where the certified housing becomes unavailable for reasons beyond the employer's control. The Department believes that the requirements that the substitute housing be rental or other public accommodations and that the employer provide evidence that the new housing meets the applicable safety and health standards offer workers the necessary protections. Therefore, the Department has included this provision in the final rule. The final rule specifically references the applicable standards to which rental or public accommodation housing, including substitute housing, is subject.

The Department received comments on other housing-related issues for which no changes were proposed. A number of commenters noted that the text of proposed section 655.104(d)(1)(i) referred to employer-owned housing, whereas the current regulation at 29 CFR 655.1102(b)(1)(i) and the preamble to the proposed rule referenced employer-provided housing. The Department did not intend to change the requirement that employer-provided housing must meet the applicable Federal standards for temporary

labor camps and has corrected this inadvertent reference to "employer-owned" in the regulatory text.

A few commenters urged the Department to relieve employers in certain border communities (i.e., Yuma, AZ) of the requirement to provide housing to H-2A workers from Mexico who are able to commute back to their homes across the border on a daily basis. The Department does not have the authority to waive the statutory obligation placed on employers to provide housing to H-2A workers. The Department does not believe it has a legal basis upon which to permit employers to employ H-2A workers without providing those workers with housing. Of course, there is no statutory requirement that workers actually reside in the employer-provided housing. So, an H-2A worker who resides within commuting distance of a home across the border could presumably return home each night if the worker wanted to, provided the employer didn't require its workers to reside in specific housing as a condition of the work agreement.

Some commenters suggested that U.S. Department of Agriculture Section 514 Farm Labor Housing Loans should be made available for the construction of housing used for H-2A workers. The Department has no authority to make the change requested by these commenters.

Several commenters raised specific concerns about the attestation process as related to housing for agricultural workers. These commenters believe that the attestation process will lead to abuses in housing because there is no process in place for establishing compliance with the housing inspection request. The Department believes it is highly unlikely that an attestation-based application will lead to additional abuse of the system. Housing inspections are still required to be completed by SWAs as part of the

certification process. This new system, the Department believes, gives the housing inspectors more time to complete inspections and should actually lead to more substantive inspections that in turn will help ensure violations are corrected.

One trade association provided comments describing a situation in the border state of Arizona. According to the association, Yuma, Arizona employers have traditionally attracted tens of thousands of seasonal workers daily, approximately half of whom reside in the U.S. while the other half choose to maintain their residences in Mexico. This association believes that requiring employers in such instances to provide housing and transportation not only hinders participation but ignores reality. The association commented that providing a housing voucher would be helpful. However, it strongly recommended that Department examine the H-2A program thoroughly to see where it can be modified or refined to accommodate areas like Arizona and further commented that, if necessary, the Department should issue a supplemental NPRM proposing additional changes. As already noted, the Department has no discretion under the statute not to require that housing be provided to such workers. The Department recognized that the statutory rules may not be well-tailored to the situation at the border, but it has little discretion to do anything about it.

Finally, the Department notes it has made several non-substantive changes to the text of 655.104(d) to provide clarity. For example, the NPRM noted the obligation to provide housing to those workers who are not reasonably able to return to their permanent residence "within the same day." The Department has amended this phrase to "at the end of the day" for readability. For the same reason, the term "without charge"

has been amended to read “at no cost to the worker,” in order to ensure clarity and understanding. In addition, non-substantive changes have been made to comport with plain English standards (for example, the use of active voice, such as the change in 655.104(d)(6)(iii) to read “The SWA is required to make its determination”).

e. Section 655.104(e)--Workers’ Compensation

The NPRM proposed to continue the current requirement that the job offer must contain the provision of workers’ compensation insurance. This is a statutory requirement. The INA at Section 218(b)(3) requires the employer to provide the Secretary with satisfactory assurances that “if the employment for which certification is sought is not covered by State workers’ compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker’s employment which will provide benefits at least equal to those provided under the State workers’ compensation law for comparable employment.” One commenter noted the State of Washington has an unusual Worker’s Compensation statute that requires workers to contribute 50% of the premium unless the employer is self-insured, whereas the NPRM required the employer to provide such insurance at no cost to the worker. The intent of the workers’ compensation provision in the INA is to ensure that no worker is left without insurance in those States that exclude agricultural work from coverage. Therefore, the Department has modified language in 655.104(e) to clarify that the employer should follow State law, but if the State excludes the type of employment for which the certification is being sought, then the employer must purchase the insurance at no cost to the worker.

Other commenters complained that the Department no longer requires submission of proof of Worker's Compensation Insurance. These commenters believe that employers circumvent this requirement by having inadequate coverage or by allowing the coverage to lapse after receiving certification, or by not buying it all because state law does not require it.

The Department is confident that the attestation based application system will allow the Department to enforce these provisions because these attestations are made under penalty of perjury. If it is revealed during an audit that an employer fraudulently claimed to have met all program requirements, the employer would also be subject to debarment from the program.

f. Section 655.104(f)—Employer-provided Items

The NPRM proposed to continue the current requirement that employers provide workers with "all tools, supplies, and equipment required" to perform the duties of the job. The NPRM allowed employers to require workers to provide tools or equipment where the employer can demonstrate such a practice was "common" in the area of employment. The Department received one comment relating to its proposal, asserting that the Department should not have deleted the current language mandating approval from the Department if employers require employees to purchase any tools and equipment because it is common practice to do so. Whether a common practice in fact exists will still be a determination of fact, to be decided ultimately by the Department and not by the employer. The only shift in this determination is that the employer will now bear the burden of proof in the event of an audit or investigation to show that the practice

claimed in fact exists. The Department will take appropriate action in the event of a discrepancy.

The Department has made amendments to this provision to revert to the current requirement of a "prevailing practice" rather than a "common practice." This change, in combination with the reversion to the definition of what is a "prevailing" practice, will enable employers to understand clearly when such charges are permitted. The Department believes it will be easier for employers to determine when a practice is "prevailing" pursuant to the mathematical formula for that term that is a vague formulation. Language was inserted referencing the requirements of section 3(m) of the Fair Labor Standards Act, 29 U.S.C. 203(m) (FLSA), which does not permit deductions for tools or equipment that reduce an employee's wage below the wage required under the minimum wage, or, where applicable, the overtime provisions of the FLSA.

g. Section 655.104(g)--Meals

Section 655.104 (g) concerns the provision of meals to workers and the amount employers may charge workers for meals each day. Although the Department proposed no changes to this section, a few comments were received stating that the amount allowed to be charged/reimbursed does not reflect the true cost of the employer's providing or the worker's purchase of meals. The Department reminds employers of their ability to petition for higher meal charges, a practice which has been continued in the Final Rule in Section 655.114.

h. Section 655.104(h)--Transportation

Existing regulations at 20 CFR 655.102(b)(5) require employers to provide or pay for workers' daily subsistence and transportation from the place from which the worker has come to the place of employment. The employer is to advance these costs to the worker when it is the prevailing practice of non-H-2A employers in the occupation and area to do so. If the employer has not advanced transportation and subsistence costs or otherwise provided or paid for these costs and the worker completes 50 percent of the work contract period, the employer is required to reimburse the worker for these costs at that time. The Department proposed no change to this requirement, but sought comments and information on the costs and benefits to employers and workers of continuing to require employers to pay for the workers' inbound and outbound (return) subsistence and transportation costs. (73 FR 8554-8555)

The Department received several comments on this requirement. Some comments from employers and employer associations advocated that employers and employees should share the costs of workers' inbound subsistence and transportation. These commenters argued that both employees and employers benefit from the H-2A employment relationship and therefore should share the costs. Others suggested that the employees should bear the full cost of their inbound subsistence and transportation, arguing that the inbound travel primarily benefits the workers as they are able to seek subsequent H-2A employment once they are in the country. Some commenters also noted that no other nonimmigrant work-related program requires employers to pay for the workers' inbound subsistence and transportation.

Comments from employee advocates urged the Department to continue the requirement that employers provide or pay for workers inbound subsistence and transportation costs, asserting that inbound subsistence and transportation costs:

> [a]re necessary for many reasons – to attract U.S. workers; to encourage employers to fully employ the workers in whom they have invested and to recruit only those workers needed; …and, because farmworkers wages are so low, to prevent farmworkers from becoming even more deeply indebted (and more exploitable) or from seeking low-cost transportation that is often unregulated and deadly.

While there was disagreement among commenters on the current requirement that employers pay inbound subsistence and transportation, there was agreement that employers should continue to pay for workers' outbound transportation. Employer and worker advocate commenters agreed that payment of outbound travel is a critical means to help ensure that workers depart the U.S. at the end of their H-2A contract.

Many comments addressed the timing of reimbursement to workers for inbound subsistence and transportation costs. Most commenters referenced the appellate court's decision in Arriaga v. Florida Pacific Farms, L.L.C., 305 F.3d 1228 (11th Cir. 2002), rehearing en banc denied, which held that the growers violated the minimum wage provisions of the Fair Labor Standards Act (FLSA) by failing to reimburse farmworkers during their first workweek for travel expenses (and visa and immigration fees) paid by the workers employed by the growers under the H-2A program. Under the FLSA, pre-employment expenses incurred by workers that are primarily for the benefit of the employer are considered deductions from the employees' wages during the first

workweek, and such deductions must be reimbursed to the extent that the costs effectively result in workers' weekly wages being below the minimum wage. Although the employer in the Arriaga case did not take deductions from the workers' wages, the Court held that the costs incurred by the workers amounted to "de facto deductions" that the workers absorbed, thereby driving the workers' wages below the statutory minimum. The Eleventh Circuit reasoned that the transportation and visa costs were necessary and incidental to the employment of the workers and stated that "[t]ransportation charges are an inevitable and inescapable consequence of having H-2A foreign workers employed in the United States; these are costs which arise out of the employment of H-2A workers." Finally, the court held that the growers' practices violated the FLSA minimum wage provisions, even though the H-2A regulations provide that the transportation costs need not be repaid until the workers complete 50 percent of the contract work period. The Eleventh Circuit noted that the H-2A regulations require employers to comply with applicable federal laws, and in accepting the contract orders in this case, the ETA Regional Administrator informed the growers in writing that their obligation to pay the full FLSA minimum wage is not overridden by the H-2A regulations.

Comments from employers recommended continuing the Department's requirement that workers be reimbursed at the 50 percent point of the work contract, stating that the current policy appropriately balances the interests of employers and employees by creating an incentive for employees to complete at least half of the contract. Many employers urged the Department not to require immediate reimbursement to workers and that the Department:

> …should explicitly state that an employer of H-2A workers does not have an obligation under the INA, the Fair Labor Standards Act ("FLSA"), or DOL regulations to reimburse a worker's in-bound transportation expense until the 50% point of the work contract and that if a worker's payment of inbound transportation and subsistence costs reduces his/her first week's wage below the minimum wage, such reduction does not result in a violation of the FLSA.

Employee advocates, on the other hand, pressed the Department to require employers to comply with the FLSA which, they state, requires the reimbursement of costs at the beginning of employment when those costs are for the benefit of the employer and effectively reduce the workers' weekly income below the minimum wage. Another employee advocate suggested that the Department consider requiring H-2A employers to advance to workers inbound costs and to pay referral fees to domestic labor contractors to encourage the movement of low-wage U.S. workers to labor shortage areas.

After due consideration of the comments, the Department has determined to continue the current policy of requiring employers to provide or pay for workers' inbound and outbound subsistence and transportation and the corresponding requirement for reimbursement of such inbound costs upon the worker's completion of 50 percent of the work contract period. The Department recognizes the conundrum faced by employers on the timing of reimbursement to workers for their inbound subsistence and transportation expenses. Employers within the Eleventh Circuit must, of course, abide by the court's decision in Arriaga. However, the Department continues to believe that reimbursement at the 50 percent point is appropriate, as at least up until that point in the

work contract the employer has not received sufficient benefit from incurring the costs for them to be considered primarily for the employer's benefit. Thus, the Department believes that the better reading of applicable statutes and regulations indicates that immediate reimbursement of workers is not required by the FLSA in the context of the H-2A program.

The FLSA allows an employer to count as wages the reasonable cost of "furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." 29 U.S.C. 203(m). The regulations do not define facilities other than to state that they "must be something like board or lodging." (29 CFR 531.32) The regulations also state that "[t]he cost of furnishing "facilities" found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages." (29 CFR 531.3(d)(1))

Many "facilities" are of some benefit to both the employer and the employee. Foreign workers seeking employment under the H-2A nonimmigrant visa program often travel a great distance to accept the offer of employment made by growers. Their travel allows them not only to perform work, but to live and engage in non-work activities in the U.S. The fact that farmworkers voluntarily traveled such a great distance to obtain work indicates that the travel benefits the employees at least as much as it did the employers. The comments also support this. Had the workers not deemed the jobs as ultimately benefiting them economically, bearing in mind the unavailability of comparable-paying jobs in their own country, then they would not have been willing to travel the many miles required in order to come to work for the growers.

Further, absent the primacy of the 50 percent rule and the fact the worker must pay for his own transportation, a worker would have little incentive to stay and complete the work under the certification, and the program could then devolve into an almost certain avenue for workers to get a "free ride" into the U.S. without having to provide anything in return. The practical effect of the Eleventh Circuit's decision is to require employers to advance the workers' return transportation costs without any reciprocal guarantee that the workers will continue to work for the employer after the first workweek. In the Department's view, at least until the 50% point in the work contract, the employer has not yet received sufficient benefit from the employee's travel for the travel costs to be deemed as having produced any substantial benefit at all for the employer. Indeed, given the comments of worker advocates that employer-provided transportation provides workers the substantial benefit of transportation that is safe and secure, and avoids placing the workers in debt in ways that render them vulnerable to exploitation, the Department believes that the transportation requirement must be deemed to be primarily for the benefit of the employees, at least until the 50% mark in the work contract is met. Thus, the Department has publicly stated that "in enforcing the FLSA for H-2A workers, the Department's general policy is to ensure that workers receive transportation reimbursement by the time they complete 50 percent of their work contract period (or shortly thereafter) rather than insisting upon reimbursement at the first pay period." The Department continues to believe that this is the appropriate interpretation of the interplay between the H-2A program regulations and the FLSA in regards to transportation reimbursement. It cautions employers, however, that they are required to abide by governing judicial decisions applicable to their place of employment.

The phrase in the current regulation "place from which the worker has departed" establishes the beginning point from which employers must provide or pay for inbound subsistence and transportation and, if the worker completes the work contract period, the ending point for outbound subsistence and transportation. This phrase has at times been interpreted by the Department to mean the worker's "home." or the place from which the worker was recruited. Most recently, the phrase was addressed in ETA Training and Employment Guidance Letter No. 23 -01, Change 1 (August 2, 2002); "'[h]ome' is where the worker was originally recruited." While the Department proposed no changes to this regulatory language or interpretation, comments were received on this point. One agricultural association suggested that the Department clarify that transportation from and back to the place from which the worker came to work should be considered to require transportation from or to the site of the U.S. Consulate that issued the visa. This commenter stated:

> For the past 20 years the phrase "from the place from which the worker has come to work for the employer to the place of employment," has meant payment of transportation from the location of the U.S. Consulate which issued the H-2A visa to the place of employment of the petitioning employer. Although the Department in its memoranda refers to "place of recruitment" its examples of how this rule works speaks only of transportation from and back to the worker's home country. There is no mention of the worker's village. This interpretation is in line with the INA and DHS regulations which do not allow a worker to enter the U.S. until that foreign worker has an H-2A visa. Thus, the worker cannot "come to work or the employer" until he or she has an H-2A visa. It is at the point that

the worker has the H-2A visa that he or she is eligible to go to work for the employer.

The Department finds this to be a compelling argument. It is the Department's program experience that workers, particularly H-2A workers, gather in groups for processing and transfer to the U.S. The logical gathering point for these workers is at the U.S. Consulate's location, as the workers encounter the process for the first time at the visa application. It is the place in the foreign country from which all workers must depart, as all workers must obtain a visa for admission. In most countries which send H-2A workers to the U.S., even such processing is usually centrally located (in Monterrey, Mexico, for example, rather than in Mexico City or another consulate location). Choosing this option also provides the Department with an administratively consistent place from which to calculate charges and obligations. We have therefore made corresponding changes in the regulatory text to clarify that the "place from which the worker has departed" for foreign workers outside of the U.S. is the appropriate U.S. Consulate.

Finally, the Department sought to clarify that minimum safety standards required for employer provided transportation between the worker's living quarters (provided by the employer pursuant to INA 218(c)(4)) and the worksite are the standards contained in the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) (29 U.S.C. 1841). The Department does not seek to apply MSPA to H-2A workers and has no authority to do so. This clarification is intended to remove any ambiguity concerning the appropriate minimum vehicle safety standards for H-2A employers.

i. Section 655.104(i)--Three-fourths guarantee

The Department chose, in the NPRM, to continue the so-called "three-fourths guarantee," by which it ensures that H-2A workers are offered a certain guaranteed amount of pay for the completion of the specified period of the contract. In doing so, the Department suggested some minor changes to make the guarantee easier to apply in real-life situations.

One grower association objected to the three-fourths guarantee. They stated that it needs to be eliminated because it is arcane, is seldom understood by the growers, and complicates the system by creating more "red tape" for the growers. Other commenters supported the rule, but commented on the nuances of the changes made to the rule under the NPRM. And a few commenters believe the guarantee deters employers from over-recruiting, which creates an oversupply of workers and drives wages down, and by contrast assures long-distance migrants that attractive job opportunities exist. However, these commenters also believe that worker abuses stem from the guarantee requirement, such as employers misrepresenting the length of the season. They suggested the Department add language to allow workers to collect the three-fourths guarantee "based on the average number of hours worked in a particular crop region and upon a showing of having worked through the last week in which the employer offered work to a full complement of his workforce."

The Department does not believe the rule is obsolete. On the contrary, it provides essential protection for workers, both domestic and foreign (H-2A), in that it ensures their commitment to a particular employer will result in real jobs that meet their reasonable expectations. The Department does not find this argument credible. For those employers

that might try to evade their responsibilities, the Department has created debarment proceedings and other protections, such as significant monetary penalties to act as a deterrent. Organizations such as those represented by the commenters are encouraged to provide information to the Department that will help open an investigation into employers who are abusing the system to avoid paying workers the minimum guaranteed to them.

Changing the three-fourths guarantee to be based on a per-crop harvest calculation using an average of hours worked rather than a contract period would make it nearly impossible to track and enforce the guarantee and administratively unworkable. It is unclear to the Department how these commenters expected the guarantee to be made without a contract period (all three comments used the identical three sentences to describe their suggestion). To force employers to keep track of workers on a per-crop basis and allow the workers to collect money based on the three-fourths guarantee when the U.S. workers transition from one employer to another during the peak harvesting times appears patently unfair and the Department is not willing to create such an option.

Two commenters also suggested that the Department take out the reference to "work hours" and return the term "workday" because the commenters believed that the employer could submit orders based on a "bogus" hourly work day or work week. The Department purposely added the sentence with "work hours" and kept the old references to "workday" in the NPRM in order to make the formula for calculation of the total amount guaranteed easier to understand and calculate. The end result is the same. An unscrupulous employer could commit the same abuse under the old system as under this new system.

A farm bureau requested that we insert language at the end of 655.104(i)(1) to protect employers from U.S. workers who voluntarily abandon employment in the middle of the contract period and then return at the end of the contract period or those U.S. workers who show up in the middle of the contract period. This commenter does not believe that an employer should have any liability under the three-fourths guarantee rule for such unreliable employees. The guarantee has never applied to workers who voluntarily abandon employment. In the final rule this is stipulated in 655.104(n).

Farmworker advocates expressed concern that the Department would not enforce this provision. The Department appreciates the comment and will take the issues raised by this commenter into consideration when implementing the new rule.

Another commenter requested clarification on what hours an employer may count toward the three-fourths guarantee when an employee voluntarily works more than the contract requires. The commenter asked for language to be inserted into 655.104(i)(3) stating that all hours of work actually performed including voluntary work over and above the contract requirement can be counted by the employer. The Department believes that adding the language requested by commenter to 655.104(i)(3) would be redundant because such language was added to 655.104(i)(1) in the NPRM and is included in the final rule.

In proposed paragraph 655.104(i)(5) the Department sought to reiterate the employer's obligation to provide subsistence and transportation between the worksite and living quarters to workers during the contract period, notwithstanding the three-fourths guarantee. The proposed paragraph, while entitled Obligation to provide housing and meals, actually discussed the obligation to provide subsistence and transportation. Two

comments were received on this paragraph. One employer association suggested that the text of the paragraph be revised to reflect that employers are not obligated to provide housing to workers who quit or are terminated for cause. One employee advocacy organization commented that the clarification that the employer is not allowed to shut down the labor camp or the camp kitchen during the contract period is a positive change. The Department has modified the paragraph to clarify that the employer's obligation to provide housing and subsistence during the contract period is not affected by the three-fourths guarantee and that employers are not obligated to provide housing to workers who voluntarily abandon employment or are terminated for cause.

Finally, the Department in the NPRM inadvertently deleted some qualifying phrases from this provision. Section 655.104(i)(3) discusses an employee's failure to work in the context of calculating of whether the period of guaranteed employment has been met. The final rule reinserts the phrase "permitting an employer to count all hours of work actually performed (including voluntary work over 8 hours in a workday or the worker's Sabbath or Federal Holiday)." The final rule also reinserts the reference to an employer's non-liability for payment to an H-2A worker whom the CO certifies is displaced because the employer's compliance with accepting referrals of U.S. workers up to 30 days after the first date of need in Section 655.104(i)(4).

j. Section 655.104(j)--Records

The NPRM proposed continuing the "keeping of adequate and accurate records" with respect to the payment of workers, making only minor modifications to the current regulation. The Department received several comments specific to the provisions of this section.

A commenter requested that the Department eliminate the requirement for employers to provide information to the worker through the worker's representative upon reasonable notice. Another commenter suggested refinements to the provision, including suggesting that a "worker's representative" be defined and documented in some manner so as to prevent the theft of information under the guise of disclosure to worker's representatives, and also to require disclosure of records within five days instead of upon "reasonable" notice.

The Department does not believe this requirement should be eliminated because it is the Department's goal to encourage the availability of information to workers. The Department agrees it did not clarify in sufficient detail who or how a worker's representative can be identified so as to prevent disclosure of records to the wrong persons, such as an employer's competitors, and accordingly has added clarifying language in the Final Rule. However, with respect to changing "reasonable time" to five days, the Department declines to adopt a hard-and-fast rule, but agrees that five days is a reasonable minimum period of notice. We believe that providing more flexibility rather than a strict timeframe is warranted in such a situation. The standard of what constitutes "reasonable" notice in this situation will fluctuate given the time of year and the number of records involved; reasonable notice in the harvest seasons might be as much as a week to 10 days, whereas such notice at other times might be the 5 days recommended by this commenter.

k. Section 655.104(k)--Hours and Earnings Statements

The Department did not receive any comments on this section. However, the Department made non-substantive changes to this Final Rule's provision to reflect plain English standards.

l. Section 655.104(l)--Rates of Pay

In the NPRM, the Department proposed to require employers to pay the highest of the adverse effect wage rate, the prevailing wage rate, or the Federal, State, or local minimum wage. Comments specific to the issue of the wage rate are dealt with in 655.108. The NPRM further proposed a modest change to the regulation governing productivity standards. Under existing regulations, an employer who pays on a piece rate basis and utilizes a productivity standard as a condition of job retention must utilize the productivity standard in place in 1977 or the first year the employer entered the H-2A system with certain exceptions and qualifications. The NPRM proposed to simplify this provision by requiring that any productivity standard be no more than that normally required by other employers in the area. The Final Rule specifies that required productivity standards cannot be unusual for workers performing the same activity in the area of intended employment.

No commenter explicitly opposed the change in the methodology by which acceptable productivity standards are determined, but several employers asked for additional flexibility in order to be allowed to use a productivity standard even if the majority of employers in the area do not utilize one. We believe the standard in the final rule will provide adequate flexibility for employers while ensuring that the wages and

working conditions of U.S. workers are not adversely affected by the use of productivity rates not usual in the area of intended employment.

Because this provision talks about the use of piece rates, several comments took the opportunity to suggest changes to how piece rates are treated within the H-2A program. Worker advocates argued for the reinstitution of pre-1986 rules regarding piece rate adjustments. Some employers argued that the Department should not attempt to regulate piece rates. As the NPRM did not propose changes to long-standing procedures for the regulation of piece rates, these comments have not been considered for purposes of this final rule.

m. Section 655.104(m)--Frequency of Pay

The Department proposed in the NPRM to continue the requirement of the current regulation that the employer must state in the job offer the rate of frequency with which the worker is to be paid, based upon prevailing practice in the area but in no event less frequently than twice a month. The Department received one comment on this provision noting that weekly or daily earnings are "always" the prevailing practice in agriculture, never bi-weekly, and that the Department should accordingly require weekly payment. Because the Department has maintained this provision in the current regulations for more than 20 years with no dissension form the employer or worker communities, the provision will not be amended at this time. The Department notes that the stated minimum frequency is secondary to the prevailing practice n the area; if it is "always" the case that wages are paid weekly (or even more frequently), that practice will take precedence and the Department will seek to enforce that prevailing practice.

n. Section 655.104(n)—Abandonment of Employment

The NPRM included a provision that the employer is not required to pay the transportation and subsistence expenses of employees that abandon employment, provided the employer notifies the Department or DHS within 48 hours of abandonment. One association of farm employers argued that this requirement was unreasonable in that the typical practice is termination in the event of 3 days beyond the abandonment or "no show" of the worker. One employer opined that this requirement should create an obligation on the part of the Department to help employers locate and pursue remedies against employees who voluntarily abandon employment without returning to their home country.

The Department acknowledges the need for clarification in the provision to ensure that the 48 hour standard begins to run only when the abandonment is discovered. The Department has therefore, added language to the provision clarifying that the employer must notify no later than 48 hours "after such abandonment or termination is discovered by the employer."

o. Section 655.104(o)—Contract Impossibility

The current and proposed regulations contain a provision that allows an employer to ask permission from the Department to terminate an H-2A contract if there is an extraordinary, unforeseen, catastrophic event or "Act of God" such as a flood or hurricane that makes it impossible for the business to continue.

One commenter noted that the proposed regulation eliminates a current requirement that "the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker," and stated that U.S. workers, in particular, would benefit from such an effort. The Department declines to adopt this suggestion, as it believes the workers themselves will be in a better position to find alternative job opportunities than an employer whose business enterprise has just been brought to the brink of ruin by an Act of God.

p. Section 655.104(p)--Deductions

The Department, in the NPRM, proposed requiring employers to make assurances in their application that they will make all deductions from the workers' paychecks that are required by law. A group of farmworker advocacy organizations asserted that the Department was skirting its responsibility under Arriaga by allowing "reasonable" deductions to be taken from a worker's paycheck without any mention of the FLSA. This commenter believes that the Department inappropriately removed clarifying language in the current regulation that "an employer subject to the Fair Labor Standards Act (FLSA) may not make deductions which will result in payments to workers of less than the federal minimum wage permitted by the FLSA." This commenter opined that workers under the H-2A program are entitled to full coverage under the FLSA, and that the Department should not make regulatory changes which suggest otherwise. By eliminating this language from the rule, this commenter believes the Department would effectively undermine the rights of farm workers to be paid the minimum wage free and

clear of costs imposed on them for inbound transportation and visa costs, as established by case law, thereby failing to provide such rights in the H-2A program.

The Department does not agree with this commenter's characterization of the applicable law under the FLSA governing inbound transport. Nevertheless, we have returned the deleted language to the Final Rule to clarify that employers must of course comply with all statutory requirements.

q. Section 655.104(q)--Copy of work contract

The NPRM contained the provision found in the current regulation specifying that a copy of the work contract must be provided to the worker no later than the date the work commences. One group of farmworker advocacy organizations pointed out that this proposed regulation does not require that the work contract be given to the employee in the employee's native language and believed that these regulations as proposed are contrary to the requirements in MSPA [29 U.S.C. 1821] for domestic workers. The Department recognizes that MSPA requires that required disclosures be provided, as necessary and reasonable, in Spanish or other language common to workers who are not fluent or literate in English. The INA in Section 218 does not provide a similar requirement for H-2A, and therefore such a requirement was not incorporated into the H-2A regulations. However, the completion of Form ETA 790, the form that comprises the agricultural clearance order that is submitted to the SWA, guarantees that the worker receives the job's core duties in Spanish.

8. Section 655.105 --Assurances and Obligations of H-2A Employers

The Department proposed instituting an application requiring employers to attest to their adherence to the obligations of the H-2A program. The Department received many comments expressing approval of the new attestation-based system, and others opposed to such a change. Still other commenters expressed general approval of the new attestations but suggested changes to the attestations and the process of submitting such attestations.

The Department received two comments regarding the substantive obligations imposed on employers through the attestations. One commenter requested that the Department add another attestation that employers will not confiscate workers' passports. Another commenter requested that the Department impose substantial penalties on employers who lure H-2A workers away from contract jobs before the termination of their contracts. This commenter believes that such a practice victimizes both the employer, who loses laborers, and the employee, who loses status under U.S. law when they prematurely terminate a contract.

The Department is not aware that the confiscation of passports is a widespread practice among agricultural employers hiring H-2A workers. However, where evidence of such practice is found, it would likely indicate the presence of other practices prohibited by the H-2A regulations, such as the withholding of pay and other program entitlements. In such situations, the Department possesses mechanisms under this Final Rule to investigate and take appropriate action against such unscrupulous employers, both through program actions including revocation and debarment and through direct enforcement (civil fines, debarment). Confiscation of the passports will also typically

constitute theft punishable under State law. The Department welcomes specific and credible information on such practices as it takes such charges very seriously.

On the subject of changes of employment, the proposed companion regulation to the NPRM, issued by USCIS (73 Fed. Reg. 8230, Feb. 13, 2008), underscored that H-2A workers are free to move between H-2A certified jobs, and proposed to provide even greater mobility. The ability of workers to move to new employment is not something the Department wishes to discourage.

One commenter requested that we allow substitution of H-2A workers at the port of entry without having to file a new petition. An Application for Temporary Labor Certification is filed without the names of the foreign workers. Substitution at the port of entry – presumably because the alien named in the DHS petition filed pursuant to that labor certification was not admitted – is a question more properly addressed by DHS.

a. Section 655.105(a)

The attestation at 655.105(a) in the NPRM requires the employer to assure the Department that the job opportunity is open to any U.S. worker and that the employer conducted (or will conduct) the required recruitment, and was still unsuccessful in locating qualified U.S. applicants in sufficient numbers to fill its need. This assurance was criticized by a farm bureau because it believes that it is impossible for employers to state they "will conduct" recruitment as required in the regulations and at the same time attest that they were unsuccessful in finding any U.S. workers. The Department has clarified this language in the Final Rule to enable employers to attest that they "have been" unsuccessful in locating U.S. workers sufficient to fill the stated need.

One group of advocacy organizations believes the Department should retain the language from the current 655.103(c), which states: "Rejections and terminations of U.S. workers. No U.S. worker will be rejected for or terminated from employment for other than a lawful job-related reason, and notification of all rejections or terminations shall be made to the SWA." (Emphasis supplied.) This commenter requests that the provision against termination should be added to the assurance found in the new 655.105(a), specifically where it states: "Any U.S. workers who applied for the job were rejected for only lawful, job-related reasons."

The Department declines to add language regarding terminations at this location in the regulations. The provision at issue is an attestation by an employer regarding the hiring of U.S. workers, not their termination. The termination of U.S. workers for inappropriate reasons is already covered under the regulations by the prohibition in 655.105(j), discussed below. Thus, the termination of U.S. workers for inappropriate reasons is already contained in a separate provision.

b. Section 655.105(b)

This provision requires employers to offer terms and conditions that are "normal to workers similarly employed" and "which are not less favorable than those offered to the H-2A workers." One commenter noted that this standard is not sufficiently protective of the wages and working conditions of U.S. farmworkers to meet the statutory precondition that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers. According to this commenter, a practice applying to a small percentage of workers may still be considered "normal." This commenter opined that this

criterion violates the statute, because requiring anything less than the prevailing practices of non-H-2A employers with respect to job terms will necessarily harm U.S. workers, either by putting downward pressure on wages and conditions and/or by facilitating job offers that are meant to deter U.S. workers from applying and accepting work.

The Department disagrees. Where the Department has identified particular terms or working conditions that have an important impact on U.S. workers—such as wages or the obligation to provide tools—it has inserted provisions addressing them directly, typically by requiring adherence to prevailing practices. Not every term or condition attaching to a job, however, threatens to negatively impact the wages and working conditions of U.S. workers simply because it is uncommon. An employer may, for example, be the only employer in the area that grows a particular crop, or that requires the use of a particular tools. Such requirements generally do not threaten to adversely affect U.S. workers and are not entirely legitimate for employers to impose. Other specific provisions in the regulations safeguard against conditions and terms designed to discourage U.S. workers and for which there is no business reasons.

c. Section 655.105(c)

The Department proposed in the NPRM to continue to require that the employer submitting an application attest that the job opportunity being offered to H-2A workers is not vacant because the former occupants are on strike or locked out in the course of a labor dispute involving a work stoppage The comments regarding labor disputes, which overlap with the contents of 655.109(f), are addressed below.

d. Section 655.105(d)

The NPRM included a provision that required the employer to attest it would continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity. The time by which the employer had to accept referrals, which was the later of the date the H-2A workers departed the home country or three days prior to the date of need, has been amended in this Final Rule to reflect the longer recruitment period discussed supra, e.g. the date that is 30 days after the first date the employer requires the services of the H-2A worker.

The only comment that the Department received on this section is discussed in greater detail under the Department's discussion of the 50 percent rule in 655.102(b), above.

e. Section 655.105(e)

No comments were received on 655.105(e)(1) regarding the attestation promising to comply with all labor laws. Comments received on 655.105(e)(2) pertaining to the housing attestation are addressed in 655.102(e) and 655.104(d). Comments received for 655.105(e)(3) pertaining to the workers' compensation attestation are addressed in 655.104(e). Finally, comments received on 655.105(e)(4) about the transportation attestation are addressed in 655.104(h) and the comments on worker protections are addressed in the revocation section 655.117.

f. Section 655.105(f)

Several commenters commented on section 655.105(f), which as published in the NPRM required employers to notify the Department and DHS within 48 hours if an H-2A worker leaves the employer's employ prior to the end date stipulated on the labor certification. The commenters thought that 48 hours was not enough time to accomplish this especially in light of DHS' requirement that proof of notification be kept for up to one year. The commenters thought it was unfair to require the employer to comply with this requirement and incur the added expense of sending the notice by certified mail. One commenter went on to say that such notice is not needed in all cases. The commenter cited the example of an employee transferring to another employer with approval to do so by the Department and DHS and asks why the employer should still be required to provide notification in such cases. According to this commenter, notification should only be required if the H-2A worker absconds from the work site without official permission to do so.

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. For instance, an employer would no longer be responsible for providing or paying for the subsequent transportation and subsistence expenses or the "three-fourths guarantee" for a worker who has separated prior to the end date stipulated on the labor certification, either through voluntary abandonment or termination for cause. 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, the Department revised the

notification requirement to reflect a time period of no later than 48 hours after the employer discovers the employee is missing.

The Department also received comments on this section relating to notification when H-2A workers leave their home country for the first place of intended employment. The Department believes those comments pertain to requirements in the DHS NPRM published February 13, 2008 rather than the Department's NPRM of the same date.

g. Section 655.105(g)--Offered Wage Assurances

Comments received pertaining to the offered wage are addressed in 655.108.

i. Section 655.105(i)

The NPRM contained an assurance requiring the employer to attest that it was offering a full-time temporary position, whose qualifications are consistent with the "normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations or crops." This was a continuation of current obligations.

The Department received several comments relevant to this provision. One commenter opined that the Department should scrutinize employer applications that offer U.S. workers a 30-hour work week arguing that such a requirement is not normal and is meant to dissuade U.S. workers from applying when in reality H-2A workers would work 50-60 hours a week. The commenter argues, under the new rule, it will become impossible for the Department to deny an application because the standard for what is "normal" is so lax.

The word "normal" in 655.105(i) does not refer to the requirement that the jobs be full-time, but rather to the qualifications provision in that section. Thirty hours a week has never been considered full-time employment in the H-2A program, and full-time employment is a basic program requirement. Moreover, other provisions in these regulations prohibit giving H-2A workers more favorable job terms than were advertised to U.S. workers, which include the number of hours of employment.

Another commenter noted that the requirement that the job duties be normal to the occupation and not include a combination of duties not normal to the occupation. has led to frequent disputes, particularly in specialty areas of agriculture. This commenter noted that there is a distinction between restrictive requirements that are clearly contrived for the purpose of disqualifying domestic workers and those directly designed to producing specialized products, utilizing unusual production techniques or otherwise seeking to distinguish their products in the marketplace.

The Department agrees that the INA was not meant to require employers to adhere to timeworn formulas for production in the H-2A or any other employment-based category, and that job requirements for which there is a legitimate business reason—in other words, requirements that really do relate to a job needed to be performed and are not designed for the sole purpose of discouraging U.S. workers—should be allowed. The plain text of this provision, however, deals with qualifications, not job duties. Job duties are addressed in 20 CFR 655.104(b).

j. Section 655.105(j)--Layoffs

Two commenters saw the new provision on layoffs as unnecessary and unworkable. One commenter saw this as contrary to the section on unforeseeable events and also illogical because many employers request a contract period of ten months. This would mean that employers would be unable to lay off workers at the end of one season, because the new season begins within 60 days and the proposed 75–day requirement will not have lapsed. Another commenter suggested a change to the language in this section to include a caveat that such layoffs shall be permitted where the employer also attests that it will offer or has offered the opportunity to the laid-off U.S. worker(s) beginning on the date of need, and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons.

The Department agrees with the changes proposed by the commenters in general. We have made the time change to reflect the revised timetables for recruitment in the Final Rule. We also agree that layoffs must be qualified with the opportunity for U.S. workers to be rejected for lawful, job-related reasons as being essential to preserving the employer's right to reject those workers it knows to be unreliable. We have accordingly inserted these changes in the Final Rule.

k. Section 655.105(k)--Retaliation and discharge

One commenter reasoned that the Department has weakened its own enforcement ability by eliminating the word "discharge" from the list of prohibited retaliatory acts against a worker who files a complaint or testifies against the employer, consults with an attorney, or asserts any rights on behalf of himself/herself or other workers.

The Department believes it has, in fact, strengthened its enforcement ability by addressing discharge separately in 655.105(l).

m. Section 655.105(m)--Timeliness of fee payment

The Department received one comment on this section and has addressed it in the debarment section.

o. Section 655.105(o)-- Prohibition on Cost-shifting

The Department included in the NPRM a provision prohibiting employers from shifting costs for activities related to obtaining labor certification to the worker and further requiring the employer to contractually forbid its agents from accepting money from the H-2A worker for hiring him or her. The Department received several comments in relation to this provision.

A State Workforce Agency expressed concern that this prohibition will create another disincentive for U.S. employers to use the program because it gives the impression that workers will be able to request reimbursement from the employer for any monies paid to a recruiter. The Department notes in response that the H-2A rule does not require the employer to reimburse the H-2A worker. Rather, the rule requires the employer to contractually forbid any foreign recruiters it hires from charging the H-2A worker any fees.

One group of farmworker advocacy organizations believes this rule does not go far enough to protect workers from exploitation by recruiters. Our proposal represents the Department's first effort to regulate in this area under the H-2A program and we

decline to go further, at this time. We will consider further actions if experience dictates that they are necessary, and if specific actions are identified that would be effective and within the Department's enforcement authority.

Several farmers commented that they need agents to find H-2A workers because they are unable to travel to different countries to find employees, interview them, and help them process all the necessary papers to get their visas. Employer commenters believe that an H-2A worker receives a benefit from the job, including more money than he or she is able to earn in his or her home country. Therefore, workers should also bear some of the financial responsibility for the opportunity in the form of paying for the services that enable that worker to find his or her way through the bureaucratic maze both in the worker's country and the U.S. Department of State Consulate. According to these commenters, many of these workers would never be able to apply for H-2A visas because they do not have passports from their own countries and they do not have the required computers and internet connections for applying to the U.S. consulate for the visa.

While the Department does not disagree that it is an additional expense for employers to bear in ensuring the workers are recruited and arrive in a timely fashion, the Department is adamant that recruitment of the foreign worker is an expense to be borne by the employer and not by the foreign worker. Examples of rank exploitation of foreign workers, who in some instances have been required to give recruiters thousands of dollars to secure a job, have been widely report. The Department is concerned that workers who heavily indebt themselves to secure a place in the H-2A program may be subject to exploitation in ways that would adversely affect the wages and working conditions of U.S. workers. We believe that requiring employers to incur the costs of recruitment is

reasonable, even when taking place in a foreign country. Employers may easily band together for purposes of recruitment to defray costs. The fact that a recruiter is essential to the securing of such worker does not dissuade the Department from requiring the employer bear the expense; rather, it underscores the classification of that payment as a cost allocable to the employer.

Many employer advocates noted that there is no definition of "recruiter" and it is unclear whether "facilitators" who help the H-2A workers apply for visas are included in this prohibition. This is an issue because DHS, in its companion H-2A proposed regulation, requires disclosure of such payments to facilitators, whether by the alien or the employer. The Department, on the other hand, forbids employers and their agents from receiving remuneration from the H-2A worker and further requires the employer to contractually forbid its agents from accepting money from the H-2A worker for hiring him or her. The Department cannot comment on the scope of the DHS regulation and finds such comments to be outside the scope of our regulation. However, to allay any confusion, we note that our own proposed regulation was intended to prohibit foreign labor contractors or recruiters, with whom an employer in the U.S. contracts, from soliciting or requiring payments from prospective H-2A workers for any activity related to the securing of H-2A workers. The department believes that this is consistent with the DHS position of disclosure, which is presumably intended to deter such payments by workers. To the extent that "facilitators" fall within these definitions, they will be encompassed by the prohibition in our regulations.

Many commenters believe that the new rule prohibits the use of foreign recruiters. It does not. It requires employers to contractually forbid foreign recruiters from receiving

payments directly or indirectly from the foreign worker. Employers who would be unable to find workers without recruiters are allowed to hire such recruiters. When they do, they must make it abundantly clear that the recruiter is not to receive any remuneration from the alien recruited.

Some commenters opined that the Department does not have the authority to regulate cost-shifting abroad. The Department recognizes that its power to secure justice across international borders is constrained. However, it can and should do as much as possible domestically to protect workers from unscrupulous recruiters. Consequently, the Department is requiring that the employer make, as a condition of applying for labor certification, the commitment that the employer is contractually forbidding any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2A workers to seek or receive payments from prospective employees. As stated above, we will be looking to amass program experience in this area and will consider further actions as experience dictates.

One commenter suggested that we certify recruiting agencies to ensure against exploitation of workers whereas two other commenters thought we should make employers attest that the fee employees paid to foreign recruiters was reasonable or did not go above a reasonable market based ceiling set by the Department. The Department simply does not have the infrastructure or expertise to assess on a country-by-country basis what a reasonable fee would be. The prophylactic rule adopted by the Department guards against worker exploitation in a manner that is enforceable. If a U.S. employer cannot find foreign workers without the help of a recruiter, then the U.S. employer must bear the cost of such recruitment efforts.

One commenter requested that we provide clarification on several terms used in this section. The first is "received payment…as an incentive or inducement to file …." The second is "… from the employee or any other party, except when work to be performed by the H-2A worker … will benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer." We have removed this language from the Final Rule to provide greater clarity to the provision's effect.

Some commenters expressed concern that the rule passed on too many costs to the employer. One commenter estimated that the cost to each employer would be $1,000 per H-2A worker. We think these estimates are exaggerated and note that employers can band together with respect to recruitment to defray costs. In any case, participation in the H-2A program has always encompassed certain additional employer costs, e.g., the provision of free housing, which further avoid adverse effect on the wages and working conditions of domestic workers.

9. Section 655.106--Assurances and Obligations of Farm Labor Contractors

a. General comments:

As discussed earlier, the definition of Farm Labor Contractor was rewritten and is for purposes of H-2A now an H-2A Labor Contractor. A fundamental distinction of these two definitions is the requirement that an H-2A Labor Contractor must employ the workers. This distinction addresses the concerns of commenters who believed that agents and attorneys must register as Farm Labor Contractors (FLC) as a requirement of the H-2A program. Any further discussion of such a requirement as outside the scope of this

rule. In order for a person under H-2A to meet the definition of an H-2A Labor Contractor, they would have to employ the workers who are subject to section 218 of the INA.

Other commenters believed that the definition of farm labor contractor also includes the activities of the foreign recruiters and obligates the employers to take on liabilities for the acts of the foreign recruiters because the definition of FLC in the NPRM was taken directly from the MSPA. The definition of an H-2A Labor Contractor is no longer taken directly from MSPA.

While we cannot reach the conduct of foreign recruiters abroad, we can regulate the conduct of U.S. employers participating in the foreign labor certification process who do business with these recruiters. The Department feels it cannot assert authority over liability to the employer for the labor contractor's activities abroad, but the Department can require the employer to contractually forbid foreign recruiters from whom the employer engages in international recruitment of H-2A workers to seek or receive payments from prospective employees, as discussed in the section addressing the prohibition on cost shifting.

There was considerable comment about the lack of an override provision in the new rule. Many commenters believed the Department should add a provision to ascertain and require that fixed-situs employers offer and pay an appropriate prevailing labor contractor override fee. One commenter elaborated on this point by explaining that employers in an area where labor contractors with domestic workers are well established can bypass the labor contractor by hiring H-2A workers directly and not paying the prevailing override fee, the commission received by the H-2ALC.

Program experience has shown that labor contractors work on the market system and do not require any special provisions to ensure they are paid their override fee. They have a finite number of employees and they agree to provide services to those farms that pay the appropriate wage or have contracted with them well in advance of the season. The Department does not seek to regulate private transactions between employers and labor contractors with regard to price of contract specifications. Employers are required to advertise before they can apply for H-2A workers, and FLCs may respond to that recruitment by offering their workers, minimizing the extent to which they can be bypassed by hiring H-2A workers.

One commenter – a farmworker advocate – argues that the newest labor contractors are often undercapitalized and can barely meet their payroll obligations. The commenter claims labor contractors' primary source of income is from the foreign recruiters who give them payments from the recruitment fees paid by the aliens. It is precisely this type of activity that the employer assurances are meant to prevent, for all of the reasons previously mentioned. Such kickbacks effectively reduce a foreign worker's wages, increasing the chance that the wages and working conditions of U.S. workers will be adversely affected.

One group of farmworker advocacy organizations complains that the Department has eliminated all requirements that employers contact and recruit through established FLCs. This commenter believes that the elimination of this requirement allows growers to bypass FLCs in favor of filing H-2A applications. The Department disagrees. As previously mentioned, employers are required to spread information about job

opportunities in a variety of ways, and there is nothing that would prevent an FLC from responding to such advertisements by offering its services.

Many commenters advocated the removal of labor contractors from the H-2A program. The use of labor contractors to supply workers, however, is a reality in the agricultural industry, and reflect the substantial need for a flexible labor supply in a sector characterized by many different crops requiring different work at different times subject to seasons, weather, and market conditions. To forbid labor contractors from utilizing the H-2A program will only encourage many of them to operate outside the system and use undocumented workers to fill their ranks. Labor contractors also must make application, attesting to the terms and conditions of H-2A employment like any other employer and list the sites where work will occur.

One group of farmworker advocacy organizations commented that FLCs, under the new rule, are not required to have a physical presence in the U.S. This commenter points out that even under the current system, which does require physical locations in the U.S., there is still room for deception by FLCs. Under the proposed system, there will be no control over the FLCs and nowhere to refer U.S. workers. The definition of an H-2A Labor Contractor in the Final Rule requires such a person to meet the definition of an "employer" and the definition of employer requires a place in the U.S. to which workers may be referred.

b. Section 655.106(a)--Provide MSPA Certificate of Registration Number -

One commenter opined that MSPA is not explicitly included in the rule even though it is mentioned throughout. This commenter believes that legal services groups

who file lawsuits under these regulations will be able to include claims based on MSPA as well. This commenter believes there are enough protections in the H-2A rule without including MSPA.

While references to certain specific elements of MSPA have been included in the H-2A regulations, such language is in this final rule for purposes of H-2A. The provisions of H-2A and MSPA operate independently from one another and the inclusion of terms used in MSPA does not provide a legal basis to file H-2A claims based on MSPA. Nothing in this rule expands the scope of MSPA or increases liabilities under it.

c. Section 655.106(c)--Disclosure of all Locations -

One agricultural employer association asserted that it is not reasonable to require H-2ALCs to disclose all customers, clients, dates, and services, and that providing evidence that the customers and clients of H-2ALCs are established business operations should be sufficient not only because the proposed requirement will subject the labor contractor to disclosure of its clientele should a FOIA request be made, but also because a labor contractor should not have to know all of the locations so far in advance and should have the flexibility to change plans. One commenter suggested that wording should be added to allow labor contractors to add or change out growers during the season by informing the Department.

The Department reminds this commenter that the disclosure requirement is contained in the current regulations and has been for many years. The Department requires such information not for the purpose of forcing a labor contractor to disclose its clientele, but to ensure that the labor contractor has real employment opportunities

available for the prospective worker. A roster of clients and dates of arrangements with each is integral to matching the request of the labor contractor with actual agricultural employment requiring the use of H-2A workers.

With respect to the commenter's concerns about disclosure, if the list of clientele is properly considered confidential business information under FOIA, it would be exempt from disclosure.

d. Section 655.106(d)--Surety Bonds

The Department requires in its NPRM that FLCs (now H-2A Labor Contractors) secure a surety bond as proof of its ability to discharge its financial obligations under the H-2A program. We received some comments opposing the surety bond requirement, and others insisting that the requirement did not go far enough.

One commenter suggests that the Department has no statutory authority to require FLCs to be bonded. This commenter believes that the Department has plenty of methods available to it to weed out the abusive FLCs and does not need the provision for bonding. The bonding requirement for labor contractors, who are typically transient and too often undercapitalized, provides a basis to assure compliance with an attestation-based program. The language in the INA which authorizes the Secretary to take such action as may be necessary to assure employer compliance with the terms and conditions of the Act provides the authority for the bonding requirement.

Another commenter believes that the surety bond required is woefully inadequate to guarantee H-2ALC compliance with program requirements, and that it only applies to those cases that come before the Administrator of the Wage and Hour Division and not

civil actions filed in state or Federal court. Another commenter believes that all H-2A employers should be required to post a bond.

The Department believes that the procurement of a surety bond will show that an H-2ALC is serious about doing business legitimately, and that a surety bond gives the Department leverage over the employer so that if the employer fails in performing its obligations, the bond will be forfeited. The surety bond is simply a device to ensure the Department has sufficient incentive for the continuing performance of the labor contractor; the labor contractor's ability to retain its interest in the bond depends entirely upon their adherence to performance obligations. The commenter is correct that the surety bond applies only to those cases that come before the Administrator. We have no authority to require it for actions beyond the Department's jurisdiction.

One agricultural employer association states that the bonding requirement is unrealistic because underwriters will not provide the bonds to anyone but the largest labor contractors. This in effect will eliminate smaller labor contractors from the program. This commenter proposes that this requirement be eliminated or in the alternative that the discretion the Administrator of WHD has to increase the bond requirements should be limited to the use of reasonable and objective criteria.

The Department does not believe that only large labor contractors will be able to obtain surety bonds. The bond is a necessary compliance mechanism to ensure compliance with program obligations, namely the assurance of payment of the wages of H-2A workers covered by Section 218 of the INA. We believe that the bond requirement will ensure that only those H-2ALCs who have sufficient funds to guarantee the wages of H-2A workers will participate in the program.

e. Section 655.106(e)--Positive Recruitment in Each Fixed-site Location of Services -

In 655.106(e), the Department imposed additional recruitment obligations on FLCs. One commenter, a large agricultural employer association, believes that the positive recruitment requirements should be the same as they are for non-FLCs who have several fixed-site locations.

The Department believes that dissimilar standards are necessary for several reasons. First, comparison is limited. Currently, only those associations that have growers in more than one state are required: (1) to place a job order with the SWA where the work will begin; (2) to recruit in the areas of intended employment; and (3) advertise, if applicable, in a traditional labor supply state. FLCs are held to a higher standard because their mobility is a major reason for their attraction to the program. They are held to a higher standard of recruitment because of this high mobility. Therefore, due to the potential breadth of areas where the work will occur, FLCs are expected to do more recruitment.

f. Section 106(f) -- Housing and transportation

All discussion of comments received on housing and transportation are discussed above in section 655.104.

10. Section 655.107 -- Receipt and processing of applications

One employer suggests that section 655.107 should include a provision that the Department will have an adequately staffed information service to answer employer questions and help employers comply with the process.

The Department appreciates the need for such services , particularly among first-time program users. Existing program resources, however, do not permit the funding of such an information service. The Department is committed to conducting briefings for users of the program to acquaint them with the terms and processes of the regulation prior to its implementation. The Department is examining other ways in which it can make program information and instructions more available to users, particularly through its website.

a. Review Criteria

The Department, in describing the review process for each application, stated each application "will be substantively reviewed for compliance with the criteria for certification" and further defined criteria for certification to "include, but not be limited to, the nature of the employer's need for the agricultural services or labor to be performed is temporary; all assurances and obligations outlined in § 655.105 in this part; compliance with the timeliness requirements as outlined in § 655.102 of this part; and a lack of errors in completing the application prior to submission, which would make the application otherwise non-certifiable." A major trade association of agricultural employers believed this language contained ambiguous phrases, particularly "include but not be limited to" and "errors . . . which would make the application otherwise non-certifiable" and, as a result, the phrase "criteria for certification" was largely undefined. A

farmworker/community advocacy organization commented the language incorporates no actual determination of whether the application complies with the statutory requirements for labor certification unlike the current regulations which require a determination at the outset as to whether an application is "acceptable for consideration" based on compliance with the adverse effect and timeliness criteria. This organization maintains that the lack of substantive review in processing attestation-based applications violates the statute. The Department has already addressed that argument in the discussion of section _____.

The trade association also pointed out that, although the language related to the nature of the employer's need included "temporary," it did not also include "seasonal." In addition, the association suggested the phrase "assurances and obligations related to the recruitment of U.S. workers" in proposed § 655.107(a)(3) [new § 655.107(b)]be clarified and recommended that if the language is intended to be construed broadly, the Department should include all of the required assurances and obligations to make this clear.

The Department has added some clarifications to the regulatory text to assist users. However, the Department does not believe it needs to relist all of the attestations in this section.

b. Section 655.107(c)--Modifications

The proposed regulations retain the process for issuance of a Notice of Deficiency by the CO and the submission of a modified application by the employer. However, under the current regulations, applications are received, modified if required, and

accepted prior to the employer's recruitment efforts. Under the proposed rule, recruitment will be conducted prior to submission of the application.

A major trade association requested clarification on the effect a modification will have on the validity of the recruitment effort and recommended the regulations state that if an application is ultimately accepted, even after modification, any required modifications to the application will not invalidate any recruitment conducted based on the application as originally submitted. A professional association recommended that if an initial application contains a deficiency related to recruitment, the CO could require remedial recruitment efforts to be completed prior to the final determination and the remedial recruitment efforts and the date of need extended to accommodate the required recruitment efforts. This association believed such a process would be better than the issuance of a denial, which would require the employer to begin the process, including the pre-filing recruitment, over again and, therefore, not be able to complete the process in order to meet the employer's actual date of need.

The proposed rule revises the timeframe for an employer to submit a modification to the application from 5 calendar days to 5 business days and this change was supported by a major trade association. However, the association believed that 5 business days is not sufficient time for an employer to decide whether to modify the application or submit a request for an expedited administrative judicial review. The association requested the timeframe for requesting an expedited review should be extended to 7 business days.

The Department has decided to retain the requirement for submission of either a modification or request within 5 business days, as proposed. The timeframe has been changed from 5 calendar days to 5 business days and the Department believes that due to

the time-sensitive nature of the H-2A program, the majority of employers prefer a speedy timeline that ensures disputes and deficiencies are resolved as quickly as possible.

c. Section 655.107(d)--Amendments

The Department did not change the requirements for amendments to an application seeking additional workers. An association of growers/producers requested that the requirement in proposed 655.107(a)(6)(i) [now 655.107(d)??] limiting the increase in the number of workers to not more than 20 percent (or 50 percent for employers of fewer than 10 workers) be changed to allow employers of fewer than 10 workers to increase the number of workers in their initial application by up to 10 workers. A State government agency noted its agreement with retaining the current limitations.

The Department has decided to retain the provisions from the NPRM regarding the number of workers that may be requested through amendments. Our experience indicates these limits are necessary to discourage employers from requesting a lower number of workers than actually needed and subsequently submitting an amendment to increase the number. In addition, it is important that many of the H-2A program requirements, such as housing and daily transportation, must be based on accurate assessments of employer needs.

The Department provided new provisions relating to amendments to reflect the shift to an attestation-based process. A group of farmworker advocacy organizations commented that the new language is weaker than the language in the current regulations. The organization objected to the deletion of language making explicit that labor certifications are subject to the conditions and assurances made during the application

process and recommended this language be included. The organization also recommended the language prohibiting changes to the benefits, wages, and working conditions as contained in current regulation should be included in the new rule. Finally, the organization believed that the provision in proposed 655.107(a)(6) [now 655.107(d)(?)]which allows minor changes in the period of employment and also requires an assurance that U.S. workers will be provided with housing and subsistence costs under certain circumstances when the season is delayed does not go far enough because it does not address problems that H-2A workers might encounter related to housing, subsistence, lost work opportunities, and an employer's failure to meet its obligation under the three-fourths rule.

11. Section 655.108--Offered Wage Rate

A number of comments questioned the continued need for an adverse effect wage rate (AEWR). An association of growers believes that "there is no valid basis for setting an adverse effect wage rate, separate and distinct from the prevailing wage for the occupation in the area of intended employment, and requiring the payment of such a wage if it is higher than the prevailing wage." (ETA-2008-0001-0847-66) Instead, an association of growers finds that "the DOL's discussion in the preamble to the proposed regulation makes the case against an AEWR." Another grower's association doubts the Department's assertion "in the preamble that the wages and working conditions of agricultural workers are depressed by the presence of a high proportion of illegal aliens, but does not offer any independent analysis to support this proposition." This

organization further asserts that field and livestock workers' average wages have increased at a faster rate than those for non-farm workers.

Other comments focused on an apparent inconsistency between the H-2A program and the other temporary worker programs, none of which requires an AEWR in addition to a prevailing wage.

There is bipartisan recognition in Congress as well as recognition by the Supreme Court that direct competition from a large undocumented labor force represents perhaps the biggest threat to the wages and working conditions of U.S. workers. Consequently, the Department decided against laying out an extensive justification in the NPRM for continuation of the AEWR. Likewise, most commenters in favor of the continued use of the AEWR did not explicitly lay out the case for supporting the AEWR, but instead focused their critiques on the methodology for determining the AEWR. The Department notes that, by definition, the adverse effect wage rate is the wage rate that ensure there will be no adverse effect on the wages of U.S. workers. As the Department laid out in detail in the preamble to the NPRM, because of the large number of undocumented workers in the agricultural sector, precise tailoring of wages to local labor market conditions is the most critical factor in preventing an adverse effect on the wages of U.S. workers. If the wage is set too low it will displace U.S. workers or force them to accept substandard wages in order to compete with the foreign workers willing to accept the low wages. Conversely, an AEWR that is set too high can harm the U.S. workers because agricultural employers may risk hiring undocumented foreign workers instead of participating in the H-2A program. This in turn erodes the earnings and employment opportunities of U.S. workers in agriculture. The Department does not believe that the

concept of the AEWR is foundationally tied to the concept of wage depression in the agricultural sector—indeed, the last Departmental study on the matter concluded that as a general matter there is not. Moreover, even if there were wage depression (or, for that matter, wage inflation), the Department does not believe that it has a statutory mandate to use its labor certification process to attempt to raise or lower the wages being paid to agricultural workers. Rather, the Department's statutory responsibility is to ensure that H-2A workers are not paid a wage rate that will adversely effect the wages currently being paid to U.S. workers, whatever those wages happen to be. The Department can best assure that wages are not adversely effected through careful tailoring by geographic area, occupational category, and skill level, ensuring that wages are not undercut either by the H-2A program or by undocumented workers. The Department has no statutory authority to deny a labor certification on account of a wage rate, however, where that wage rate will not have an adverse effect.

A group of farmworker advocacy organizations notes that "DOL proposes to continue this [AEWR] requirement, which it should do, but proposes to change substantially the methodology to determine the Adverse Effect Wage Rate."

The Department recognizes the strong views in this area and has carefully considered the comments addressing the proposed use of wage estimates derived the Bureau of Labor Statistics' (BLS) Occupational Employment Statistics (OES) survey to set the AEWR. Numerous commenters questioned the benefit of switching from the US Department of Agriculture's (USDA's) Farm Labor Survey (FLS) to the BLS OES survey. As one noted, "Nothing DOL says today about the USDA FLS justifies a switch to the BLS OES." The Department has considered these comments, re-examined the

various wage surveys, and continues to believe that the OES survey has numerous advantages with respect to the FLS and is the data vehicle best suited for determining the adverse effect wage rate.

The Department strongly values the geographic and occupational precision of the OES estimates as well as the ability to establish four wage level benchmarks commonly associated with the concepts of experience, skill, responsibility, and difficulty within a given occupation. These features are unique to the OES survey and offset any potential limitations of OES-derived wage estimates with respect to those from the FLS or other sources.

Some commenters questioned the statistical reliability of OES wage estimates for detailed geographic areas, noting that more detailed areas have reduced samples and high relative standard errors. The Foreign Labor Certification Data Center takes data quality into account when updating its Online Wage Library and adjusts the geographic areas used to derive wage estimates as needed to ensure data reliability. A "GeoLevel" variable indicates if such adjustments have been made:

> If the data used to calculate the wage estimate came from the actual metropolitan statistical area (MSA) or balance of state (BOS) area the GeoLevel code will equal "1."
>
> If there were no releasable estimates for the desired area then the wages area for the area indicated plus its contiguous areas. This is signified by a GeoLevel "2."
>
> If there were no releasable estimates for the area, or for the area plus contiguous areas the wage is calculated from statewide data, indicated by a GeoLevel equaling "3."

Finally, if there is no releasable estimate for the state, the national average is used. This is indicated by GeoLevel "4."

A U.S. Senator considers inconsistent the fact that the Department "faults the USDA survey because its wage rates are based on multi-state regions," citing text from 46 Fed. Reg. 4570: "While agricultural labor markets for seasonal, labor-intensive crops have a local component, an interstate character to these markets emerges in the presence of migratory workers that move from State-to-State and crop-to-crop." A U.S. Senator goes on to note that "Broad regional wage standards are appropriate in this context, where more localized rates might unfairly disadvantage workers employed in areas with only a small number of potential employers, who can collude to keep wages low." The Department does not agree with this interpretation of the text from 46 Fed. Reg. 4570. The text refers to the considerable geographic mobility of a large proportion of agricultural workers, particularly migrant workers, but does not imply that this mobility should lead to similar wages for agricultural work across states and local areas. Wage estimates from the OES are well suited to capture these substate wage differences such that the Department may tailor H-2A certification decisions and wage setting to reflect local labor market conditions.

One critique of the OES survey is that it is not as timely as the FLS. A group of farmworker advocacy organizations claims that "OES is out of date and harms U.S. workers." It is true that the lag between the survey reference period and data publication is greater for OES than for FLS. This lag simply reflects the greater scope of the OES survey, which collects detailed employment and wage data from approximately 200,000

establishments each six months. Few business establishment surveys rival OES in comprehensiveness. The rolling three-year sample used in OES reduces year-to-year volatility in the wage estimates, and as a result, it is highly unlikely that the one-year period between the reference period and data publication would result in substantively different wage estimates than if the lag were less.

The Institute for Research on Labor & Employment considered problematic the fact that the OES reference months are May and November, "which may not be best approach if one is interested in farm workers." The presumption is that farm workers on payrolls between June and October may have higher wages than those during the reference months. The Department does not have any evidence, however, to support this hypothesis. Although there is, as one would expect, a clear seasonal component to agricultural employment, monthly CPS data on agricultural wage and salary workers show that June and July employment in recent years has tended to be just 10-20 percent higher than employment in May or November. Furthermore, estimates from the FLS do not show a clear cyclical pattern in wage rates, but suggest that there is little seasonal variation at an aggregate level. The Department will work with the Bureau of Labor Statistics to examine the extent to which seasonal patterns may affect the OES-based wage rate estimates.

The Department is confident in the quality of the agricultural workers wage estimates calculated using the OES survey, even with its lack of direct coverage of agricultural establishments. As noted by the American Farm Bureau Federation, "the OES's agricultural wage information is based on data collected from farm labor suppliers individuals who specialize in finding, pricing, and placing agricultural workers with local

farm employers." Nonetheless, the Department recognizes that it is reasonable to consider the survey's nonfarm scope to be a shortcoming, and the Department will work with BLS to expand the coverage of the OES to include agricultural establishments, in keeping with recommendations from various commenters, including the North Carolina Growers' Association and the New York State Department of Labor. Despite this drawback, which the Department hopes to correct, the Department continues to consider the many advantages to the OES survey to make it the best data source available, for all the reasons laid out in the preamble to the NPRM.

Many commenters expressed concern about the calculation of four wage level benchmarks from the OES survey data. The concerns focused on both the reasonableness of basing the AEWR on a wage estimate that is less than a mean or median wage rate as well as on the methodology used to establish the wage levels. A group of farmworker advocacy organizations stated: "… it is not appropriate in setting the adverse effect wage rate to choose a wage that is lower than the average. It is especially inappropriate to allow an employer claiming a labor shortage to offer a wage rate (such as level one or level two) that is at or just above average of the lowest one-third of workers."

To the extent there is little distributional variation in skill level of agricultural workers within a specific occupation in a specific labor market, one would also expect there to be little variation in the wage rate. In these cases, one would expect relatively little variation of the Level 1 or Level 2 wages from the mean or median. On the other hand, to the extent that there is skill-based wage variation and demand for low-skilled guest farm workers, then being able to assign the AEWR based on the wages within the lower end of the distribution affords an added level of precision to the AEWR.

The four skill levels would afford the Department and employers using the H-2A program the same opportunity to more closely associate the level of skill required for the job opportunity as afforded in the other guest worker programs. This precision complements the geographic and occupational specificity of the OES wage estimates. The Department considers the lack of such precision to be a shortcoming of the current AEWR methodology.

There also appeared to be some confusion among some of the commenters who believe the NPRM language allows an employer to choose the level and the wage survey and propose its "offered wage rate" to the NPC for approval. The term "offered wage rate" will now become a term of art for the H-2A program. After analyzing the AEWR, OES prevailing wage, the state and local minimum wages, and the piece rate, it is the NPC – not the employer – that will determine the wage that must be offered by the employer.

12. Section 655.109--Labor certification determinations

a. Section 655.109(b)--Timeframes for determination

The Department did not propose any changes to the requirement that a determination on an application be issued no later than 30 calendar days before the date of need. An individual employer suggested that certifications should be issued 60 to 90 days before the employer's date of need rather than the 30 days currently required. A State government commented the CO should be required to issue the determination by the earlier of 15 days after receipt of a complete application or 30 days before the date of need to allow USCIS and the State Department more time. A professional association

suggested no earlier than 40 days and no later than 30 days before the date of need for issuance of the final determination. An association of growers/producers recommended the timeframes should be simplified and standardized to encourage grower participation. Specifically, it recommended the pre-filing recruitment be conducted 90 days prior to the date of need and the other activities all occur no later than 45 days prior to the date of need. This association also asserted there is no empirical evidence extending the pre-application recruitment period will produce farm worker job applicants and requiring growers to estimate their workforce needs four months ahead of peak season is unrealistic.

The requirement that the Department issue a certification no later than 30 days prior to the date of need is statutory and cannot be changed by regulation. While employers can file earlier in anticipation of their date of need and the Department can issue certifications earlier based upon those earlier filings, the Department cannot require employers to file any earlier than 45 days. Fifteen days to process a case is a narrow enough window for the Department to review and make a determination based on the application. The Department believes the adjustments made to recruitment and filing timeframes adequately address the issue of filing times. Employers are encouraged to file as early as possible and to take care that their submitted applications are complete to minimize potential delays.

b. Section 655.109(b)--Criteria for Determination

The Department included a provision in the NPRM to outline the criteria upon which a determination was made. However, the criteria established in this provision was

redundant of other provisions in the regulation. The Department has accordingly revised this provision to eliminate unnecessary duplication and resulting confusion from the employer community.

1) Job opportunity – 655.109(b)(4)(vi)

A professional association commented that the job requirements, combinations of duties, or other factors that may make a specific application unique should be acceptable if justified by business necessity. This association asserted that nothing in the INA requires that a specific employer perform any job in exactly the same way as other employers perform the job. An association of growers/producers agreed and also pointed out that under the proposed provisions a grower using technology not yet considered normal practice could be denied H-2A workers due to its job requirements and/or combination of duties.

The Department agrees that a business reason justification is sufficient to legitimize a combination of job duties or job requirement, showing that the job descriptors describe a legitimate job to be filled rather than one expressly designed to discourage U.S. workers from applying. The Department, therefore, has revised the language in this provision to reference back to the regulatory requirements contained elsewhere in the regulation, both to minimize confusion and to clarify the basic parameters under which certification will take place.

2) Extrinsic Evidence

A group of farmworker advocacy organizations suggested the regulation should be clear that the CO can also consider extrinsic evidence in making a final determination. The organization believed the CO should be able to deny certification to an employer who has engaged in violations of employment-related laws whether or not there has been a final finding to that effect and whether or not the employer has previously participated in the H-2A program. The commenter also suggested that if the CO has reason to doubt the accuracy of any of the attestations or assurances, the CO has the authority to request additional information and the authority to deny the certification. In the same vein, the commenter recommended the regulations should include a process by which the CO will receive and consider supplemental information from SWAs, workers and others.

The Department does not agree that adding explicit language to provide the CO with authority to consider extrinsic evidence is mandated by the Rule. The Final Rule allows for certification to be based on the criteria outlined in § 655.107(a). Adding a process for the provision of extrinsic evidence would create an adversary process for the granting of a benefit, with COs at a loss to evaluate such evidence in the context of the application and unable to evaluate its authenticity, particularly in light of the tight statutory timeframes given to the Department to adjudicate applications. Workers who are affected by an agricultural clearance order have a complete process in 20 CFR Part 658, subpart E (incorporated by reference in 655.116) through which to submit and obtain resolution on their complaints. Anyone having information bearing upon an H-2A employer may avail themselves of the protections contained within these regulations and all other mechanisms, such as filing a complaint with WHD. That would ensure adverse

information is received by the Department in a way in which it can provide the most benefit.

c. Section 655.109(d)--Accepting Referrals of U.S. Workers

A large association of agricultural employers suggested that the proposed regulations and the Final Determination letter should clarify that the obligation to continue to accept referrals of eligible U.S. workers continues only until the employer has accepted the number of referrals of eligible U.S. workers equal to the number job openings on the Application for Temporary Employment Certification. The Department agrees with this statement and has included new language in 655.109(d).

d. Section 655.109(e)--Denial letters

A major trade association pointed out the proposed regulation at 655.109(e) states that if the certification is denied the Final Determination letter will state "the reasons the application is not accepted for consideration." The association commented it was their presumption this language was used inadvertently but asked for clarification if its use was intentional. The Department's use of the language "not accepted for consideration" was, in fact, inadvertent. Section 655.109(e) has now been revised to read: "the reasons certification is denied."

e. Sections 655.109(e) and (f)--Appeal Process for Denied and Partial Certifications

The proposed regulation did not explicitly reference the appeal procedures in either the Denied certification (655.109(e)) or Partial certification (655.109(f))

provisions. Although the proposed rule "Administration and de novo hearing" procedures (§ 655.115) does reference a decision by the CO to deny, a major trade association commented that the regulation should be clarified by specifying the appeal procedures in § 65.109. The Department appreciates this comment and has inserted text in both sections 655.109(e) and 655.109(f) stating the final determination letter will provide the procedures for appeal in either situation. Employers should note that, if a partial certification is received, only the period of need or the availability of U.S. workers are at issue and thus subject to appeal.

f. Partial Certifications – 655.109(f)

The proposed regulations contained a provision at Sec. 655.109(f) for partial certifications. The provision stated that "the CO may, in his/her discretion, and to ensure compliance with all regulatory requirements, issue a partial certification, reducing either the period of need or the number of H-2A workers being requested or both for certification, based upon information the CO receives in the course of processing the temporary labor certification application, an audit, or otherwise." Although the current regulations do not contain the phrase "partial certification," they do provide that the OFLC Administrator shall grant the temporary alien agricultural labor certification request "for enough H–2A workers to fill the employer's job opportunities for which U.S. workers are not available." A farmworker/community advocacy organization voiced its concern that the deletion of the language in the current regulation and the addition of language providing for discretionary partial certifications violates the statutory precondition for certification that the employer not have U.S. workers available to fill its

job opportunities. This organization expressed the opinion that the new language would allow employers to import more foreign labor than they actually needed.

The Department has retained the provision regarding partial certifications. The Department believes that the language describing partial certifications provides more clarity regarding the process of obtaining a certification where the Department determines that fewer workers than were originally requested in the application are required. A lack of available U.S. workers is a necessary precondition to filing an application. Allowing a partial certification covers situations where the employer recruited for a need of X workers, and found sufficient workers through recruitment to meet only a part of its need, but still needs X workers minus the number of workers successfully recruited. An employer who found sufficient workers to meet its entire need cannot, by statute and this pre-recruitment model, even file an application. The Department retains the authority to reduce the number of positions requested in the event the information contained in the application demonstrates an availability of workers who were eligible and applied for the position, or who appear during the post-filing recruitment period.

A major trade association commented that the proposed provision has no counterpart in the existing regulations and that the Department articulates no rationale for why such a provision is necessary or how it will ensure compliance. The association recommended the provision be deleted from the final regulations. The association also expressed concern that there was no due process for an employer whose application was arbitrarily changed. This association believed the CO should issue a Notice of Deficiency, require the submission of a modification and offer an appeal process.

As explained above, the ability to issue a partial certification is necessary where the Department receives an application with respect to which eligible and qualified U.S. workers are subsequently successfully recruited prior to certification. A modification process is one option the Department considered to address such a situation, but given the likely time frame of filing by employers, a modification will not often be possible. In response to the comment regarding an appeal process, the Department has added language regarding appeal provisions to this provision in the Final Rule.

Two association of growers commented that labor disputes in agricultural employment are not covered by the National Labor Relations Act and, therefore, there is no official process for determining the existence of a labor dispute. The language in § 655.109 of the NPRM mirrors the 1987 language still in use in the current regulations at § 655.013(a), which was very carefully crafted to bar only certification of the single job opportunity vacated by each particular worker who walked off the site and not all jobs requested to be certified. However, the attestation itself in the proposed § 655.105(c) conflicts with § 655.109.

As discussed above in section 655.105(c), the Department has removed the language in § 655.109 of the NPRM regarding work stoppage as redundant, and instead inserted the language in the employer's assurances.

g. Section 655.109(g)--Fees for certified applications

The Department proposed the following new fee structure: an application fee of $200 for each employer receiving a temporary agricultural labor certification plus $100 for each H-2A worker certified; an application fee of $200 for each employer-member of

a joint employer association receiving a certification plus $100 for each H-2A worker certified for that employer-member; and a processing fee of $100 for any amendments accepted for processing plus $100 for each additional H-2A worker certified. The proposal did not set a cap on the amount of fees to be charged as provided in the current regulations. The Department received numerous comments regarding the proposed fees. Many of the commenters acknowledged that an increase was warranted but strongly objected to the amount of the increase. Several commenters requested a justification for the amount of the increase and further detail regarding the activities and related costs involved in processing since the Department stated in the preamble to the proposed rule that it was updating the fees to align with "the reasonable costs of processing" H-2A applications, as authorized by the INA. Also in this context, commenters questioned why the fees would increase to such an extent since the Department was proposing to streamline and increase access to the H-2A program. One association of growers/producers recommended that the Department determine a more reasonable processing fee and explore adding to those revenues from another source rather than seeking to recover processing costs through processing fees. A State government agency suggested that fees should be used to fund program costs incurred by the SWA instead of being deposited in the Treasury. (Unfortunately, such an amendment requires a legislative change). Another commenter asserted that under the Treaty of Guadalupe Hidalgo, the application and processing of the application for H-2A temporary workers who are Mexican citizens must be free of charge and, therefore, employers seeking to employ such nonimmigrant workers should not be charged processing fees.

A number of associations of growers/producers, a trade association, and several individual employers commented that the increased fees would add to the cost of an already expensive program and, if the application process is to become more efficient and streamlined as proposed, believed a fee increase would be counterproductive. Some commenters stated the increase in fees, when coupled with other increased costs, could drive farmers out of business or dissuade many from participating in the program at all. Another association of growers/producers suggested the fee structure should take into consideration all of the fees growers must pay and suggested a fair compromise would be to reduce the fees for farmers using H-2A workers, ask workers to pay for costs incurred in traveling to the U.S. port of entry closest to the employer, and require the employer to bear the costs from the point of entry to the farm. A trade association commented that the proposed increase in the certification fee would place the program out of reach for many growers. A trade association also commented that many growers utilize workers for a short period only and that under the proposed regulations a grower's cost for 10 H-2A workers would increase to $10,000 in application fees and the total cost could rise to almost $20,000 before any revenue would be gained through harvesting of the crop.

Several commenters opined regarding the payment arrangements. One association of growers/producers suggested that any increase in fees should be tied to the cost of inflation or the consumer price index and not related to the cost of processing. A United States Senator and others stated a doubling of the fees would be acceptable. One individual employer/farmer suggested the fees should remain at current levels. A trade association commented that fees should be based on the number of employers certified rather than the number of applications.

Following consideration of all the comments, the Department has decided to retain the current fee structure rather than that proposed in the NPRM. At this time, the Department believes that it is of utmost importance to increase accessibility to the program and recognizes that the proposed increase in fees could have discouraged both potential new users and current users of the program. Moreover, the increased fee would not have helped the program run more quickly or more efficiently at this time because the funds are all deposited directly in the Treasury as miscellaneous receipts.

The Department may, in the future, revisit the fee structure and propose changes in the amount of the processing fees. The Department appreciates the many comments received requesting additional information on the actual costs involved in the processing of applications and finds these requests to be reasonable. Since the Department is changing the program to an attestation-based process, it does not have experience with the actual operation of the program under the new process and, therefore, agrees that it should not revise fees until cost information using the new model is available.

Many commenters specifically requested the inclusion of a cap on the amount of fees and commented that the elimination of a cap might cause participants to abandon the program. As noted above, the Department has decided to retain the current fee structure, which includes a limit on the amount to be paid by one employer.

The Department also received comments on the proposed $100 processing fee for an amendment, coupled with a fee of $100 for each additional H-2A worker certified on the amendment. A trade association noted that amendments to applications can be for many reasons, including increasing the number of workers requested, adjusting the date of need, and making minor technical amendments to the application. It commented

further that while it is reasonable to charge the additional certification fee for an amendment to increase the number of workers in order to avoid creating a disincentive for understating the number of workers on the original application, it is not reasonable to charge a fee for other amendments, including minor technical amendments.

In keeping with the retention of the current fee structure, no fee for amendments is included in the final regulation.

12. Section 655.110 Validity and scope of temporary labor certifications

a. Scope of Validity—Associations - 655.110(c)

The Department made no changes in the proposed regulation regarding certifications provided to associations acting as joint employers. A farmworker/community advocacy organization suggested that the Department should include language currently in the H-2A Program Handbook limiting such applications to those involving "virtually identical job opportunities." The Department declines to adopt this suggestion, which is inconsistent with the plain text of the NPRM, but has clarified the language in the regulation regarding the use of so-called "master application" by associations.

b. 655.110(e) -- Redetermination of Need

The proposed regulations omitted the provision in current regulations allowing employers to request an expedited "redetermination of need" if a labor certification is denied, in whole or in part, because U.S. workers are available and, subsequent to the denial, the U.S. workers identified as available are no longer available. The Department

received several comments objecting to the deletion of this provision and requesting its inclusion in the final regulations. Two commenters pointed out the requirement in Section 218(e) of the INA mandating a new determination within 72 hours in cases of availability. A major trade association also mentioned that Congress was sufficiently concerned about the failure of domestic workers to report that it included a heavy obligation on the Department to re-establish need. Others commented that the need for a redetermination procedure is even greater since the recruitment efforts will put job commitments farther in advance of the dates of need and thereby increase the likelihood of workers not reporting. A trade association provided data from a farmer to illustrate the need for a process for redetermination and also described a procedure they would like implemented wherein U.S. workers referred by the SWA would be asked to sign a form indicating their intention to return for work on the date of need and to work for the duration of the contract. The goal of this process would be to not have the number of jobs certified be reduced by the total number of referrals but rather by the number of workers who signed the form.

In response to the comments, the Department has included a new section, 655.110(e), addressing the procedures for requesting a redetermination of need. The Department appreciates the suggestion but has determined the additional requirement for U.S. workers to sign a form stating they will return does not appear likely to improve the problem of "no-shows" among the U.S. worker population the employers seek to address. The Department will therefore not add the requirement.

A major trade association also posed a question about handling a situation where the employer obtains sufficient commitments from qualified U.S. workers for the job

opportunity during the pre-filing recruitment and is precluded from filing an application but subsequently learns that some of these workers will not honor their commitments. Since no application was filed, technically, the employer in this situation would not be able to request a redetermination. The association claimed the Congress clearly did not intend to leave employers without an adequate workforce and stated it is incumbent upon the Department to accommodate employers who are in this situation.

In response to these comments, the Department has decided to incorporate the provisions under 655.106(h) in the current H-2A regulations, which allow an employer to request for a new determination on the H-2A certification application in the event of nonavailability of U.S. workers or nonavailability of able, willing and qualified workers, to address emergencies outside the control of the employer. The Department however cannot add a similar provision to allow an employer who was precluded from submitting an application due to the availability of able, willing and qualified U.S. workers but who subsequently discovers that not all the workers will be able to honor their commitments, to request an expedited determination because the Department lacks such authority under the INA. Section 218(e)(2) of the INA only authorizes the Secretary to make such expedited determinations for a certification that was denied in whole or in part because of the availability of qualified workers.

13. Section 655.111--Required departure

The Department included language in the NPRM to explaining the relationship between the labor certification’s validity period and the foreign worker's period of stay in the U.S. and informing employers of their obligation to notify H-2A workers who begin

employment with them of the workers' responsibility to register their departure if and when required by the DHS. A trade association questioned the inclusion of this section in the Department's regulations. This association commented that it has no bearing on either the issue of the availability of U.S. workers, or whether the employment of aliens will adversely affect U.S. workers, the two issues which are within the statutory purview of the Department. A professional association commented that the Department's language in the proposed §. 655.111 did not allow for transit time for workers after the expiration of the labor certification and was, therefore, in conflict with the USCIS requirements which provide a specified period of time after expiration of the labor certification before departure from the country is required.

The Department agrees with the comment regarding the lack of clarity in the language used in the proposed rule. The Department notes that DHS provisions require the worker be given (in current regulations) a period of 10 days of valid status beyond the validity period of the labor certification in which to depart. We have revised the regulation to acknowledge this period, to permit clarity for the employer.

A labor certification’s validity period is based upon the need of each employer, as discussed above. Accordingly, it would not be appropriate for the regulations to provide a set validity period for a particular industry.

14. Section 655.122--Audits

One commenter felt that there was no policy or legal rationale given by the Department for this new system that includes audits and referrals. The Department believes that a sufficient policy rationale for the necessity of audits was provided in the

NPRM. Reviewing the documentation attached to and supporting the attestations made by an employer in the context of an H-2A application is an essential element of a shift of the program oversight from the government to the employer's attestations. The government, to protect the basic integrity of the process of H-2A certifications, must be reassured the applications are filed in accordance with the basic obligations of the program. This rationale applies not only to certified applications but to those applications which did not result in certification. The Department reserves the ability to enforce program responsibilities with respect to those who seek its benefits, and in particular with respect to those who receive them. The audit provides reassurance to the employer, the Department, and the affected employees that all program obligations are understood and followed.

Another commenter stated that 30 days to respond to the audit request was not enough time during growing season. The Department does not believe that audit requests will be so burdensome that they cannot be complied with within a few days as long as the employer retained the required documentation contemporaneously with performing the required actions; for example, kept the tear sheet of the advertising, and the recruitment report.

A SWA suggested that every application be audited and some SWAs suggested they should participate in audits, and should be provided funds to do so. The Department disagrees. Audits will be conducted based on the presence or absence of certain criteria, as well as on a random basis to ensure program integrity. To ensure effective audits, the Department does not publicly disclose its audit criteria.

One commenter stated that "non-program" participants should not be included in the audit process. There is no provision for such audits in the rule.

A farmworker advocacy organization expressed the belief that the proposed increase in audits and penalties would not adequately address concerns related to worker protections and remarked the penalties would come too late in the process to benefit U.S. workers searching for work.

The Department believes, on the contrary, that the audit process will address concerns related to worker protections. The Department has reserved its right – its duty – to audit applications based on selected criteria as well as on a random basis. Worker protections are at the root of the H-2A program and will provide many of the criteria for audits. In addition, the Department's investigative authority under WHD is an additional and comprehensive tool to address these concerns and benefit U.S. workers. U.S. workers, additionally, have at their disposal a complaint system (found in the Employment Service Complaint system regulations at 20 CFR 658 et seq.) to address complaints arising from agricultural job orders, such as a non-legitimate failure to refer. The use of all such tools will help to ensure employer compliance with the requirements of the program.

Another commenter stated that the penalties enumerated will do little to deter abuses and that the Department should consider the complementary tool of civil money penalties for lesser violations found in the audit process. The Department cannot institute such a policy without statutory authority to do so.

One commenter stated that the enumerated penalties are so severe that farmers could go out of business and that employers should therefore be informed, in detail and in

advance, about the methods, criteria and scope on which these audits and potential sanctions will be based. In addition to the explanation of the audit procedures and sanctions already provided in the Rule, the Department intends to develop materials for employers to assist them in understanding the various aspects of the program, including audits. However, the Department cannot reveal its audit criteria, which must be kept secret to ensure program integrity.

There was a suggestion that the Department do pre-audit inspections of applications and issue a notice of violations so that there is an opportunity to correct mistakes without penalty. The Department will be engaging in review of applications and intends to issue Notices of Deficiency when such correctable deficiencies are found.

Many commenters expressed skepticism about enforcement, saying the Department's prior enforcement in the H-2A arena has not been as tough as they would like. One commenter also doubted the ability of adjudicators to discover fraud and did not believe that sufficient resources existed to accomplish this function.

This Rule introduces new enforcement measures, such as certification revocation, and new grounds for the Department to impose sanctions to more effectively address violations of the terms and conditions of the labor certification. Accordingly, the Department will have greater flexibility than under the current regulation to initiate and impose sanctions. Additionally, the Department has reallocated additional resources for these enforcement and compliance activities.

Several commenters opined that the rule will not prevent international recruitment system abuses. The Department has little control over international recruitment system abuses unless U.S. employers or their agents are involved. The new rule allows the

Department to sanction the U.S. parties involved in abuses. The Department will work to coordinate at a higher level potential sanctions and initiatives against those who seek to exploit individuals who become H-2A workers; that is not, however, an activity within the processes reachable by this rule except as heretofore noted.

One commenter believes that the Department should create a new division within ETA to conduct audits and report to the Secretary on the efficacy of the H-2A program. A new division is unnecessary as the audits will be undertaken in connection with OFLC program operations.

A farm bureau offered a rewrite of § 655.112, believing that audits should only be conducted on recruitment and employers should be told specifically what criteria could lead to an audit. We thank the commenter for its detailed analysis of the audit requirements, but we do not agree with its premise that audits should be limited to the recruitment portion of the application. We do, however, agree that to avoid confusion and ambiguity and to put employers on notice, more clarity is required as to which documents can possibly be requested in an audit letter and therefore, we have delineated this more clearly in the Final Rule.

15. Section 655.113 -- H-2A applications involving fraud or willful misrepresentation

The NPRM proposed a new section 655.113, creating a process whereby applications involving fraud or willful misrepresentation can be investigated and, if appropriate, acted upon. The NPRM provided that a finding of fraud or willful misrepresentation would result in termination of processing of current applications.

One commenter expressed concern that the proposed rule did not go far enough in § 655.113 to give the CO explicit authority to deny an application because of suspected fraud or factual inaccuracy. The commenter suggested that the regulation should set forth a process that allows SWAs, workers, and others to send in information and allow the CO to consider such documentation. The same commenter feared that without a definition of "possible fraud or willful misrepresentation" that the Department will only use a criminal standard of guilt and thereby allow many employers who engage in lesser fraud to go unsanctioned. The Department will define such terms and evidence to be used in policy guidance rather than in the rule itself.]

Another commenter believed that it is unfair to put the full burden on the employer for employing undocumented workers if the employer has limited capacity to verify the legality of the worker documents and whether or not they are fraudulent.

The rule is not meant to and will not punish the employer for complying with the requirements in the I-9 form to verify employment eligibility. There is nothing in either the Department's regulation or the DHS regulations that punish an employer for unknowingly accepting fraudulent documents that appear authentic.

16. Section 655.114 -- Petition for higher meal charges

The Department proposed in the NPRM a process, similar to that found in the current H-2A regulations, to set meal charges and to petition for the right to charge workers higher meal charges. This provision is based in the ability of employers to charge against the worker's pay a reasonable charge for meals, to be set by the

Department and increased on an annual basis. The NPRM set out the procedure by which an employer may petition for a higher charge to be allocated to its workers.

A commenter requested that we define "representative pay period" in 655.114(b). The Department has removed the language regarding a "representative" pay period and believes this deletion adequately addresses this commenter's concerns.

17. Section 655.115--Administrative review and de novo hearing before an administrative law judge

The NPRM contained a provision setting out the procedure by which an employer could request a review on the record of a certification denial, including a de novo hearing. The Department received several comments on this section.

One commenter requested that copies of certified case files should be delivered to the employer within two business days. This would require the additional expense for overnight courier service and is not a justifiable government expense without a mandate from Congress.

The same commenter suggested that the rule be amended to include explicit language that hearings for debarments are available and specify the procedures for them, and state that all relevant documents and other evidentiary material, including exculpatory evidence, must be provided to the employer. The Department believes this is already specified in the rule in Section 655.115.

Another commenter suggested that workers and their representatives should be allowed to intervene in administrative review proceedings and suggested that the changes made to 29 CFR 501 and 502 actually decrease the protection of worker's rights.

One commenter suggested the rule should also specify that the removal of the requirement to answer the complaint in the de novo hearing does not preclude the ALJ from requiring an answer or its equivalent as a matter of discretion or from limiting the discoverability of information. The same commenter believes the rule should specify that the Department bears the burden of proof in the proceedings because the employer is presumed innocent until proven guilty.

The Department does not believe there is any reason to add additional language to the rule, which already states that 20 CFR part 18 governs the rules of procedure. Specifically, 29 CFR 18.1(b) and 18.5(e) cover the ALJ's discretion to request an answer or require discovery. The burden of proof is governed by common law principles in which the moving party has the burden of proof. In this case, the burden would be on the applicant to provide a complete application in the first instance and when it is found to be incomplete by the Department's Certifying Officer, then, once again, it is the appellant/applicant's burden to prove that it submitted the requisite information. The burden does not shift to the government because it is not the government that is requesting a benefit. The labor certification process is a civil process and guided by civil rules of procedure and not criminal.

18. Section 655.116--Job Service Complaint System; enforcement of work contracts

The NPRM contained the provision in the current regulations regarding complaints filed with the Job Service Complaint system for the enforcement of contracts.

Commenters suggested that site visits be implemented, employer and worker interviews be added, a 24/7 anonymous call-in number be created, and mediation offices

(called “work visa representational offices” by the commenter) be created where contract disputes can be discussed between the employer and laborer. The Department agrees that such a complaint system could be a useful enforcement tool in some cases, but program resources are not adequate to establish and staff such an operation at this time. More importantly, a complaint system already exists in the Job Service complaint system found in 20 CFR Part 658, and any similar system specific to H-2A agricultural clearance orders or applications would be overlapping and a waste of already low government resources.

Some commenters believe that this rule is still too onerous and that it will not encourage famers to utilize the program due to all the audits and compliance requirements. The Department disagrees and believes that this rule is much easier to understand and comply with than its predecessor. The program is still a complex one, due to statutory requirements and historical practice. The Department has attempted, in this Final Rule, to simplify the procedures for employers while still ensuring program integrity and worker protection.

One commenter stated that workers should be punished by being permanently barred from the program if they jump to another unauthorized employer or overstay their visa. This is not an issue for the Department, which certifies positions, and does not touch upon issues regarding worker status, which is properly in the realm of DHS.

Another commenter suggested that a mechanism should be created to pre-certify employers as being in compliance with program requirements and obligations prior to the issuance of the Labor Certification. This is something the Department will consider

implementing at a future time, when employers have a demonstrated record with program requirements.

A commenter suggested that the Department institute procedures for workers and their advocates to raise grievances or lodge complaints for Departmental review and expedited resolution. The commenter also requested that a graduated system of fines be created, allowing a "learning curve" for agricultural employers to become more familiar with the H-2A requirements. The Department again notes the existence of the Job Service complaint system currently in place, and its availability for just such actions

19. Section 655.117--Revocation of H-2A certification approval

a. Comments opposing revocation because other penalties sufficient

Several employers and employer associations objected to revocation on the grounds that other penalties for non-compliance are sufficient, citing the Department's increase in both the penalties for non-compliance and the bases upon which non-compliance can be asserted, along with the new document retention, audit process, and expanded bases for debarment. Similarly, several commenters cited the Department's existing ability to provide evidence to the DHS supporting the revocation of a petition.

We disagree that the existence of these other penalties makes revocation an unnecessary remedy. Revocation has been explicitly endorsed by Congress as a means of ensuring the integrity of the program. The Department's obligation in this regard is self-evident. The ability of the Department to revoke an application is essential to maintaining and enhancing program integrity and a necessary companion to the flexibility of a self-attestation model. In addition, DHS authority to revoke a petition,

while certainly a possibility, presents a narrower frame of punishment and thereby impacts individuals, whereas the Department's revocation authority sanctions the employer directly.

b. Revocation too severe a penalty

Several employers and employer associations objected to revocation of the labor certification because of the negative impact that it would have on an employer's business. A commenter also stated that revocation could effectively result in an employer violating state law in Wyoming, which apparently prohibits sheepherders from abandoning sheep. Given that revocation is meant to be a sanction against employers who have violated the terms and conditions of the certification or for whom certification is otherwise unwarranted, it should be no surprise that the employer may face serious consequences as a result. It is in the best interest of the Department to ensure that the integrity of the H-2A labor certification program is upheld. If the granting of a labor certification was not justified, revocation of such certification is a reasonable measure for the Department to take. It is not one the Department will undertake with anything less than full and due consideration.

c. Interference with DHS Authority

An association of growers requested that the Department clarify the legal basis for exercising the enforcement of DHS regulations and the rationale for doing so, stating that employers should not have to face two enforcement authorities with different policy objectives enforcing the same regulations. We agree with the commenter's concern that

the Department should not be enforcing DHS regulations and accordingly have deleted the reference to 8 CFR 214.2(h)(5) in Section 655.117(a)(1).

d. Grounds for Revocation

1) Certification Not Justified -- 655.117(a)(1)

A law firm (on behalf of MPAS and Vermillion Ranch) questioned the Department's authority to revoke a labor certification application under Section 218 of the INA simply because the Department has decided to revisit the merits of the application, stating that the Department would need authority comparable to that provided in Section 205 of the INA to do so. Additionally, one law firm interprets Section 218(e) to authorize the Department to revoke certifications only in the case of fraud or criminal misconduct. We disagree. Section 218(e) addresses the authority to revoke a certification and does not qualify or limit the bases for which such authority may be exercised. The Department interprets the absence of such limitations to mean that under this general grant of authority, the Department has the inherent authority to withdraw any labor certification that it finds was not justified under the criteria set forth under the INA.

2) Violation of Terms and Conditions of Labor Certification – 655.117(a)(2)

An employer suggested that the employer's violation of the terms and conditions of the labor certification under 655.117(a)(2) should be qualified with "knowingly and willfully." An association of growers suggested that the revocation could only be exercised when the employer willfully misrepresents a material fact in the application.

Similarly, an association of growers suggested that the Department should clarify that technical or good faith violations of the regulation should not result in an enforcement action. After reviewing these comments, we have added in this Final Rule an intent requirement ("willfully") with respect to violations of the terms and conditions of the labor certification. Given that revocation is a serious penalty, we believe that the addition of this qualification is justified.

A group of farmworker advocacy organizations suggested that the regulations should clarify that a revocation may occur where the employer does not offer the job terms required in the regulations or does not comply with the job terms required in the regulations. We believe that this basis for revocation is already covered by Section 655.117(a)(2), since the terms and conditions of the labor certification incorporate the employer attestations set forth in the regulations under 655.105.

A group of farmworker advocacy organizations suggested that revocation should be utilized when an employer has an active certification and intends to bring additional workers but is unwilling or unable to provide the terms and conditions of the work promised. We believe that the grounds that the commenter cited for revocation are incorporated in 655.117(a)(2), assuming that the employer's unwillingness or inability to provide the terms and conditions of the work promised manifests itself in the violation of the terms and conditions of the labor certification.

A group of farmworker advocacy organizations suggested that revocation should be used if a timely audit discovered that U.S. workers had been discouraged or denied employment. Again, we interpret 655.117(a)(2) to cover such a violation since an

employer must attest on its labor certification application that any U.S. workers who applied for the job were rejected only for lawful, job-related reasons.

A group of farmworker advocacy organizations suggested that revocation of a current job order should be allowed based on violations of prior job orders. Substantial violations of prior job orders are covered in the debarment section at 655.118. We believe that debarment is the more appropriate remedy for substantial violations of prior job orders since a revocation is meant to address problems with the existing labor certification.

3) Referrals from WHD – 655.117(a)(3)

A private citizen objected to the inclusion of a recommendation by WHD as a ground for revocation. The Department believes that the Division plays a critical role in upholding the integrity of the labor certification process by enforcing an employer's obligation to provide the wages, benefits, and working conditions required under the terms and conditions of a labor certification. Accordingly, their input in the revocation process would help to protect workers from additional violations or abuse by unscrupulous employers.

e. Procedure – 655.117(b)

An association of growers suggested that the Notice of Intent to Revoke should include the statement of factual grounds for the alleged basis for revocation. The regulation already provides that the Notice of Intent to Revoke is to contain a detailed statement of the grounds for the proposed revocation and thereby would include the

factual grounds for the proposed revocation. Accordingly, we do not believe that it is necessary to change the proposed language of the regulation.

One commenter suggested that employers should be able to request a hearing with respect to the Notice of Intent to Revoke. The Department does not believe that a hearing is necessary, as the employer already would have plenty of opportunities to dispute the revocation. The regulations allow for an employer to submit rebuttal evidence in response to the Notice of Intent to Revoke and, if applicable, to file an administrative appeal.

While a group of farmworker advocacy organizations expressed concern that a final determination should not be required to revoke a labor certification, the Department received a number of comments from a large number of employers and employer associations objecting to revocation taking effect immediately at the end of the 14-day window for the employer to submit rebuttal evidence, if the employer fails to do so. The commenters cited due process concerns and the devastating and irreversible impact that revocation would have on farms while the matter was being adjudicated. We agree with these concerns and accordingly, have changed the language in 655.117(b)(2) to provide that the filing of the administrative appeal stays revocation. Accordingly, an association of growers' suggestion that the effective date of revocation should be one day after the appeal period expires so that the employer would not be required to cease employing the worker while it decides whether to appeal is no longer relevant.

Two commenters expressed concern about the Department’s ability to revoke a labor certification on a very broad range of criteria and suggested that the Department provide a standard for the Department’s decision to revoke when the employer submits

rebuttal evidence. While we agree that the grounds for which the Department may revoke a labor certification in 655.117(a) are quite broad, to define by regulation a particular standard would be impracticable since the facts will differ from case to case. Accordingly, standards will be developed as cases are adjudicated through the administrative appeals process.

An association of growers suggested extending the employer's rebuttal period from 14 days to 30 days with extensions granted by the CO on a reasonable basis, and if such a request is denied unjustifiably, the denial may be a basis of, or an additional reason for, reversal by the Department. Similarly, an association of growers suggested that employers should be given 14 instead of 10 days to file an administrative appeal. We disagree with the proposal to extend the time period for rebuttal with indefinite extensions by the CO and as a result, to allow a denial of such an extension to be a basis for reversal of the revocation. We also disagree with the proposal to extend the time period for an administrative appeal. We carefully considered what time period would be appropriate for employers to rebut the notice of intent to revoke and to file an administrative appeal. We would not be issuing a notice of intent to revoke if the reason for doing so did not seriously jeopardize the integrity of the H-2A labor certification process. Accordingly, it is imperative for the Department to be able to act quickly, especially if the livelihood of the workers and an employer's ability to plan for its labor needs are at stake. The addition of at least a minimum of 20 days to the process would not only impede the efficiency of the labor certification system but also prolong the period of time for which employers would be subject to uncertainty regarding their labor

needs, a concern that was as raised by a commenter. As a result, we are maintaining the proposed rule's 14-day periods for rebuttal and administrative appeal.

An association of growers also suggested that the CO have more than 14 days to reach a final decision – that the CO should in fact have all the time that he or she believes is necessary to reach the best possible decision on the record as it is presented. While we appreciate an association of growers' concern that the Department have a sufficient amount of time to render its decision, 14 days is an adequate amount of time for the Department to consider all the facts at hand to make a decision and to ensure that the revocation proceedings move along in an expeditious manner for the reasons stated in the previous paragraph.

Two commenters suggested revising the regulation so that an employer be provided 14 days from the date that it receives the Notice of Intent to Revoke to provide rebuttal evidence instead of from the date of the Notice. Because the date the employer actually receives the Notice is virtually impossible to verify, we have decided to retain the date of the Notice as the starting point for the 14 day rebuttal period.

One commenter suggested phasing in the Department's compliance and control measures so that employers have the opportunity to adapt to the program. We do not believe that it is necessary to phase in such measures. Employers have received notice of, and have had an opportunity to comment on, the measures that the Department has proposed. Employers certainly have had an opportunity to plan for such changes, and we do not believe that providing any additional time for employers to adjust to the new requirements is warranted.

f. Worker Protections

A group of farmworker advocacy organizations suggested that ETA require employers with open clearance orders that have not been accepted to accept the referral of H-2A workers who are already present in the U.S. and have been affected by revocation, and that ETA should deny job orders to employers who refuse such H-2A workers. We understand the serious toll revocation of a labor certification can take on an employer's workforce – both U.S. and H-2A workers alike – and agree that certain worker protections should be triggered in the event of revocation. This group's suggestion applies only to H-2A workers; however, we believe that it is necessary to address protections to all workers and thus have included an additional provision which sets forth the employer's obligations in the event of revocation. The employer will be responsible for reimbursing each worker's inbound transportation and subsistence expenses, outbound transportation expenses, payment due to the worker under the three-fourths guarantee, and any other wages, benefits, and working conditions due or owing the worker under the regulations.

g. Beyond the Scope of the Regulation

Several comments were received that were clearly beyond the scope of the revocation provision. Among them were several comments regarding issues that touch upon agencies with responsibility for H-2A issues that have nothing to do with the labor certification process or the enforcement of the obligations and assurances made by employers with respect to H-2A workers.

A group of farmworker advocacy organizations suggested that the Department should establish a MOU with ICE to alert ICE upon revocation that an employer's request for workers has been denied and to heighten inspections of that employer's I-9 forms to ensure that the employer does not attempt to recruit undocumented workers to fill the positions originally designated for H-2A workers. While we understand the concern of the commenter, we do not believe that the regulation is the appropriate place to address the details of the Department's coordination and communication with DHS in the event of revocation.

20. Section 655.118--Debarment

The current regulations provide ETA the authority to deny certification (i.e., debarment) and require the WHD to report findings to make a recommendation to ETA to deny future certifications. Debarment authority for issues arising from WHD investigations would reside with the WHD Administrator, while debarment authority for issues arising out of the attestation process would remain with ETA. The final rule modifies the proposal by providing concurrent authority for debarment to ETA and WHD, in order to assure that all appropriate alleged violations are subject to review for purposes of debarment.

The final rule is in keeping with recommendations made as far back as 1997 in a General Accounting Office (GAO) report to Congress in which GAO proposed that authority to suspend employers with serious labor standard or H-2A contract violations be extended to the WHD. See U.S. Gen. Accounting Office: Report to Congressional Committees: H-2A Agricultural Guestworker Program, Changes Could Improve

Services to Employers and Better Protect Workers, 68, 70 (1997)). Both agencies will coordinate their activities whenever debarment is considered. The standards for debarment used by WHD are identical to standards used by ETA for debarment actions under 20 CFR part 655, thus ensuring consistency in application, though ETA has some additional standards that will not be utilized by WHD. Providing WHD with the ability to debar will allow administrative trials and appeals for civil money penalties assessed by the WHD to be consolidated with debarment actions that arise from the same facts. This change will remove the requirement that ETA review WHD investigations, eliminating a step in the administrative process and allowing for more expeditious proceedings and efficient enforcement. This will not affect ETA's ability to institute its own debarment proceedings regarding issues that arise from the application, attestations, or ETA's proposed audits. Conforming changes are provided to other sections in part 501 to reflect the WHD debarment authority.

a. WHD Debarment

A number of commenters opposed extending debarment authority to the WHD These commenters requested that debarment authority remain with ETA to avoid inconsistencies in the interpretation of the H-2A regulations between the Wage and Hour Division and ETA. One of these commenters stated that extending debarment authority to the WHD would enhance enforcement, while recommending regulatory language requiring coordination between the two agencies. Given the ETA role in the administration of the H-2A program and the WHD role in its enforcement, coordination between the agencies is essential, whether or not debarment authority is extended. The

Department has concluded that both agencies are and will continue to be fully capable of coordinating program and enforcement activities to ensure the effectiveness of the debarment provisions and the entire statutory scheme. The final regulation specifically provides for agency coordination whenever debarment determinations are made.

One commenter stated that the WHD should have concurrent debarment authority with ETA to ensure that debarment is available for all appropriate violations. The Department has considered this comment, and as noted above, agrees that concurrent debarment authority is the most effective procedure for allowing all employer conduct that should be considered for debarment to be addressed. Of course, debarment for any particular violation will be addressed only by a single agency.

b. Parties Subject to Debarment – 655.118(a)

1) Successors in Interest

One organization objected to the debarment of an employer's successor in interest, as opposed to only those entities with a substantial interest in the employer. This commenter expressed concern that because debarment can result in the dissolution of the employer's business, debarring a successor in interest would impede the sale of assets and business to others who are not complicit in the cause of debarment. The Department's primary objective in debarring successors in interest is to prevent persons or firms who were complicit in the cause of debarment from reconstituting themselves as a new entity to take over the debarred employer's business. The final regulation includes a definition of successor in which the culpability of the successor and its agents for the

violations resulting in debarment must be considered. This definition will avoid harm to firms without any connection to the debarred firm or its agents.

2) Attorneys and Agents

One commenter suggested that agents of employers should be debarrable as well as employers, given that the substantial violations listed in 655.118(b) could be committed by either the employer or the employer's agent. Another commenter also expressed concern that agents could not be sanctioned even though they may commit debarrable activities. We agree that agents should be included as debarrable parties for the reasons cited by the commenters. Additionally, to be consistent with the Department's permanent labor certification program, we believe that substantial violations should include acts committed by attorneys of employers and, accordingly, that attorneys of employers be debarrable parties as well. The preamble to the NPRM expressed the Department's intention to include both actions by agents and attorneys of employers as debarrable offenses and agents and attorneys as debarrable parties: "Accordingly, if the OFLC Administrator finds that an employer or an employer's agent or attorney has misrepresented a material fact or made fraudulent statements in its attestations, materially failed to comply with the terms of the attestations, or committed an act(s) of commission or omission that reflects a willful failure to comply with an obligation, attestation, or other activity listed in proposed 655.118, the OFLC may order debarment of the employer, agent and/or attorney for a period of up to 3 years." 73 Fed. Reg. 8538, 8548 (Feb. 13, 2008). The Department has now included such references in

accordance with its intentions as expressed in the preamble of the NPRM.

c. Bases for Debarment

1) General opposition

Several commenters objected to the debarment provision on the basis that it was too severe a penalty and would discourage participation in the H-2A program. Additionally, another commenter expressed concern that overly circumscribed debarment regulations would continue to impede enforcement by the Department. As discussed in the preamble to the NPRM, the changes to the debarment provision were in response the unnecessarily narrow definition of employer actions warranting debarment, which has hampered effective enforcement of the H-2A program, and to the shift toward an application process involving less upfront oversight by the SWA. We have carefully considered the comments that we received in response to the NPRM and believe that the resulting debarment provision upholds the integrity of the H-2A labor certification program without unfairly punishing employers who utilize the program. With respect to this comment, we believe that ETA and WHD's concurrent debarment authority will help to strengthen the Department's efforts to enforce the debarment regulations.

2) "But not limited to" -- 655.118(b)

Several commenters offered that the language "but not limited to" in 655.118(b) was overly broad and raised due process concerns, as there would not be sufficient notice of what additional actions would be considered substantial violations. We agree with the commenters' concerns, and given that various grounds for debarment are already

addressed in the regulation, we do not believe that the “but not limited to” language is necessary. Accordingly it has been deleted from the regulatory text.

3) Significant injury to wages, benefits, and working conditions -– 655.118(b)(1)(i)

An association of growers suggested that the Department clarify that the significant injury to wages, benefits, and working conditions be explicitly linked to the employer's hiring of H-2A workers, which an association of growers interpreted as Congress' concern in establishing the labor certification process. We do not read Section 218 of the INA so narrowly. A substantial violation of a material term or condition of the labor certification with respect to the employment of domestic or non-immigrant workers encompasses more than injuries arising directly from the hiring of H-2A workers. For instance, an employer may pay its workers at a rate below minimum wage. The debarment of the employer for such a flagrant violation not only of the law but also the terms and conditions of the labor certification certainly would be warranted under Section 218 of the INA, despite the fact the violation did directly relate to the hiring of H-2A workers.

A group of farmworker advocacy organizations suggested that the Department should have the discretion to deny a certification to an employer who has previously engaged in violations of employment-related laws, whether or not there has been a final administrative or judicial finding of such violations and whether the employer previously employed H-2A workers or sought to do so. We believe that the ground for debarment set forth at 655.118(b)(1)(i) already encompasses the situations described by the

commenter, assuming that such violations are significantly injurious to the wages, benefits, or working conditions of the employer's U.S. or H-2A workforce.

4) Ten Percent Threshold – 655.118(b)(1)(i)

An association of growers expressed concern that under 655.118(b)(1)(i), an employer's change in the health or retirement plans or benefits offered to its employees could trigger a violation, even though the employer is in full compliance with the job order. We do not believe that this concern is warranted. The employer's action would need to be "significantly injurious" in order to trigger this violation. The language pertinent to this issue in the proposal and the final rule are identical to the language in the prior rule, and the Department has never debarred an employer on the grounds that the commenter raises.

Several employers objected to the 10% threshold required for a significant injury under § 655.118(b)(1)(i) because it would disproportionately affect small employers – i.e., an action taken against one employee might be enough to trigger a substantial violation against a small employer. A group of farmworker advocacy organizations objected to the figure because it might allow egregious actions to be taken against numbers of employees that don't meet the 10% threshold. We recognize the concerns of both the employers and worker advocates and have eliminated the 10% threshold. The consideration of the number of workers affected in debarment determinations is addressed in a new provision under § 655.118(f) which sets forth the criteria for debarment.

5) Substantial number of U.S. workers similarly employed – 655.118(b)(1)(i)

Two commenters objected to the reference to "a substantial number of US workers similarly employed in the area of intended employment" in 655.118(b)(1)(i). There was a concern that this language goes beyond the scope of domestic workers potentially employable in H-2A occupations that the adverse effect concept was intended to protect and that an employer who fully complies with program requirements could be debarred based on a finding by an economic expert that the employment of H-2A workers depresses the wages of similarly employed workers in the area of intended employment. Another commenter also expressed concern about how an employer would be aware that its actions would be significantly injurious to such workers. We recognize these concerns and accordingly, have deleted the reference to "a substantial number of US workers similarly employed in the area of intended employment" from 655.118(b)(1)(i).

6) Pattern or practice – 655.118(b)(1)(ii) and 655.118(b)(1)(iii) and generally

Several commenters suggested that the Department should require a pattern or practice of substantial violations for debarment. Of particular concern was the prospect of debarment based on the commission of one violation which they alleged would deter participation in the program. Additionally, one of these commenters commented that employers who are less sophisticated in their business practices should be spared from debarment for innocent oversights or mistakes. While we understand the commenters' concerns, we do not think that it is necessary to require a pattern or practice of substantial violations for debarment. Applying a pattern and practice requirement to each violation would leave the Department powerless to impose an appropriate penalty against

employers whose single action causes significant harm to U.S. and H-2A workers alike. Nevertheless, debarment is a serious penalty, and the Department does not intend to impose such a penalty without thoroughly evaluating the particular facts and circumstances at hand. The addition of Section 655.118(g) is meant to address various factors – including previous history of violation or violations of the H-2A provisions of the Act and these regulations -- that should be taken into account in determining whether an act constitutes a substantial violation warranting debarment. Accordingly, we have decided not to require a pattern or practice of unlawful actions to constitute a substantial violation for purposes of debarment, as we believe that the addition of Section 655.118(g) provides adequate protection against unwarranted debarments.

d. Standards – significant, willful, material and more clarification in general

Several commenters requested greater clarification of what actions would be subject to debarment and suggested including additional qualifiers or conditions to the various grounds for debarment. Two commenters stated that the grounds for debarment "reflect" unlawful activity but that the action themselves are not necessarily unlawful and, as a result, requested additional clarification as to what sort of activities would result in debarment. We disagree with the characterization of such actions constituting the grounds for debarment as not being unlawful. Section 218 of the INA authorizes debarment when an employer substantially violates a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers. The terms and conditions of the labor certification incorporate the requirements set forth not only at 655.105 and 655.106, as applicable, but also the H-2A regulations as a whole.

Accordingly, if the employer violates these terms or conditions, then the employer is violating the law.

However, in response to the request for greater clarification and concerns that the proposed rule did not provide employers with sufficient notice of what activities will result in debarment, we are providing additional clarification by setting forth criteria in 655.118(g) which should be considered in determining whether there has been a substantial violation. Such criteria include: previous history of violations, number of workers affected, gravity of the violation, good faith efforts to comply, justification for the violation, commitment to future compliance, and extent of financial gain to employer and financial loss or injury to worker. The list of criteria incorporates commenters' suggestions to include additional qualifiers or conditions to the various grounds for debarment, such as requiring violations to cause material harm, as addressed through the gravity of violation and financial loss or injury to worker criteria, or requiring willful misconduct, as addressed through the good faith effort to comply criterion. We believe that the list of criteria provides a flexible yet consistent approach to how the Department will determine whether a violation rises to the level necessary for debarment.

Several commenters requested that the Department clarify and distinguish what activity is debarrable from what activity is subject to other penalties. Many of the activities that would trigger debarment also may trigger other penalties. We do not think that it is necessary to draw such a distinction, as certain types of behavior should be discouraged, no matter what the particular penalty.

A group of farmworker advocacy organizations expressed concern that the use of the term "significant" under 655.118(b)(1)(ii) limits the authority of the Administrator to

debar an employer who has taken actions injurious to workers or refused to offer jobs to U.S. workers. We believe that any violation by the employer – no matter how minor or how egregious -- should be met with the appropriate penalty. Given the severity of debarment as a penalty for employers, the violations constituting the grounds for debarment must be substantial, as determined by the criteria set forth in 655.118(g). Employer sanctions for violations which do not rise to the level required for debarment are available through other penalties including civil money penalties.

e. Failure to offer employment/recruit US workers -- 655.118(b)(1)(iii)

An association of growers suggested that the Department clarify that a violation of "a willful failure to comply with the employer's obligations to recruit domestic workers" be subject to the following qualifications: 1) that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed; and 2) such failure is material – that if the employer had done what was required, qualified U.S. workers willing to do the job would have been found. An employer's failure to succeed in recruiting U.S. workers due to the fact that such workers are simply unavailable would not violate the regulation. Where an employer has willfully failed to comply with its obligation to recruit U.S. workers, however, it may not be possible to prove, after the fact, that workers would have been available if the proper steps had been taken. When an employer has purposely avoided its responsibility to recruit U.S. workers a substantial violation of a material term of the labor certification exists and the debarment criteria are met.

f. Civil judgment/court orders -- 655.118(b)(1)(iv)

A group of farmworker advocacy organizations suggested that an employer's failure to pay or comply with the terms of a civil judgment or court order in favor of any migrant or seasonal agricultural workers or H-2A workers should be an additional ground for debarment and that such debarment should remain indefinitely until an employer has paid all wages due and owing former workers. A group of farmworker advocacy organizations also suggested that at a minimum, the regulations should specify that an employer who has not paid assessed back wages or civil money penalties or complied with an injunction sought by the Department or paid a judgment for employment-related claims cannot receive certification. We believe that to the extent the violations asserted involve H-2A workers or U.S. workers hired in corresponding employment, the additional grounds suggested are already encompassed in Section 655.118(b)(1)(iv) which covers actions reflecting a significant failure to comply with one or more sanctions or remedies imposed by the ESA, or one or more decisions or orders of the Secretary or a court pursuant to Section 218 of the INA or 29 CFR part 501. Violations involving workers who are not subject to the H-2A program may not be the subject of debarment. As to a group of farmworker advocacy organizations' suggestion for an indefinite period of debarment, Section 218(b)(2)(B) only authorizes the Secretary of Labor to deny an employer a certification for no more than three years.

g. Incidental work – 655.118(b)(1)(vi)

A group of farmworker advocacy organizations supported the inclusion of the employment of H-2A workers in an activity not listed in the job order as a debarrable

offense because it would guard against employers that have shown a total disregard for the notion of corresponding employment which has resulted in unfair treatment of similarly employed U.S. workers. However, several commenters expressed concern that employers whose workers who would be performing work that is incidental to the activity listed in the job order could be debarred under 655.118(b)(1)(vi) for "the employment of an H-2A worker in an activity not listed in the job order." "Other work typically performed on a farm that is minor (i.e., less than 20 percent of the total of the job duties and activities that are listed on the Application for Temporary Employment Certification) and incidental to the agricultural labor or services for which the H-2A worker was sought" is included in the definition of agricultural labor and services at 655.100(c)(1)(vi). Accordingly, work that is incidental to the particular agricultural labor or services which are listed in the job order would be considered to be part of the activity that is listed in the job order. However, for the sake of clarity, we have added the following language at the end of 655.118(b)(1)(vi): "Activities for which the H-2A worker was sought include activities that are minor and incidental to the agricultural labor or services. See 655.100(c)(1)(vi)."

One commenter also suggested that the regulations should provide a means to modify the job description covered by a temporary agricultural labor certification should a situation arise that requires more than minor incidental work, such as an act of nature requiring structural repairs and/or clean-up, or the temporary incapacity of a worker due to illness or injury who could do other work. If the work as the commenter describes is more than minor in amount and incidental to the activity listed in the job order, such work would be beyond the scope of the existing temporary agricultural labor

certification. Accordingly, an employer would need to file a new labor certification application.

ih. Outside area of intended employment – 655.118(b)(1)(vi)

A law firm questioned how the employment of a H-2A worker outside the area of intended employment would support debarment under Section 218(b) of the INA. As discussed earlier, the statute authorizes debarment when an employer substantially violates a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers. 655.105(b) requires the employer to attest that it is offering terms and working conditions normal to workers similarly employed in the area of intended employment and which are no less favorable than those offered to the H-2A workers and are not less than the minimum terms and conditions required under the regulations. Section 655.105(d) requires the employer to attest that it will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply for the job opportunity until the date that is 30 days after the first date the employer requires services of the H-2A workers. The area of intended employment therefore plays a key role in determining the employer's particular obligations with respect to the terms and working condition offered and the SWA with which the job order is posted. An employer would not be able to abide by these attestations if it places its workers outside the area of intended employment and accordingly, would be committing a substantial violation of a material term and condition of the labor certification with respect to the domestic and nonimmigrant workers alike.

An association of growers suggested that the Department apply a "common sense" interpretation of the regulations, particularly with respect to where a certification describes an area of intended employment which, for example, is within a 25 mile radius of a particular city, but the worker ends up working a field for a new customer that is 27 miles from that city. As discussed above, to allow an employer to place workers beyond the area of intended employment would render the attestations, which are dependent on the presumption that the workers will be working in the area of intended employment identified in the job order, useless. Accordingly, it would be appropriate in such a case for the employer to file another labor condition application which covers the applicable area of intended employment.

i. Fees – 655.118(b)(2) – and Impeding Investigations – 655.118(b)(1)(v)

Several commenters objected to the inclusion of acts of commission or omission that reflect actions impeding an investigation and the employer's failure to pay the necessary fee in a timely manner as being too severe a ground for debarment and questioned whether the inclusion of these grounds were within the Department's authority under the INA. The INA authorizes debarment for a substantial violation of a material term or condition of a labor condition application with respect to the employment of domestic or non-immigrant workers.

Section 655.109(g) specifically provides that as a condition of the issuance of the labor certification, the employer must pay the processing fee in a timely manner, and 655.105(m) provides that an employer must attest that all fees associated with processing the temporary labor certification will be processed in a timely manner. Additionally, a

law firm objected to the inclusion of an employer's failure to pay the necessary fee in a timely manner because it does not comport with longstanding practice in other existing immigration procedures. However, an employer's failure to pay the necessary fee in a timely manner has been a ground for debarment under the H-2A regulations since July 1987. Accordingly, the Department's retention of this ground for debarment supports the Department's longstanding practice and is necessary for the Department to administer effectively the H-2A labor certification process.

Additionally, a wool growers association was concerned that if the check arrived one day late, then the employer could be debarred under 655.118(b)(2). We do not read the provision to be that absolute and inflexible. Even though Section 655.109(g)(2) provides that fees received by the CO no more than 30 days after the date the temporary labor certification is granted will be considered timely, the language of "timely manner" provides the Department with some discretion so that a check that arrives on the 31st day would not automatically result in the debarment of the employer. The Department takes very seriously its responsibility to administer the H-2A program in a fair and reasonable manner.

Full cooperation with investigations to determine compliance with the terms of the labor condition application and the regulations is essential to the viability of the H-2A program. Accordingly, the labor condition application provides that the employer will cooperate fully with any investigation undertaken under the statute or regulations. Impeding an investigation would therefore qualify as a substantial violation of a material term of the labor condition application.

j. Fraud and Material Misrepresentation – 655.118(b)(3)

Although no comments were received with respect to this provision, the Department added "knowingly" before "making a material misrepresentation" for the sake of clarity and consistency.

k. Debarment Proceedings – 655.118(c)

1) Statutory authority – requirement for notice and hearing

Some commenters expressed concern that the regulations exceeded the statutory grant of authority for debarment provided to the Department under the Immigration and Nationality Act. These commenters questioned whether the regulations were consistent with the statutory requirement that a determination of a violation can only be made after notice and an opportunity for hearing. We believe that the regulations are consistent with the statutory requirement for notice and an opportunity for a hearing. Under 655.118(c), the Department provides notice to the employer through a Notice of Debarment, and the employer is provided with the opportunity for a hearing through the administrative appeals process. Accordingly, the regulation's debarment procedures are consistent with the statutory requirement that a determination of a violation be made after notice and an opportunity for hearing.

Additionally, several commenters questioned whether the Department was exceeding its statutory authority under the INA, given that a final determination of the violation would likely not occur until more than two years have passed since the violation. The INA provides that "(2)(A)the employer during the previous two-year period employed H-2A workers and the Secretary of Labor has determined, after notice

and opportunity for hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers. (B) No employer may be denied certification under subpart (A) for more than three years for any violation described in such subparagraph." 8 U.S.C. 1188(b)(2).

The statute presents three requirements for denial of a certification. First, the employer must have employed H-2A workers within "the previous two-year period"; second, the Secretary must determine, after notice and hearing, that a substantial violation occurred during that two-year period; and third, denial of certification based on a finding of violations may not extend for more than three years. However, the statute does not place a time limit on when the Secretary's final determination may occur. While a substantial violation must have occurred within the two-year period, so long as a determination is ultimately made, a certification may be denied based on that debarment. The most reasonable reading of the debarment provision, giving effect to all its language, is that Congress intended the Secretary to initiate an investigation leading to debarment within two years of the alleged violation and, by referring in section 1188(b)(2)(B) to a maximum three-year period, to permit any eventual debarment action to be for up to three years.

The Department's interpretation of this provision was codified in the prior regulations at 20 C.F.R. 655.110(a) and upheld in Matter of Global Horizons Manpower, Inc. and Mordechai Orian, ALJ No. 2005-TAE-00001 (June 16, 2006).

Several farm bureaus and growers' associations suggested that employers be provided with an opportunity to be heard before the issuance of a Notice of Debarment

due to the concern that parties opposed to the H-2A program would spark investigations that are not aimed at improving working conditions but at shutting down an employer's ability to hire H-2A workers when qualified workers are unavailable. As discussed above, the Department already provides employers with an opportunity for a hearing through the appeals process, and debarment is stayed upon the administrative appeal of an employer. Having an additional level of hearings would be overly cumbersome and impede the Department's administration of the H-2A program. Based on our experience with the permanent labor certification program, after which the H-2A program's debarment provision was modeled, we have concluded that the procedures set forth in the regulations provide sufficient protection against meritless claims.

2) Timing

Commenters expressed conflicting concerns over the amount of time debarment procedures would entail. Two employer associations expressed concern that because of the length of the process, an employer could face uncertainty as to its debarment status and that the employer's ability to plan for its labor needs would be adversely affected. An association of growers proposed a much more drawn-out procedure starting with a detailed notice of an intent to debar from the Department, a disclosure of the full evidentiary record by the Department, a pre-notice hearing with a minimum of 30 days (with extensions), issuance of a formal notice of debarment by the Department which should include the factual and legal grounds for the intended action, prescribe an effective date that is after the time period for filing a timely appeal, provide at least 14 days to appeal, and administrative appeal by the employer, with the proceedings to be

governed by 29 CFR 18. We have already discussed the reasons we have not included a pre-notice hearing. The final regulations require a Notice of Debarment to state the reason for the debarment finding, including a detailed explanation of the grounds for the debarment. We believe that An association of growers raises a valid point about prescribing an effective date that is after the time period for filing a timely appeal, and we have added to the regulation the requirement that the Notice of Debarment specify that the employer have 30 days to file an administrative appeal before debarment becomes effective. We believe that the procedures set forth in these regulations provide a middle ground between these two sets of concerns by providing a period of time that is both sufficient for thorough consideration of the grounds for debarment and expedient enough so as to allow the Department to debar bad actors before they can cause any additional harm or in the case of a successful appeal, the employer may resume its normal business operations.

3) Phasing In/Grace Period

Two commenters suggested phasing in the Department's compliance and control measures so that employers have the opportunity to adapt to the program. We have addressed this comment in the preamble to 655.117 governing revocation.

l. Debarment Involving Members of Associations – 655.118(d), (e), and (f)

A group of farmworker advocacy organizations suggested that debarment should also apply to an association and its members' successors in interest so that associations and their principals will not be able to re-constitute themselves and continue business as

usual. Because associations and/or their members operate as employers under the various scenarios addressed by the regulations in 655.118(d), (e), and (f), the successor in interest language for employers in 655.118(a) would also apply to associations and their members as well. Accordingly, we do not believe that it is necessary to change the language in 655.118(d), (e), or (f).

4) Protections to Workers of Debarred Employers

A legal services provider suggested that the Department establish a system allowing H-2A workers from a debarred or decertified employer to be transferred to the next available H-2A order in the state or region to protect these workers from becoming jobless due to enforcement actions against their employer. Because debarment applies only to an employer's ability to obtain future labor certifications, and revocation applies to an employer's existing labor certification, we believe that it is neither necessary nor useful to set up such a system, as a debarred employer would not have any H-2A workers.

m. Beyond the Scope of the Regulation

Two grower associations suggested that the Department provide technical assistance to employers on complying with the H-2A program through training and a 1-800 hotline on selecting agents. We do not believe that the regulations are the appropriate forum to address these issues.

21. Timeline for Anticipated Training and Education Outreach Initiatives

Commenters suggested that the Department include a timeline for training and education outreach initiatives in the final rule and indicate who would be responsible for such training and outreach – the Department or the SWAs. The commenters also gave us specific ideas on what they would like to see in the training and educational materials. The commenters requested that we prepare training on how to respond to the threat of litigation; how to respond to audits; how to comply with all program functions; the application process, and how to avoid violations and penalties. There were also requests that we provide the training in both English and Spanish.

These are policy issues that are usually handled through guidance letters and are too detailed to include in the rule, however, the Department appreciates the input from commenters as it will enable the Department to prepare its training based on these comments. As for who will provide training, the Department believes the training should be consistent, therefore, the Office of Foreign Labor Certification will be developing and providing the training.

B. Revisions to 29 CFR Parts 501, 780, and 788

Comments received that discussed whether the commenter was generally in favor of or generally opposed the proposed regulations typically did not differentiate between the proposed changes to 20 CFR part 655, Subpart B and 29 CFR part 501. Comments received about proposed changes in 29 CFR part 501 typically commented on a specific change proposed in this part. These are addressed below. Comments specific to the proposed changes to 29 CFR part 780 and 29 CFR part 788 are also discussed below.

1. Changes to Parts 780 and 788

In the notice of proposed rulemaking (NPRM) published February 13, 2008, the Department proposed a modification to Parts 780 and 788 of the FLSA regulations to recognize that the production of "Christmas" trees through the application of agricultural and horticultural techniques to be harvested and sold for seasonal ornamental use constitutes agriculture as the term is defined under the FLSA. As explained in the preamble to the NPRM, the Department deemed this change necessary in light of the Fourth Circuit Court of Appeals' decision in U.S. Department of Labor v. North Carolina Growers Association, 377 F.3d 345 (4th Cir. 2004), and because it recognizes that modern production of such trees typically involves extensive care and management.

Many individual employers, trade associations, and associations of growers approved of the Department's proposed rule to classify Christmas tree farming as an agricultural activity under FLSA. Several commenters noted that the Christmas tree industry had undergone significant changes, such as no longer harvesting from natural stands, in the time since the FLSA was first passed in 1938. Commenters also listed a range of current common practices shared by Christmas tree producers and other row crop farmers, such as planting, pruning, weed control, pest control, transplanting, and harvesting under a deadline. The insights provided by these comments further confirms that the determination to classify Christmas tree farming as agriculture under the FLSA is appropriate.

Two commenters suggested that many of these activities were also covered by the 1938 FLSA primary definition of agriculture. Moreover, the commenters maintained that, since the FLSA classifies nursery activities as an agricultural activity, Christmas tree

production and harvesting, which the commenters believed to be nearly identical to those in nursery production and harvesting, must also be classified as agricultural activity.

Several commenters expressed appreciation for the Department's attempt to establish a national standard for Christmas tree labor status. Several others maintained that the ambiguity surrounding the industry's status had hurt Christmas tree growers nationally because laws were not being applied in a uniform fashion across the states. In addition, many commenters pointed to the Fourth Circuit's 2004 decision in U.S. Department of Labor v. North Carolina Growers Association, in which the court held that Christmas tree farming fit the definition of agriculture as proof that Christmas tree production was an agricultural activity. 377 F.3d at 352. This holding created confusion between the Department's classification and federal law. Two commenters noted that Christmas tree growers located in the Fourth Circuit may have achieved clarity with respect to their status as agricultural producers, but the status of all other Christmas tree growers not within the jurisdiction of the Fourth Circuit remained unclear until now.

Other commenters added that, under many other federal rules including property tax, sales tax, and agricultural worker's protection standards for pesticide use, Christmas tree growers were already considered to be agricultural. Several commenters acknowledged that certain Christmas tree growers may dig trees with a soil ball, which is considered a nursery activity and therefore an agricultural activity, but may also produce trees for harvesting by cutting, which has, historically, not been considered to be agricultural activity. The commenters noted that the decision to dig or cut a tree depends on market conditions at the time of harvest, and the same employees could hypothetically participate in both scenarios. Two commenters concluded, however, that this difference

between nursery and Christmas tree harvesting was irrelevant because the production practices remained the same and should be construed as agriculture. Likewise, one commenter wrote that the same equipment was often used for both Christmas tree production and nursery projects.

Three commenters offered suggestions for minor changes to the rule stating that the proposed language offered overly specific timeframes for cultural operations. The commenters argued that such timeframes may vary according to region and tree species and that future changes to horticultural procedures might affect some of the listed activities in the rule. One commenter further stated that removing the timeframes would not affect the Christmas tree industry's ability to operate within FLSA's definition of agriculture, but would possibly eliminate an unnecessary rigidity that might otherwise disqualify Christmas tree production that appropriately qualifies for agricultural status. The Department has determined that the timeframes are sufficiently flexible to allow for variation due to region, species, and procedural differences. In fact, the Department agrees with the Fourth Circuit's reasoning in the North Carolina Growers Association case that performance of certain actions on the plants within certain timeframes is an important indicator that what is being produced is a seasonal ornamental horticultural commodity. See 377 F.3d at 345.

One commenter, commenting on its own behalf and on behalf of numerous advocacy groups, opposed the rule, asserting that, while the H-2A program offered more comprehensive protections for workers than did the H-2B classification (under which many Christmas tree harvest workers had previously been allowed into the country to work), Christmas tree workers under the H-2A Program would lose their coverage under

the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) as well as their claims to overtime. The commenter added that the matter of overtime pay was critical because the Christmas tree harvest season can be extremely intense with extensive overtime work. Temporary, non-immigrant workers for Christmas tree production have been brought in under the H-2A Program and not the H-2B non-agricultural Program for many years now based on the IRC definition of agriculture, which the H-2A regulations use (as well as the FLSA definition of agriculture), and would not have been within the definition of a worker subject to MSPA. The proposed rule insures equity within the industry in that employers across the country will be bound by the same requirements under the FLSA in the wake of the Fourth Circuit's North Carolina Growers Association decision. See id. . The Department is adopting the proposed changes for 29 CFR Part 780 without change.

No comments were received with respect to the proposed change to 29 CFR Part 788.10. Therefore, the Department is adopting the proposed rule without change in the final rule.

2. Changes to Part 501

Section 218(g)(2) of the INA authorizes the Secretary of Labor to take such actions, including imposing appropriate penalties, seeking appropriate injunctive relief, and requiring specific performance of contractual obligations, as may be necessary to ensure employer-compliance with the terms and conditions of employment under this section of the statute. The Secretary has determined that the enforcement of the contractual obligations of employers under the H-2A Program is the responsibility of the

Wage & Hour Division (WHD). Regulations at 29 CFR part 501 were issued to implement the WHD's responsibilities under the H-2A Program and the amendment of these regulations is part of this proposed rulemaking.

Concurrent with the Department's finalization of the proposed amendments to its regulations in 20 CFR part 655, Subpart B to modernize the certification of temporary employment of nonimmigrant H-2A workers, the Department is finalizing the proposed amendments to its regulations at 29 CFR part 501 regarding enforcement under the H-2A Program.

The changes proposed for enhanced enforcement to complement the modernized certification process, so that workers are appropriately protected when employers fail to meet the requirements of the H-2A Program, are incorporated into this final rule. Given the number of changes proposed for 29 CFR part 501 and the number of sections affected by the proposed changes, we have included the entire text of the regulation and not just the sections changed. We note that a number of comments suggested changes but that the existing text of the regulation, which was to remain unchanged, already addressed such issues in the manner raised in the comments. We will discuss comments received and any changes to the regulatory text in the NPRM in response to comments.

a. Amended sections

Based on comments received and our recognized need for clarification, we made changes to the following sections subsequent to the proposed rule: Sections 501.1, 501.3, 501.4, 501.8, 501.10, 501.15, 501.16, and 501.20.

The following sections have not been changed since they were published in the notice of proposed rulemaking: Sections 501.0, 501.2, 501.5, 501.6, 501.19, 501.21, 501.22, 501.30 through 501.33, and 501.41 through 501.45.

The following sections were not included in the proposed rule and have not been amended since publication in 52 FR 20527, June 1, 1987: Sections 501.7, 501.17, 501.18, 501.34 through 501.40, 501.46, and 501.47.

b. § 501.0 Introduction

Language was added to the proposed introduction section 501.0 to update the reference to Section 218 of the Immigration and Nationality Act (INA) and provide that corresponding employment only includes U.S. workers who are newly hired by employers participating in the H-2A Program. Two commenters disagreed with this change. One found the Department's argument for removing U.S. farmworkers who are not newly hired from the protection of the H-2A provisions unpersuasive. The other noted that, while the Department justifies these changes by noting situations where H-2A workers are paid more than similarly employed U.S. workers will arise very rarely, if ever, in practice, the fact that an irrational result arises only rarely does not serve as a justification for ever allowing it to occur and requested the Department to withdraw this proposed change. As we stated in the preamble to the proposed rule, the INA only requires that the employment of the alien in such labor or services not adversely affect the wages and working conditions of workers in the United States similarly employed. Where an employee has agreed to work at a certain wage, and receives that wage prior to the time an employer has hired an H-2A worker, the payment of the H-2A worker at a

rate that is higher than the wage received by the U.S. worker will not adversely affect the wages and working conditions of the U.S. worker. As such, the Department lacks the authority to require that H-2A employers pay existing workers the rates paid to subsequently hired H-2A workers.

One commenter proposed that the definition of "corresponding employment" be clarified to exclude those persons who may be willing to work limited hours or fewer days than those for which full-time workers are sought under an H-2A job order. These regulations are applicable to the employment of U.S. workers newly hired by employers of H-2A workers in the same occupations during the period of time set forth in the labor certification approved by ETA. These workers are engaged in corresponding employment. Any U.S. worker who is hired in corresponding employment must receive the benefits and protections outlined in the H-2A job order, the work contract, and the applicable regulations. Consequently, an employee who is hired to perform any work covered by the job order during the contract period is entitled to all the material terms and conditions of the job order or work contract for the corresponding employment, but not for any time spent in work not covered by the job order or work contract. If part-time workers are engaged in corresponding employment, they are entitled to the same rights as the H-2A workers, including payment of the AEWR (or highest applicable H-2A-required rate). The H-2A record keeping requirements mandate the recording of all hours offered. Hours offered but not worked by a part time employee would count towards the employer's three-fourths guarantee obligation. No changes were made to section 501.0 in the final rule.

c. § 501.1 Purpose and scope

One commenter suggested that the Wage and Hour Division does not need to be an enforcement authority in connection with the H-2A Program. As discussed above, the Secretary determined that the enforcement of the contractual obligations of employers under the H-2A Program is the responsibility of the Wage & Hour Division (WHD) and there is no clear rationale for discontinuing WHD's responsibilities.

This section in the regulations previously addressed whether employment had been offered to U.S. workers for up to 50 percent of the contract period. The proposed rule had requested comments on this requirement and proposed replacing the 50 percent rule with expanded, up-front recruitment requirements. In the final rule in 20 CFR part 655, Subpart B, the requirement will now be whether employment has been offered to U.S. workers up to the 30th day after the first date the employer requires services of the H-2A workers. This change to the 50 percent rule is more fully discussed in the preamble to the final rule for 20 CFR part 655, Subpart B. For purposes of 29 CFR part 501, language regarding this requirement has been modified to address whether employment has been offered to U.S. workers as required for a 30 day period. Language in this section also clarifies the WHD's role when U.S. workers are laid off or displaced, in light of section 501.19(e) discussing WHD's authority to assess civil money penalties for violations of these requirements. Also, a commenter noted that the statutory language indicated that the Secretary was authorized to take action as described in section 501.1(c) and the language has been changed to reflect the statute.

One commenter suggested that the proposed language for section 501.1(c)(2) could be interpreted as disjunctive. The comment contends that clarifying language

would deter violations by preventing employers from shifting liability to other entities and ensure workers' access to a meaningful recovery from either a FLC (see 501.10 definitions for H-2A Labor Contractor (H-2ALC) definition) or its bond insurer. Accordingly, section 501.1(c)(2) includes the term "and/or" to demonstrate the liability of H-2ALCs as well as their surety for violations of the H-2A rules and regulations. This change is intended to clarify the surety's and the H-2ALC's liability and to provide an additional means of wage recovery.

d. § 501.2 Coordination of intake between DOL agencies

The proposed rule clarified the procedure for addressing contractual H-2A labor complaints filed with either the ETA or any State Workforce Agency (SWA). Such complaints will be forwarded to the WHD office of the Department of Labor and will be administratively addressed as provided in these regulations. No changes have been made to section 501.2 in the final rule.

e. § 501.3 Discrimination

Proposed section 501.3(b) added two provisions to the existing regulation prohibiting discrimination against persons exercising rights under the H-2A statute. The Section modified the debarment remedy to conform to proposed section 501.20, which provided the WHD with authority to debar violators under certain conditions. The section also added language codifying the existing procedure for forwarding complaints based on citizenship or immigration status to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment

Practices. Under this procedure, complaints based on citizenship or immigration status are forwarded to the Department of Justice, while aspects of the complaints which allege a violation of this section, or any other portion of the H-2A statute or regulations, are investigated by the WHD.

The Department received four comments on section 501.3. One private citizen stated that guestworkers should be protected from discrimination on the same terms as U.S. workers. One non-profit legal aid firm stated that H-2A employers have a reputation for mistreating U.S. farmworkers and urged the Department to closely monitor hiring and employment practices and severely penalize employers who discriminate against U.S. workers.

One agricultural organization stated that the Department has not explained the legal basis for this authority or the proposed new procedures for handling discrimination claims. The agricultural organization also stated that Congressional intent is contrary to the Department's assertion of broad authority over undefined forms of discrimination with an uncapped make whole remedy.

With the exception of debarment procedures, which are discussed in conjunction with the debarment regulation, section 501.20, the proposed regulation, like the final regulation, does not contain new procedures for the investigation of discrimination complaints. As part of the Application for Temporary Employment Certification, an employer attests that it will not discriminate against persons who exercise their rights under the H-2A statute and regulations. Authority for the current regulation is found in Section 218(g)(2) of the INA which authorizes the Secretary of Labor to take such actions, including imposing appropriate penalties and seeking appropriate injunctive

relief and specific performance of contractual obligations, as may be necessary to ensure employer compliance with terms and conditions of employment.

The agricultural organization further stated that employment discrimination claims should be handled by the Equal Employment Opportunity Commission (EEOC). On the other hand, one farmworker advocacy organization argued that the Office of Special Counsel (OSC) has no statutory authority to enforce the rights of long-term, lawful permanent residents. This commenter proposed that section 501.3 should be modified to empower the WHD to investigate and prosecute complaints of discrimination on all unlawful grounds, including citizenship or immigrant status.

The Department has clarified the final regulation to make clear that the WHD will continue to investigate all alleged violations of the H-2A statute and regulations, and forward complaints of citizenship and immigration status, which it lacks authority to enforce, to the Department of Justice. Similarly, discrimination claims subject to EEOC jurisdiction will be forwarded to that agency. As noted above, where the same operative facts that support an allegation of citizenship discrimination or any other type of discrimination also support a claim of discrimination under the H-2A statute and regulations, which generally relate to retaliation for exercising rights under the program, the WHD will investigate the claim of discrimination under the H-2A statute and regulations and refer the claim of citizenship or other discrimination to the Department of Justice or to any other appropriate agency.

f. § 501.4 Waiver of rights prohibited

Proposed section 501.4 proposed a change to the existing regulation to conform to the modified definition of corresponding employment in section 501.0 and to remove language that was not necessary to the meaning or interpretation of the regulation. No other change was intended. The final regulation adds language that was included in the prior regulation to make clear that the prohibition on the waiver of rights does not prevent agreements to settle private litigation.

An agricultural organization expressed concern that this provision prohibits anyone from seeking a waiver of rights and recommended that the Department clarify that this does not preclude offering a settlement, proposing a waiver or general release, or informally resolving disputes in the workplace. As noted above, the Department has included language from the current regulation stating that agreements to settle private litigation are not prohibited. In other contexts employees may not waive statutory or regulatory rights.

g. § 501.5 Investigation authority of Secretary

This section discusses the authority of WHD to debar under the H-2A Program. In addition, the proposed rule provided that sanctions may be imposed on any employer that does not cooperate with an H-2A investigation. One commenter stated that the proposed rule changed the broader term <u>person</u> to <u>employer</u> and recommended the use of the prior language. The term <u>employer</u> is used to conform to the statutory language. To be consistent with language used elsewhere in the part and in 20 CFR 655 Subpart B, this section now includes the employer's attorney or agent.

h. § 501.6 Prohibition on interference with DOL officials

The proposed changes to section 501.6 were intended to ensure that DOL officials receive cooperation from employers participating in the H-2A Program in conducting audits, investigations, and other enforcement procedures intended to ensure the efficiency and effectiveness of the Program and included language specifically addressing WHD's authority to debar under the H-2A Program. No changes were made to section 501.6 in the final rule.

i. § 501.8 Surety bond

In order to assure compliance with the H-2A labor provisions and to ensure the safety and security of workers under the H-2A Program, proposed section 501.8 requires all H-2A Labor Contractors (H-2ALCs) seeking H-2A labor certification to obtain a surety bond for $10,000, where the H-2ALC employs fewer than 50 employees, or for $20,000, where the H-2ALC's employees number 50 or more. The purpose of section 501.8 is to ensure that workers employed under the H-2A Program receive all wages and benefits owed to them by a H-2ALC who is found to have violated the provisions of the H-2A Program during the period for which it was certified. Rather than requiring H-2ALC applicants to remit the bonds directly to the Department, however, proposed section 501.8 requires that the H-2ALC attest to having obtained the required bond and to provide the specific bond and bonding company information in conjunction with the H-2A certification application.

The proposed requirement for a surety bond from H-2ALCs was met with approval from two commenters. A worker advocacy organization suggested that the

Department consider other associated worker costs in addition to the number of employees to compute the amount of the bond that the H-2ALC would have to obtain.

Other commenters disagreed with the surety bond requirement. An agricultural organization that disagreed with section 501.8, as it was proposed, argued that the surety bonds will not be financially feasible for any but the largest H-2A contractors. It contends that such bonds are not only financially constrictive but are also difficult to obtain in the bond underwriting market. The Department notes, however, that several states, including California, Illinois, Oregon, and Texas, have adopted similar state regulations requiring comparable surety bond amounts from employers and labor contractors without causing any significant impediments to employers and agricultural labor contractors. Several commenters argued that the Department's ability to increase the bond amounts based only on its discretion is unreasonable and is outside the scope of the Department's authority. Instead, they suggest that the regulation provide more objective criteria for setting the bond levels instead of relying solely on the discretion of the Secretary of Labor.

The Department has determined that it has the authority, where warranted by the circumstances and supported by objective criteria, to require that an H-2ALC obtain an increase in a bond amount if it is deemed necessary to effectuate the purposes of ensuring that the H-2ALC comply with the requirements and obligations of the H-2A Program. A clarification that objective criteria are required to support an increase in the bond amount has been added to the Final Rule. The due process rights of H-2ALCs are further preserved through the H-2ALC's right to request a hearing pursuant to section 501.33 regarding the Department's determination that the amount of a bond is to be increased in

order to be allowed to participate in the H-2A Program. By reviewing the historic bonding requirements in conjunction with worker claims, the Department preserves the discretionary authority needed to ensure that the obligations owed by the H-2ALCs to workers employed under the H-2A program are fulfilled, including wages paid, and to ensure that the protections offered to those workers by the H-2A Program are maintained.

j. § 501.10 Definitions

Section 501.10 incorporates the definitions listed in 20 CFR part 655, Subpart B that pertain to 29 CFR part 501. The discussion of definitions that are common to both 20 CFR 655.100 and 29 CFR 501.10 can be found in the preamble for 20 CFR 655, Subpart B above.

As noted in two comments, the definition of employ in proposed 29 CFR 501.10 was defined as to suffer or permit to work whereas the terms employer and employee were defined in terms of the common law test. Since the two concepts are different and the use of suffer or permit to work is precluded by the 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.

The definition of work contract has been updated to reflect language used in the proposed changes to 20 CFR part 655, Subpart B.

The proposal, like the final rule, utilized the term successor in interest in sections 501.16(b) and 501.20. Because the proposal did not contain a definition of the term, and because the definition may change depending on whether a make whole remedy under

501.16(b) is needed or a penalty under 501.20 is assessed, a definition of the term has been added to clarify the final rule.

k. § 501.15 Enforcement

This section updated references to Section 218 of the INA and changed language addressing corresponding employment. In addition, language has been added to be consistent with other sections regarding WHD's authority to address whether employment has been offered to U.S. workers as required and whether U.S. workers were impermissibly laid off or displaced.

l. § 501.16 Sanctions and remedies

The proposed rule modified the current language to conform to the proposed regulation at section 501.20, which provided authority to the WHD to debar violators under certain circumstances and to conform to the bonding requirements in 20 CFR part 655, Subpart B.

A farmworker advocacy organization comments that the proposed rule can be read to restrict payment of back wages to fixed-site employers in the event that a joint employment relationship exists between a fixed-site employer and an H-2ALC. Since it is the Department's intent to hold both employers in a joint employment relationship liable for back wages, the regulation has been clarified to make that point plain.

The farmworker advocacy organization also commented that the distinction between the WHD's jurisdiction to debar and the ETA's jurisdiction to debar is unclear, and expressed concern that some violations that may merit debarment would not be acted

upon. The commenter suggested that debarment authority be concurrent to assure that all appropriate allegations would be addressed. After careful consideration of this alternative, the Department has determined that concurrent jurisdiction, together with full coordination between the two agencies, will best assure that all potential violations will be addressed. The final rule has been modified accordingly.

Finally, the rule has been clarified to make explicit that back wages may be assessed in the event a U.S. worker is adversely affected by a lay off, displacement, or a failure to hire in violation of the statute or regulations. This clarification conforms the regulation to the provisions of the proposed civil money penalty and debarment regulations which provide for penalties in the event a U.S. worker is adversely affected by a layoff or displacement. Assessment of back wages in the event of a job loss due to the hiring of H-2A workers is essential to ensure that the employment of the alien in such labor or services will not adversely affect the wages and working conditions of U.S. workers similarly employed. While the authority to assess back wages is already provided in the proposed regulation, the clarification is useful in light of the explicit penalty provisions in sections 501.19 and 501.20.

m. § 501.19 Civil money penalty assessment

Section 218(g)(2) authorizes the Secretary to set appropriate penalties to assure compliance with the terms and conditions of employment under the H-2A statute. Proposed section 501.19 increased the maximum civil money penalties from the current maximum of $1,000 per violation. Section 501.19(c)(1) proposed an increase to a maximum penalty to $5,000 per worker for a willful failure to meet a condition of the

work contract or for discrimination against a U.S. or H-2A worker who filed a complaint, has testified or is about to testify, or has exercised or asserted a protected right. Section 501.19(d) proposed a change to the maximum penalty for interference with a WHD investigation to $5,000 per investigation. Section 501.19(e) proposed an increase to $15,000 for the maximum penalty for a willful failure to meet a condition of the work contract that results in displacing a U.S. worker employed by the employer during the period of employment on the employer's application, or during the period of 75 days preceding such period of employment. Section 501.19(c)(2) proposed a new penalty of up to $50,000 per worker for a violation of an applicable housing or transportation safety and health provision of the work contract that causes the death or serious injury of any worker. The section also proposed a new penalty of up to $100,000 per worker where the violation of a safety and health provision involving death or serious injury is repeated or willful.

Three worker advocacy organizations and a U.S. Senator supported the Department's proposal to increase the amount of fines and penalties for noncompliance with H-2A rules. One commenter stated that enhanced enforcement activities are key to an effective attestation-based application program and encouraged the Department to utilize all fines levied for noncompliance to further enhance enforcement measures. Similarly, one worker advocacy organization stated that the increased money penalties are welcomed and may have some tangible deterrent effect; however, it did not think they were adequate to achieve meaningful assurance of employer compliance.

Fourteen commenters opposed the proposed increases in penalties and fines, arguing that the increases are excessive. Six commenters argued that the excessive

increases in fines and penalties would discourage employers, especially new employers, from using the H-2A Program. Some agricultural organizations raised concerns that the increased penalties would deter employers from participating in the program out of fear that excessive penalties could end a business. Similarly, some agricultural organizations argued that the increased penalties are excessive given the complicated nature of the program and the likelihood of an inadvertent mistake on the part of the employer that could prove to be financially disastrous. One farm labor contractor argued that the fines are unnecessary since employers strive to treat all workers fairly and attempt to follow the rules.

Some commenters suggested that the Department not assess a $5,000 civil money penalty against employers new to the H-2A Program and the certification requirements. While one commenter endorsed and encouraged the Department's ability to utilize all fines and penalties for noncompliance with the H-2A rules, he raised some concern that the proposal does not provide any leeway to new users of the program. The commenter recommended a graduated system of fines to allow for a learning curve for new users. Similarly, one agricultural organization suggested that the civil money penalties be graduated for the first, second, and third offenses to allow for a learning curve due to the complexity of the program.

Initially, it should be noted that the prior rule provided penalties in the maximum amount of $1,000 for <u>each act</u> of discrimination or interference. 29 CFR 501.19(c). While the final rule will result in increased penalties in some cases, it will also limit penalties for discrimination to $5,000 per worker and penalties for interference to $5,000 <u>per investigation</u>, creating new caps for these penalties.

The Department does not believe that higher penalties, where applicable, will prevent employers from participating in the H-2A Program. Rather, the Department agrees with Senator Chambliss that enhanced enforcement activities are key to an effective attestation-based application program and will assist the Department in enforcing worker protections. The new attestation process increases the possibility that certain requirements of the work contract may not be fulfilled by some employers. The higher penalties are an important and effective deterrent against violators who disregard their obligations under the attestation program and/or who discriminate against workers.

It is worth noting that some commenters believe that the penalties are excessive, while others claim they are inadequate. The Department believes that the penalties are set at an appropriate amount that will serve as an effective enforcement tool to discourage potential abuse of the program.

While the new sections increase the amount of the penalties that the Department may seek for some violations, they do not modify or change in any way the relevant factors that the Administrator will use in determining the amount of the penalty as listed in the prior rule. The Administrator will not seek the maximum amount for every violation. Rather, the Administrator will continue to evaluate the relevant factors listed in section 501.19(b), and the totality of the circumstances, when determining the amount of the penalty. The factors that will be considered include, but are not limited to, the previous history of violation(s) of the H-2A provisions of the Act and the regulations; the number of workers affected by the violation(s); the gravity of the violation(s); efforts made in good faith to comply with the H-2A provisions of the Act and these regulations; explanation of the person charged with the violation(s); commitment to future

compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H-2A provisions of the Act; and the extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the worker. These criteria assure that excessive penalties will not be assessed and that penalties will be appropriately tailored when minor or inadvertent violations are committed.

As previously noted, the Department's proposal also allows the Administrator to seek higher civil money penalties for a violation of an applicable housing or transportation safety and health provision of the work contract that causes death or serious injury of any worker. The Department has corrected a typographical error in section 501.19(c)(3), which inadvertently stated that "[f]or purposes of paragraph (c)(3) of this section, the term serious injury means." The proposed section should have referenced paragraph (c)(2).

One agricultural organization supported increased prosecution of repeat or flagrant violators of the H-2A Program instead of implementing excessive fines for inadvertent violations. Some commenters disagreed with the $50,000 penalty per worker for these violations, and one agricultural organization opposed additional penalties of $15,000, $50,000, and $100,000 for violations that result in injury and death. These commenters expressed concerns that in some circumstances an employer could have no reasonable means of knowing about housing or transportation defects or an employee's misbehavior or carelessness that could lead to serious injury or death. One agricultural organization argued that these penalty increases would not reduce accidents but would rather deter employers from participating in the H-2A Program.

The Department believes that the proposed penalties would provide a meaningful assurance that participants in this attestation-based program will meet their obligations to ensure that the housing and transportation provided to the workers meets all applicable safety and health requirements, which in turn will prevent tragic and debilitating injuries. The Administrator will not seek the full amount in every circumstance. The Department will continue to evaluate the relevant factors listed in section 501.19(b), and the totality of the circumstances, to determine the civil money penalty assessment for these violations. For instance, the gravity of the violation(s); efforts made in good faith to comply with the H-2A provisions of the Act and these regulations; explanation of the person charged with the violation(s); and the extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the worker will be considered by the Department in determining the civil money penalty assessment against an employer for a violation of an applicable housing or transportation safety and health provision of the work contract that causes death or serious injury of any worker. The Department believes that evaluating these relevant factors, along with the totality of the circumstances, should alleviate the commenter's concerns that excessive penalties will be assessed for inadvertent violations. Furthermore, one commenter expressed concern that serious injury is not further defined. It is the Department's view that section 501.19(c)(3), which defines serious injury as the permanent loss or substantial impairment of the senses, function of a bodily member, organ, or mental faculty, or the loss of movement of a body part, is sufficient to put employers on notice as to the types of injuries that the Department will consider when assessing a penalty.

One agricultural organization stated that penalties are not the proper deterrent to stop safety violations because they are imposed after an accident and recommended greater emphasis on preventing accidents. Similarly, two agricultural organizations requested a specified time period for employers to correct violations before penalties would be assessed. One agricultural organization stated that employers who make good faith efforts to comply with the revised H-2A Program should be allowed a 60 day compliance period to correct the error without the assessment of fines and penalties.

While the Department recognizes the need to prevent accidents before they happen, the Department believes that the burden to do so should rest with the employer who has attested that the housing and/or transportation provided to the workers meets all applicable requirements. Furthermore, the ability to assess a civil money penalty where violations have been found will serve an important incentive for employers to ensure that the housing and transportation that they provide are safe to the H-2A and U.S. workers and meet all applicable safety and health requirements. The Department does not believe that a 60 day compliance period after a violation has been discovered would ensure that employers fulfill their obligations to provide safe housing and transportation. Rather, the 60 day compliance period would not be an effective deterrent for employers who might not cure safety violations until discovered by the Department.

One law firm argued that, to the extent that the Department contemplates issuing fines for violations of other laws, such as the Occupational Safety and Health Act or Fair Labor Standards Act, those fines would be duplicative and not authorized by law. The law firm also argued that there is no justifiable basis for treating H-2A employers more harshly than non-H-2A employers for violations of the same statute, but even if special

treatment for violations of other laws by H-2A employers could be justified, any enhanced enforcement through heavier penalties or other punitive action for failure to comply fully with other laws as violations of the H-2A regulations should at least be deferred for at least 3 years after any new rules are implemented. The Department does not and will not assess penalties for the same housing violation under multiple laws at the same time. Where an employer violates an OSHA Temporary Labor Camp standard, which could also be a violation of the H-2A housing regulations, a violation will be charged under only one of those statutes. WHD follows this practice in enforcing OSHA temporary labor camp standards and MSPA housing standards that can apply to the same facility. However, an employer has an obligation to follow all applicable laws and regulations. To the extent that an employer is covered by the FLSA, the Division may enforce and seek remedies under both the H-2A program and the FLSA. Of course payment of the AWER, or the prevailing wage under the H-2A Program, would also satisfy the obligation to pay the minimum wage under the FLSA. While all of the facts and circumstances of a given case will be considered in the assessment of any penalty, the Department has determined that a blanket 3 year deferral of penalty assessments is not warranted.

The proposed section 501.19(e) states that the civil money penalty shall not exceed $15,000 per worker for willful layoff or displacement of any similarly situated 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 75 days before the date of need. A civil money penalty will not be assessed for layoffs where the employer has offered the opportunity to the laid-off U.S.

worker, and the U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons. The final rule has changed the 75 day period to a period within 60 days of the date of need in conformity with the change to section 655.100)(a)(1)(ii) which modified the requirement that the employer begin advertising within 75 days of the date of need to within 60 days of the date of need.

Some commenters argued that $15,000 for displacement of a domestic worker was excessive and could put a small farm out of business. The Department does not believe that this penalty is excessive. Rather, a civil money penalty of up to $15,000 for displacement of a U.S. worker is an important enforcement tool under this attestation-based program. The Department believes that a significant penalty will serve as an important deterrent for employers who might turn away qualified U.S. workers from an occupation covered by an Application for Temporary Employment Certification. As discussed above, the Department will continue to evaluate the relevant factors listed in section 501.19(b), as well as the totality of the circumstances, to determine the civil money penalty assessment for these violations.

One commenter argued that the Department was purporting to legalize the displacement of U.S. farmworkers based on nothing more than an employer's unscrutinized, self-serving statement that U.S. workers did not want, or were unqualified for, the job. The Department did not intend this consequence and has made changes to the regulatory language to reflect our intent that the employer show that the U.S. worker did not want, or was unqualified for, the job. The Department has removed also attests that it language from the regulation and replaced it with has, which more accurately reflects that intent. Thus, a civil money penalty will not be assessed for layoffs where the

employer has offered the opportunity to the laid-off U.S. worker(s) and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons.

One agricultural organization argued that the safe harbor provision seems to require an actual offer and would not be satisfied by a good faith, but unsuccessful, attempt to locate the domestic worker. The agricultural organization noted that it may be difficult to locate domestic workers to make the offer and recommended that the attestation could be satisfied with reasonable, good-faith efforts to contact these workers through a written communication to the worker's last known address or any other reasonably specific attempt to make contact. Such a change is unnecessary. The regulation only applies to layoffs or displacements that occur within 60 days of the date of need. Since the employer is required to know his labor requirements within 60 days of the date of need (see 20 CFR 655.100(a)(1)(ii) requiring advertising within 60 days of the date of need) the employer should be able to inform the worker of the job opportunity while he is working for the employer.

The agricultural organization also argued that this section should be revised because the maximum period of admission under the H-2A Program for one employer is 10 months, making it possible that the employer could discharge the domestic worker at the end of the employer's period of need and then begin a new employment period 2 months later. This employer would have discharged the domestic worker within the displacement provision timeline, notwithstanding the fact that the employer was in compliance with the H-2A Program. The agricultural organization argued that this could expose employers to large fines for no reason other than the timing of the seasons. The

agricultural organization recommended that the section be revised to reflect the timeframes inherent in the H-2A regulations to avoid this inequitable outcome. As noted above, the time frames have been modified to prohibit displacement and layoff within 60 days of the date of need. In any event, no revision is necessary, since the employer will know of its need within 60 days and be able to inform the employee of the job availability within that time frame.

One law firm requested that the Department remove what they considered improper, substantial new penalties against agents and attorneys of H-2A employers who are found or accused of making material misrepresentations in the certification application process. The law firm stated that such disciplinary measures are usually handled through the state bar association and that imposing substantial penalties, including debarment merely for accusations of material misrepresentations, is a violation of due process principles. The Department believes that attorneys and agents making fraudulent representations with regard to an attestation-based application program should be subject to civil money penalties. Assessing such penalties will not only deter such behavior but will protect employers from those who are making misrepresentations on their behalf. Because agents and attorneys will be able to avail themselves of the same hearing procedures available to employers, no due process issue should arise.

Some commenters argued that the new regulations failed to provide an appeals process for violations or fines and requested that procedures be developed to allow employers to appeal violations and fines when good faith efforts were taken to comply with the rules. The Department already provides such a process in Subpart C – Administrative Proceedings. The current section 501.30 provides the administrative

proceedings that will be applied with respect to a determination to impose an assessment of civil money penalties. The only modification to this section was that the administrative proceedings will also be applied with respect to the determination to impose debarment. Under current and proposed section 501.33(a), any person who desires review of a civil money penalty determination shall make written request for an administrative hearing no later than 30 days after issuance of the notice to the official who issued the determination at the Wage and Hour Division. Such timely filing of an administrative appeal stays the determination pending the outcome of the appeals process pursuant to proposed section 501.33(d).

n. § 501.20 Debarment

The final debarment regulation at section 501.20 differs slightly from the final debarment regulation at section 655.118. Section 655.118 contains three provisions: 655.118(b)(1)(iii); 655.118(b)(2) and; 655.118(b)(3), which are not contained in 501.20. Section 501.20 contains one provision that is not included in 655.118: section 501.20(b)(vi), which provides for debarment in the event that any of the provisions of 501.3, relating to discrimination, are violated. With these exceptions, the debarment regulations promulgated by ETA and those promulgated by the Wage and Hour Division are virtually identical. Accordingly, the preamble for the regulation at 655.118 contains all of the discussion of the comments and the changes to 501.20, as well as to 655.118. Please see that section of the preamble for a discussion of the comments and changes to 501.20.

a. § 501.21 Referrals of revocations to the ETA

Section 501.21 adopts provisions consistent with the proposed changes in 20 CFR part 655, which provide ETA the authority to revoke an existing certification, by allowing the WHD to recommend revocation to ETA based upon the WHD's investigative determinations. The section also addresses WHD's ability to debar to be consistent with other sections. No further changes to section 501.21 have been made.

b. § 501.30 Applicability of procedures and rules

The language in section 501.30 was revised in the proposed rule to illustrate the administrative process for assessing civil money penalties and seeking a debarment under the H-2A Program. With the exception of civil money penalty assessments and debarment disputes, the Department of Labor may file an action directly in Federal court seeking enforcement. No further changes have been made to section 501.30.

c. § 501.31 Written notice of determination required

The administrative process was revised in the proposed rule to reference WHD's authority to debar. No changes have been made to section 501.31 in the final rule.

d. § 501.32 Contents of notice

This section was revised in the proposed rule to reference WHD's authority to debar. No changes have been made to the section in the final rule.

e. § 501.33 Requests for hearing

The proposed rule added language to the regulation to make clear that exhaustion of the appeal of the Administrator's determination is required before a party may appeal an agency ruling to Federal court. No comments were received and the final rule is adopted as proposed.

f. § 501.42 Exhaustion of administrative remedies

Proposed section 501.42 clarified the current regulation to assure that the exhaustion of all administrative remedies is required before an appeal of the decision of the administrative law judge can be taken to the Federal courts pursuant to the Administrative Procedure Act.

One commenter noted that the additional language, stating that the decision of the administrative law judge shall be inoperative pending final review of the Administrative Review Board's (ARB) decision, was unnecessary to ensure exhaustion and harmful to workers. In Darby v. Cisneros, 509 U.S. 137, 152 (1993), the Supreme Court decided that agencies may not require exhaustion of administrative remedies before an appeal may be filed with a federal district court unless a rule is adopted that an agency appeal must be taken before judicial review is available, and, it is provided that the initial decision is inoperative pending appeal. Id. Accordingly, the additional language is necessary to the exhaustion requirement. Further, it is unclear what harm may result from requiring that workers await a decision by the ARB before appealing to Federal court. There is a distinct public benefit from the uniform agency decision making process accorded by ARB review.

1. Nomenclature Changes

The proposed rule also made a number of non-substantive nomenclature changes and technical corrections to 29 CFR part 501. These include: reflecting that the INA was amended in 1988 while the current regulations were already in effect

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 (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting 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) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Department has determined that this Final Rule is not an "economically significant regulatory action" under Section 3(f)(1) of E.O.12866. The procedures for filing an Application for Temporary Employment Certification under the H-2A visa

category on behalf of nonimmigrant temporary agricultural workers, under this regulation, will not have an economic impact of $100 million or more. The regulation will not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, nor public health or safety in a material way. In fact, this Final Rule is intended to provide relief to the affected employers both directly, by modernizing the process by which they can apply for H-2A labor certification, and indirectly, by increasing the available legal workforce. The Department, however, has determined that this Final Rule is a "significant regulatory action" under Section 3(f)(4) of the E.O.

Summary of Impacts

The changes in this Final Rule are expected to have little or no direct cost impact, above and beyond the baseline of the current costs required by the program as it is currently implemented. The re-engineering of the program requirements, including attestation-based applications and pre-application recruitment, will have the effect of reducing employer application costs in time and resources and introduce processing efficiencies that will reduce costs for employers, particularly costs associated with loss of labor due to delayed certifications. The Department requested comment on what costs these policies introduce and what efficiencies may be gained from adopting these new procedures, toward the goal of ensuring a thorough consideration and discussion of the costs and benefits at the final rule stage. Several commenters believed that the proposed changes could increase costs for employers and doubted that they would achieve the proposed objectives. Changes including reductions in the required newspaper advertisements as well as record retention in the Final Rule and described in the preamble address many of these concerns.

The additional record retention costs for employers are minimal and the Final Rule includes a three-year requirement as compared to the originally proposed five-year requirement. The new record retention requirements will require a burden of approximately ten minutes per year per application to retain the application and supporting documents above and beyond the one year of retention required by regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR 1602.14, promulgated pursuant to Title VII of the Civil Rights Act and the American With Disabilities Act, and 29 CFR 1627.3(b)(3), promulgated pursuant to the Age Discrimination in Employment Act. In FY 2007, 7,725 employers filed requests for 80,294 workers. Using standard administrative wage rates, including benefits, of $60.42[4] per hour, this additional burden for each of the two years following the mandated year above is approximately $77,791 total per year (or approximately $10 per applicant per year) if the current number of requests remains constant. Any increase in the use of the program would result in the same ultimate burden to applicants.

Employers will experience efficiencies as a result of the reengineering of the process. These savings are expected to be found in the simplified attestation-based application. While the Department cannot precisely estimate the cost savings as a result of this time saved, it believes that employers will experience economic benefits as a result of this reengineering of the application process to an attestation-based submission, including lower advertising costs and fewer labor costs from overlapping or duplicative workforces. These savings may be impacted by increased usage of the program by

[4] Derived by utilizing the Bureau of Labor Statistics 2006 median wage for Human Resources Manager wage of $42.55 and a 1.42 factor for the cost of benefits and taxes.

employers; while at this time it is impossible to tell exactly what that increased usage will be, the savings to employers will be universal to new users as well as current participants.

B. Regulatory Flexibility Analysis.

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires that a regulatory flexibility analysis be prepared and made available for public comment. The RFA must describe the impact of the rule on small entities. (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have significant economic impact on a substantial number of small entities. The Assistant Secretary of ETA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), and certifies under the RFA at 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities. The rule does not substantively change existing obligations for employers who choose to participate in the H-2A temporary agricultural worker program.

The factual basis for such a certification is that even though this rule can and does affect small entities, there are not a substantial number of small entities that will be affected, nor is there a significant economic impact upon those small entities that are. In FY 2007, 7,725 employers filed requests for 80,294 workers. Of the total 2,089,790 farms, 98% have sales of less than $750,000 per year and fall within SBA's definition of small entities. However, the Department does not expect that there will be a substantial number of small businesses that will utilize the H-2A program in light of its prior history. In FY 2007, 7,725 employers filed requests for 80,294 workers. Even if all of the 7,725

employers who filed applications under H-2A in FY2007 were small entities, the percentage of small entities applying for temporary foreign worker certification would be only 3 percent of the total number of small farms.

The Department believes that the costs incurred to 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-2A program must continue to establish to the Secretary of Labor's satisfaction that their recruitment attempts have not yielded enough qualified and available U.S. workers and that their hiring of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Similar to the current process, employers under this newly reengineered H-2A process will file a standardized application for temporary labor certification and 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-2A process on employers, the Department calculated each employer will likely pay in the range of $500 to $1,850 to meet the advertising and recruitment requirements for a job opportunity, and spend approximately 3 hours of staff time preparing the standardized applications for the required offered wage rate and for temporary labor certification, final recruitment report, and retaining all other required documentation (e.g., newspaper ads, job orders, business necessity) in a file for audit purposes that is not otherwise required to be retained in the normal course of business. In estimating employer staff time costs, the Department used the median hourly wage rate for a Human Resources Manager ($42.55), as published by the U.S.

Department of Labor's Occupational Employment Statistics survey, O*Net OnLine,[5] and increased it by a factor of 1.42 to account for employee benefits and other compensation for a total staff time cost of $181.00 per applicant.

The Department acknowledges that there might be some extremely small businesses that may incur additional costs to file their application on-line if and when the Department moves to an electronic processing model. However, neither these additional costs nor the advertising and human resource staff time, if any, will eliminate more than 10 percent of the businesses' profits; exceed 1 percent of the gross revenue of the entities in a particular sector; nor exceed 5 percent of the labor costs of the entities in the sector.

The total costs for the 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-2A labor certification applications are considered to be small businesses, the net economic effect is not significant.

The Department invited comments from members of the public who believed there will be a significant impact on a substantial number of small entities or who disagree with the size standard used by the Department in certifying that this Final Rule will not have a significant impact on a substantial number of small entities. Several small farmers and ranchers offered that the proposal could have substantial impact on sheepherding operations and other small farmers. However, the comments offered addressed requirements that were either already in place or were required by statute and therefore were unchanged by this rulemaking. Several other commenters from farming enterprises voiced concern that the Department's determination that the rulemaking was not economically significant was a judgment as to the economic significance of the

[5] Source: Bureau of Labor Statistics 2006 wage data.

industry. This was clearly a misconstruction of the Department's intent. The Department recognizes the economic importance of the agricultural and farming sector of the economy and has embarked on this rulemaking to ensure that there are sufficient workers available to ensure the economic success of individual farms and sector.

Several other commenters including individual farmers and a law firm representing farming concerns objected to what they saw as high costs of compliance with the new changes when taken together with the increased costs of filing applications with DHS. The Department appreciates and recognizes the strong cost pressures on American agricultural firms and has taken steps to reduce the costs of compliance wherever possible to ensure that farms of all sizes have the ability to participate in the program and have access to a reliable and legal workforce. We believe the improvements to this Final Rule addresses many of these concerns, while ensuring program integrity and worker protections.

Title 20--Employees' Benefits

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

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

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(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; and 8 CFR 214.2(h)(4)(i).

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

Subparts A and C issued under 8 CFR 214.2(h).

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

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and Sec. 323(c), 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 issued under Sec. 221(a), Public Law 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); 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 set forth above.

3. Revise § 655.1 to read as follows:

§ 655.1 Purpose and scope of subpart A.

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

4. Revise subpart B to read as follows:

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

655.90 Purpose and scope of subpart B.
655.92 Authority of ETA-OFLC.
655.93 Special procedures.
655.100 Overview of subpart B and definition of terms.
655.101 Applications for temporary employment certification in agriculture.
655.102 Required pre-filing recruitment.
655.103 Advertising requirements.
655.104 Contents of job offers.
655.105 Assurances and obligations of H-2A employers.

§ 655.90 Purpose and scope of subpart B.

General. This subpart sets out the procedures established by the Secretary of Labor (the Secretary) to acquire information sufficient to make factual determinations of:

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

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

§ 655.92 Authority of ETA-OFLC.

Temporary agricultural labor certification determinations are made by the Administrator, Office of Foreign Labor Certification (OFLC) in the Department of Labor's Employment & Training Administration (ETA), who, in turn, may delegate this responsibility to a designated staff member; e.g., a Certifying Officer (CO).

§ 655.93 Special procedures.

(a) Systematic process. This subpart provides procedures for the processing of applications from agricultural employers and associations of employers for the certification of employment of nonimmigrant workers in agricultural employment.

(b) Establishment of special procedures. To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the INA, while not deviating from statutory requirements, the OFLC Administrator has the authority to establish or to devise, continue, revise, or revoke special procedures in the form of variances for processing certain H-2A applications when employers can demonstrate upon written application to the OFLC Administrator that special procedures are necessary. These include special procedures in effect for the handling of applications for sheepherders in the Western States (and adaptation of such procedures to occupations in the range production of other livestock), and for custom combine crews. In a like manner, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the Administrator has the authority to establish monthly, weekly, or bi-weekly adverse effect wage rates for those occupations, for a Statewide or other geographical area. Prior to making determinations under this paragraph (b), the Administrator will consult with employer and worker representatives.

§ 655.100 Overview of subpart B and definition of terms.

(a) Overview—(1) Application filing process. (i) This subpart provides guidance to employers desiring to apply for a labor certification for the employment of H-2A

workers to perform agricultural employment of a temporary or seasonal nature. The regulations in this subpart provide that such employers must file with the OFLC Administrator an H-2A application on forms prescribed by the ETA, that describe the material terms and conditions of employment to be offered and afforded to U.S. and H-2A workers. The application must be filed with the OFLC Administrator at least 45 calendar days before the first date the employer requires the services of the H-2A workers. The application must contain attestations of the employer's compliance or promise to comply with program requirements regarding recruitment of eligible U.S. workers, including the payment of an appropriate wage, and terms and conditions of employment.

(ii) No more than 75 and no fewer than 60 calendar days before the first date the employer requires the services of the H-2A workers, and as a precursor to the filing of an Application for Temporary Employment Certification, the employer must initiate positive recruitment of eligible U.S. workers and cooperate with the local office of the State Workforce Agency (SWA) which serves the area of intended employment to place a job order into intrastate and interstate recruitment. Prior to commencing recruitment an employer must obtain the appropriate wage for the position directly from the ETA National Processing Center (NPC). The employer must then place a job order with the SWA; place print advertisements meeting the requirements of this regulation; contact former U.S. employees; and recruit in other States of traditional or expected labor supply with a significant number of U.S. workers who, if recruited, would be willing to make themselves available at the time and place needed, as required by the Secretary. The SWA will post the job order locally, as well as in all States listed in the application as

anticipated work sites, and in any additional States designated by the Secretary as States of traditional or expected labor supply. The SWA will keep the job order open until the date that is 30 days after the first date the employer requires the services of the H-2A workers. No more than 50 days prior to the first date the employer requires the services of the H-2A workers, the employer will prepare an initial written recruitment report that it must submit with its Application for Temporary Employment Certification. The employer's obligation to engage in positive recruitment will end on the actual date on which the H-2A workers depart for the place of work, or three days prior to the first date the employer requires the services of the H-2A workers, whichever occurs first.

(iii) The Application for Temporary Employment Certification must be filed by mail unless the Department publishes a Notice in the Federal Register requiring that applications be filed electronically. Applications that meet threshold requirements for completeness and accuracy will be processed by NPC staff, who will review each application for compliance with the criteria for certification. Each application must meet requirements for timeliness and temporary need and must provide assurances and other safeguards against adverse impact. Employers receiving a labor certification must continue to cooperate with the SWA by accepting referrals--and have the obligation to hire qualified and eligible U.S. workers who apply-- until the date that is 30 days after the first date the employer requires the services of the H-2A workers.

(2) Deficient applications. The CO will promptly review the application and notify the applicant in writing if there are deficiencies that render the application not acceptable for certification, and afford the applicant a 5 calendar day period for resubmission (from date of the employer's receipt) to resubmit an amended application or to file an appeal of

the CO's decision not to approve the application as acceptable for consideration. Amended applications that fail to cure deficiencies will be denied. When an application contains a deficiency related to recruitment or some other element of adverse effect, the CO will deny the application, instruct the employer to file a new application, and include guidance on how to correct the deficiency during the new recruitment period. In these cases, the application must contain a new, later date of need and demonstrate compliance with pre-filing recruitment requirements.

(3) Amendment of applications. This subpart provides for the amendment of applications at any time prior to the CO's certification determination to increase the number of workers requested in the initial application and/or change the period of employment. Where the recruitment is not materially affected by such amendments, additional recruitment may not be required.

(4) Determinations--(i) Determinations. If the employer has complied with the criteria for certification, including recruitment of eligible U.S. workers, the CO must make a determination to grant or deny, in whole or in part, the application for certification by 30 days before the first date the employer requires the services of the H-2A workers. An employer’s failure to comply with any of the certification criteria or to cure deficiencies identified by the CO, may lengthen the time required for processing, resulting in a final determination less than 30 days prior to the stated date of need.

(ii) Certified applications. This subpart provides that an application for temporary agricultural labor certification will be certified if the CO finds that the employer has not offered and does not intend to offer foreign workers higher wages, better working conditions, or fewer restrictions than those offered and afforded to U.S. workers; that

sufficient U.S. workers who are able, willing, qualified, and eligible will not be available at the time and place needed to perform the work for which H-2A workers are being requested; and that the employment of such nonimmigrants will not adversely affect the wages and working conditions of similarly employed U.S. workers.

(iii) Fees. (A) Amount. This subpart provides that each employer (except joint employer associations) of H-2A workers will pay the appropriate fees to the Department for each temporary agricultural labor certification received.

(B) Timeliness of payment. The fee must be received by the CO no later than 30 calendar days after the granting of each temporary agricultural labor certification. Fees received any later are untimely. Failure to pay fees in a timely manner is a substantial program violation which may result in the revocation of a certification, denial of future temporary agricultural labor certifications, and/or program debarment.

(iv) Denied applications. This subpart provides that if the application for temporary agricultural labor certification is denied, in whole or in part, the employer may seek expedited review of the denial, or a de novo hearing, by an administrative law judge as provided in this subpart.

(b) Definitions of terms used in this subpart. For the purposes of this subpart:

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, or the Administrator's designee.

Adverse effect wage rate (AEWR) means the minimum wage rate that the Administrator has determined must be offered and paid to every H-2A worker employed under the DOL-approved Application for Temporary Employment Certification in a particular occupation and/or area, as well as to U.S. workers hired by employers into corresponding employment during the H-2A recruitment period, to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

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

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

(2) Is not itself an employer, or a joint employer, as defined in this paragraph (b).

Agricultural association means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law that is an employer subject to Section 218 of the INA. An agricultural association may act as the agent of an employer for purposes of filing an H-2A temporary labor certification application.

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved form submitted by an employer to secure a temporary agricultural labor certification determination from DOL. An Application for Temporary Employment Certification consists of the form, the job offer and the initial recruitment report.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) 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 the regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

Attorney means any person who is a member in good standing of the bar of the highest court of any state, possession, territory, or commonwealth of the United States, or the District of Columbia, and who is not under suspension or disbarment from practice before any court or before DHS or the United States Department of Justice's Executive Office for Immigration Review. Such a person is permitted to act as an agent or attorney for an employer and/or foreign worker under this subpart.

Certifying Officer (CO) means the person designated by the Administrator, OFLC to make determinations on applications filed under the H-2A program.

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

Date of need means the first date the employer requires the services of H-2A worker.

Department of Homeland Security (DHS), through the United States Citizenship and Immigration Services (USCIS), means the Federal agency making the determination under the INA whether to grant petitions filed by employers seeking H-2A workers to perform temporary agricultural work in the U.S.

DOL or Department means the U.S. Department of Labor.

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 (b)) 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; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

Employer means a person, firm, corporation or other association or organization that:

(1) Has a location within the U.S. to which U.S. workers may be referred for employment;

(2) Has an employer relationship with respect to employees under this subpart as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and

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

Employment Standards Administration (ESA) means the organizational component within the Department that includes the Wage and Hour Division, and which is charged with carrying out certain investigative and enforcement functions of the Secretary under the INA.

Employment and Training Administration (ETA) means the agency within the Department that includes the Office of Foreign Labor Certification.

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

Fixed-site employer means any person engaged in agriculture who meets the definition of an employer as those terms are defined in this subpart who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to section 218 of the INA or these regulations as incident to or in conjunction with the owner's or operator's own agricultural operation. For purposes of this part, person includes any individual, partnership, association, corporation, cooperative, joint stock company, trust, or other organization with legal rights and duties.

H-2A Labor Contractor (H-2ALC) means any person who meets the definition of employer under this paragraph (b) and is other than a fixed-site employer or an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to section 218 of the INA or these regulations.

H-2A worker means any temporary foreign worker who is lawfully present in the U.S. to perform agricultural labor or services of a temporary or seasonal nature under INA Sec. 101(a)(15)(H)(ii)(a), as amended. 8 U.S.C. 1101(a)(15)(H)(ii)(a).

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

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

Job opportunity means a job opening for temporary, full-time employment at a place in the U.S. to which a U.S. worker can be referred.

Joint employment means that where two or more employers each have the definitional indicia of employment with respect to an employee, those employers will be considered to jointly employ that employee.

Occupational Safety and Health Administration (OSHA) means the organizational component of the Department that assures the safety and health of America's workers by setting and enforcing standards; providing training, outreach, and education; establishing partnerships; and encouraging continual improvement in workplace safety and health under the Occupational Safety and Health Act, as amended.

Office of Foreign Labor Certification (OFLC) means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the INA concerning the admission of foreign workers to the U.S. to perform work described in INA Sec. 101(a)(15)(H)(ii)(a), as amended.

Positive recruitment means the active participation of an employer or its authorized hiring agent in recruiting and interviewing qualified and eligible individuals in the area where the employer's job opportunity is located, and any other area designated by the Secretary as a multistate area of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

Prevailing means, with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that:

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

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

Representative means a person or entity employed by, or duly authorized to act on behalf of, the employer with respect to activities entered into for, and/or attestations made with respect to, the Application for Temporary Employment Certification.

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

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

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

State Workforce Agency (SWA) means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer the public labor exchange delivered through the State's one-stop delivery system in accordance with the Wagner-Peyser Act. 29 U.S.C. 49 et seq. Separately, SWAs receive ETA grants, administered by the OFLC, to assist them in performing certain activities related to foreign labor certification--including conducting housing inspections.

Successor in interest means that in determining whether an employer is a successor in interest, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

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

(7) Similarity of products and services; and

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

When considering whether an employer is a successor for purposes of § 501.20, consideration must also be given to the personal involvement of the firm’s ownership, management, supervisors, and others associated with the firm in the violations resulting

in debarment. A determination of whether or not a successor in interest exists is determined by the entire circumstances viewed in their totality.

United States (U.S.), when used in a geographic sense, means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the Virgin Islands,.

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.

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

(c) Definition of agricultural labor or services of a temporary or seasonal nature. For the purposes of this subpart, "agricultural labor or services of a temporary or seasonal nature" means the following:

(1) "Agricultural labor or services," pursuant to Sec.101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), is defined as:

(i) "Agricultural labor" as defined and applied in Sec. 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g));

(ii) "Agriculture" as defined and applied in Sec. 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f));

(iii) The pressing of apples for cider on a farm;

(iv) Logging employment; or

(v) Handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity where no H-2B workers are employed to perform the same work at the same establishment and while in the employ of the operator of a farm; or

(vi) Other work typically performed on a farm that is not specifically listed on the Application for Temporary Employment Certification and is minor (i.e., less than 20 percent of the total time worked on the job duties and activities that are listed on the Application for Temporary Employment Certification) and incidental to the agricultural labor or services for which the H-2A worker was sought.

(2) An occupation included in either of the statutory definitions cited in paragraphs (c)(1)(i) and (ii) of this section is "agricultural labor or services," notwithstanding the exclusion of that occupation from the other statutory definition.

(i) "Agricultural labor" for purposes of paragraph (c)(1)(i) of this section means all services performed:

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

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

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

(D)(1) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(2) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (c)(2)(i)(A) of this section, but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators will be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(3) The provisions of paragraphs (D)(1) and (2) of this section do not apply to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

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

(E) As used in paragraph (c)(2)(i), the term “farm” includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. (See Sec. 3121(g) of the Internal Revenue Code of 1986 (26 U.S.C. 3121(g).)

(ii) “Agriculture.” For purposes of paragraph (c)(1)(ii) of this section agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in 12 U.S.C. 1141j(g)), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. (See 29 U.S.C. 203(f) (Sec. 3(f) of the FLSA of 1938, as amended.)

(iii) “Agricultural commodity.” For purposes of paragraph (c)(1)(ii) of this section “agricultural commodity” includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as processed by the original producer of the crude gum (oleoresin) from which derived. “Gum spirits of turpentine” means spirits of turpentine made from gum (oleoresin) from a living tree and “gum rosin” means rosin remaining after the distillation of gum spirits of

turpentine. (See 12 U.S.C. 1141j(g), Sec. 15(g) of the Agricultural Marketing Act, as amended, and 7 U.S.C. 92.)

(3) "Of a temporary or seasonal nature."

(i) "On a seasonal or other temporary basis." For the purposes of this subpart, "of a temporary or seasonal nature" means "on a seasonal or other temporary basis," as defined in the ESA's WHD's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) MSPA definition. The definition of "on a seasonal or other temporary basis" found in MSPA is summarized as follows:

(A) Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though the worker may continue to be employed during a major portion of the year.

(B) A worker is employed on "other temporary basis" where he or she is employed for a limited time only or the worker's performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

(C) "On a seasonal or other temporary basis" does not include (i) the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis; or (ii) the employment of any worker who is living at his or her permanent place of residence, when

that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his or her employer and is not primarily employed to do field work.

(iii) "Temporary." For the purposes of this subpart, the definition of "temporary" in paragraph (c)(3) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position for a limited period of time, such as a peakload need, which is generally less than 1 year, unless the original temporary agricultural labor certification is extended pursuant to § 655.110.

§ 655.101 Applications for temporary employment certification in agriculture.

(a) Application Filing Requirements. (1) An employer that desires to apply for certification for temporary employment of one or more nonimmigrant foreign workers must file a completed DOL Application for Temporary Employment Certification form.

(2) If an association of agricultural producers, which uses agricultural labor or services, files the application, the association must identify whether it is the sole employer, a joint employer with its employer-member employers, or the agent of its employer-members. The association must identify on the Application for Temporary Employment Certification, by name and address, each member that will be an employer of H-2A workers. The members need not themselves sign the application. The association must retain documentation substantiating the employer or agency status of the association and be prepared to submit such documentation to the CO in the event of an audit.

(3) If an H-2A Labor Contractor intends to file an application, the H-2A Labor Contractor must meet all of the requirements of the definition of "employer" in § 655.100(b), and comply with all the assurances, guarantees, and other requirements contained in this part and in part 653, subpart F, of this chapter. The H-2A Labor Contractor must have a place of business (physical location) in the United States to which U.S. workers may be referred. H-2A workers employed by an H-2ALC may not perform services for a fixed-site employer unless the H-2ALC is itself providing the housing and transportation, or has filed in the alternative a statement of confirmation of the fixed-site employer's compliance with the housing and/or transportation obligations, as required by § 655.106, with the OFLC, for each fixed-site employer listed on the application. The H-2A Labor Contractor must retain a copy of the statement of compliance required by § 655.106(f).

(4) Employers' agents and employer associations may submit "master" applications covering a combination of job opportunities available with a number of employers in multiple areas of intended employment, as long as the combination of job opportunities is supported by documentation demonstrating business necessity and the date of need for the work to be performed is the same for all employers duly named on the application. Although master applications may be submitted, certifications will be issued to each employer, and employers listed on a master application will be billed for fees separately.

(b) Filing. The employer may complete the Application for Temporary Employment Certification and send it by U.S. Mail or private mail courier to the NPC. The Department will publish a Notice in the Federal Register identifying the address(es), and any future address changes, to which applications must be mailed, and will also post

these addresses on the DOL Internet Web site at http://www.foreignlaborcert.doleta.gov/. The form must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent). The Department may also require applications to be filed electronically in addition to or instead of by mail.

(c) Timeliness. A completed Application for Temporary Employment Certification is not required to be filed more than forty-five (45) calendar days before the date of need.

(d) Emergency Situations. (1) Waiver of time period. The CO may waive the time period for filing for employers who did not make use of temporary alien agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the CO can timely make the determinations required by § 655.109(b)(1),(2) and (4).

(2) Employer requirements. The employer requesting a waiver of the required time periods must submit a completed Application for Temporary Employment Certification, except for the standard recruitment report, and a statement requesting a waiver of the time period requirement. The statement must include whether the waiver request is due to the fact that the employer did not use H-2A workers during the prior agricultural season or whether the request is for other good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also include detailed information describing the good and substantial cause which has necessitated the waiver request. Good and substantial cause may include, but is not limited to, such things as the substantial loss of U.S. workers due to weather-related activities or other

reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.

(3) An employer may request no more than 20 H-2A positions be certified under this section and must justify the number of workers requested.

(4) The application will be processed in accordance with § 655.107.

(5) Where there is sufficient time available to complete positive recruitment within the timeframes required by these regulations, positive recruitment will be required by the CO. Where there is not sufficient time for positive recruitment, the CO will require the applicant to post a job order with the SWA serving the area of intended employment, and will extend the referral period by up to 30 days to compensate for the lost time for recruitment.

§ 655.102 Required pre-filing Activity.

(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.

(b) General Attestation Obligation. An employer must attest on the Application for Temporary Employment Certification to performing all necessary steps of the recruitment process as specified in this section and, unless a specific exemption applies, must file its initial recruitment report with its application. In addition, the employer must attest that it will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity

until the date that is, for the first 5 years following the effective date of this regulation, 30 days after the first date the employer requires the services of the H-2A workers, and thereafter the employer's date of need, unless prior to the expiration of the 5 year period the Department conducts a study that determines that the benefits of the 30 day post-date of need recruitment requirement substantially outweigh its costs, and publishes a Notice in the Federal Register to that effect. The employer must also prepare a final written recruitment report, to be submitted to the CO in the event of an audit.

(c) Retention of documentation. An employer filing an Application for Temporary Employment Certification must maintain documentation of its advertising and recruitment efforts as required in this subpart and be prepared to submit this documentation in response to a Notice of Deficiency from the CO prior to the CO rendering a Final Determination or in the event of an audit. The documentation required in this subpart must be retained for a period of no less than 3 years from the date of the certification. There is no record retention requirement for applications (and supporting documentation) that are denied.

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

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

(2) Run two print advertisements (one of which must be on a Sunday, except as provided in paragraph (g) of this section);

(3) Contact former U.S. employees who were employed within the last year (except those who were dismissed for cause or who abandoned the worksite); and

(4) Based on an annual determination made by the Secretary, as described in paragraph (i) of this section, recruit in all State(s) currently designated as a State of

traditional or expected labor supply with respect to the area in which the employer's work is to be performed as required in paragraph (i)(2) of this section.

(e) Job Order. (1) The employer must submit a job order to the SWA serving the area of intended employment no more than 75 calendar days and no fewer than 60 calendar days before the date of need for intrastate and interstate clearance, identifying it as a job order to be placed in connection with a future application for H-2A workers. For an application to be filed by an association of agricultural employers, the SWA will prepare a single job order in the name of the association on behalf of all employer-members that will be named in the Application for Temporary Employment Certification. If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is located in more than one State, the employer must submit a job order to the SWA having jurisdiction over the place where the work is expected to begin. Documentation of this step by the employer is satisfied by maintaining proof of posting from the SWA identifying the job order with the start and end dates of the posting of the job order.

(2) The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.103 and comply with the requirements for agricultural clearance orders in 20 CFR 653 Subpart F and the requirements set forth in § 655.104.

(3) The SWA will review the contents of the job order as provided in 20 CFR 653 Subpart F and will work with the employer to address any deficiencies, except that the order may be placed prior to the housing inspection required by 20 CFR 653.501(d)(6) is completed where necessary to meet the timeframes required by statute and regulation,

with the expectation that the SWA will ensure that the housing is inspected as expeditiously as possible thereafter. Any issue with regard to whether a job order may properly be placed in the job service system that cannot be resolved with the applicable SWA may be brought to the attention of the NPC, who may direct that the job order be placed in the system where the NPC determines that the applicable program requirements have been met.

(f) Intrastate/Interstate Recruitment. (1) Upon receipt and acceptance of the job order, each SWA must promptly place the job order in intrastate clearance within its respective State and begin recruitment of eligible U.S. workers. Upon an employer's placing a job order for intrastate clearance, the SWA receiving the job order under paragraph (e) of this section will promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the application as anticipated worksites. The SWA must also transmit a copy of all active job orders to no fewer than 3 States, which must include those States, if any, designated by the Secretary as traditional or expected labor supply States ("out-of-state recruitment States") for the area in which the employer's work is to be performed as defined in paragraph (i) of this section.

(2) Unless otherwise directed by the CO, the SWA must keep the job order open for interstate clearance until the date that, for the first 5 years after the effective date of this rule, is 30 days after the first date the employer requires the services of the H-2A worker, and thereafter until the employer's date of need, unless prior to the expiration of the 5 years period the Department conducts a study that determines that the benefits of the rule outweighs its costs and publishes a notice in the Federal Register to that effect. Each of the SWAs to which the job order was referred must keep the job order open for that same

period of time and must refer to the SWA to which the job offer was originally submitted under paragraph (e) of this section each eligible U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(g) Newspaper Advertisements. (1) During the period of time that the job order is being circulated by the SWA(s) for interstate clearance under paragraph (f) of this section, the employer must place an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday (except as provided in paragraph (g)(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 accepted 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 of § 655.103 and § 655.104. The employer must maintain copies of newspaper pages (with date of publication and full copy of ad), 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, 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 required by paragraph (g)(2) of this section).

(h) Contact with former U.S. employees. The employer must contact by mail or other effective means its former U.S. employees (except those who were dismissed for cause or who abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job. The employer must maintain copies of correspondence signed and dated by the employer or if other means are used, maintain detailed and dated logs demonstrating that the workers were contacted. The employer must provide in the recruitment report that any workers who did not return to the employ of the employer were either unable or unwilling to return to the job or were non-responsive to the employer's request, and must retain any documentation providing evidence of their inability, unwillingness, or non-responsiveness.

(i) Additional positive recruitment. (1) Each year, the Secretary will make a determination with respect to each State whether there are other States ("traditional or expected labor supply States") in which there are a significant number of able and qualified workers who, if recruited, would be willing to make themselves available for work in that State and which areas in that State. Such determination will be based on information provided by State agencies or by other sources within the 120 days preceding the determination (which will be solicited by notice in the Federal Register), and will to the extent information is available take into account the success of recent efforts by out-of-state employers to recruit in that State. The Secretary will not designate a State as a

traditional or expected labor supply State if the State has a significant number of employers that are recruiting for U.S. workers for the same types of occupations and work. The Secretary's annual determination as to traditional or expected labor supply States, if any, from which applicants from each State must recruit will be published in the Federal Register and made available through the ETA Web site.

(2) Each employer must engage in positive recruitment in those States designated in accordance with paragraph (i)(1) with respect to the State in which the employer's work is to be performed. Such recruitment will consist of one newspaper advertisement in each State so designated in the newspaper of general circulation that is most appropriate to the occupation and the workers likely to apply for the job opportunity, published within the same period of time as the newspaper advertisements required under paragraph (g) of this section. The advertisement must refer applicants to the SWA nearest the area in which the advertisement was placed.

(j) Referrals of U.S. workers. SWAs must refer for employment only those individuals whom they have verified through the process for employment verification established for state workforce agencies by DHS are eligible U.S. workers.

(k) Recruitment Report. (1) No more than 50 days before the date of need the employer must prepare, sign, and date a written recruitment report. The recruitment report must be submitted with the Application for Temporary Employment Certification. 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;

(iii) Confirm that former employees were contacted and by what means; and

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

(2) The employer must update the recruitment report within 48 hours of the date that is 30 days after the first date the employer requires the services of the H-2A worker. This supplement to the recruitment report must meet the requirements of paragraph (k)(1) of this section. The employer must sign and date this supplement to the recruitment report and retain it for a period of no less than 3 years. The supplement to the recruitment report must be provided in the event of an audit.

(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 and the supplemental recruitment report for a period of no less than 3 years, and must be provided in response to a Notice of Deficiency or in the event of an audit.

§ 655.103 Advertising requirements.

All advertising conducted to satisfy the required recruitment steps under § 655.102 before filing the Application for Temporary Employment Certification must meet the requirements set forth in this section and at § 655.104 and must contain terms and

conditions of employment which are not less favorable than those that will be offered to the H-2A workers. All advertising must contain the following information:

(a) The employer's name and location(s) of work, or in the event that an association is serving as an employer or as an agent, a statement indicating that the name and location of each member of the association can be obtained from the SWA;

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

(d) The wage offer, or in the event that there are multiple wage offers (such as where an association is serving as the employer or where there are multiple crop activities for a single employer), the range of applicable wage offers and, where an association is serving as the employer, a statement indicating that the rate(s) applicable to each member can be obtained from the SWA;

(e) The three-fourths guarantee specified in § 655.104(h)(3)(i);

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

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

(h) If applicable, that transportation and subsistence expenses to the worksite will be provided by the employer;

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

(j) Direct applicants to report or send resumes to the SWA for referral to the employer;

(k) Contact information for the SWA and the job order number.

§ 655.104 Contents of job offers.

(a) Preferential treatment of aliens prohibited. The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. Except where otherwise permitted under this section, no job offer may impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers.

(b) Job duties. Each job duty and requirement listed in the job offer must be appropriate, meaning that each qualification listed, when analyzed on its own, may not substantially deviate from normal and accepted qualifications required by employers that do not use H-2A workers in the area of intended employment.

(c) Minimum benefits, wages, and working conditions. Every job offer accompanying an H-2A application must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.

(d) Housing. (1) Obligation To Provide Housing. The employer must provide housing, at no cost to the worker, except for those U.S. workers who are reasonably able to return to their permanent residence at the end of the day. Housing must be provided through one of the following means:

(i) Employer-provided housing. Employer-provided housing that meets the full set of DOL OSHA standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401; or

(ii) Rental and/or public accommodations. Rental of public accommodations or other substantially similar class of habitation that meets applicable local standards for such housing. In the absence of applicable local standards, State standards will apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing. When such housing is to be supplied by an employer, the employer must document to the satisfaction of the CO that the housing complies with the local, State, or Federal housing standards under this paragraph. Such documentation may include but is not limited to a certificate of occupancy issued by a State Department of Health or other State or local agency.

(iii) Housing voucher. Except where the Governor of the State has certified that there is inadequate housing available in the area of intended employment for migrant farm workers and H-2A workers seeking temporary housing while employed in agricultural work, the employer may satisfy the requirement to provide housing by furnishing the worker a housing voucher provided that:

(A) Housing meeting applicable standards is available for the period during which the work is to be performed, within a reasonable commuting distance of the place of employment, for the monetary amount of the voucher provided, and that the owner/lessor of the housing has agreed to accept the voucher for that housing;

(B) Upon the request of a worker seeking assistance in locating housing, the employer shall make a good faith effort to assist the worker in identifying, locating and securing housing in the area of intended employment;

(C) Payment for the housing shall be made with a housing voucher, or such other means, that is not redeemable for cash by the employee to a third party; and

(D) The monetary amount of the voucher is sufficient to fully cover the cost of the room rental rate plus any taxes, deposits, utilities or other costs required by the owner/lessor of the housing accepting the voucher.

(E) The Governor's certification will be valid for a period of 3 years from the date of the certification.

(F) The phrase "good faith effort" in this paragraph includes, but is not limited to, providing to the worker the name and address of the facility or facilities at which the voucher will be accepted in exchange for housing, transportation to the facility or facilities, and providing translation services.

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

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

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

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

(6) Housing inspection. In order to ensure that the housing provided by an employer under this section meets the relevant standard:

(i) An employer must make the required attestation at the time of filing the Application for Temporary Employment Certification pursuant to § 655.105(e)(2).

(ii) The employer must make a request to the SWA for a housing inspection no less than 60 days before the date of need.

(iii) The SWA is required to make its determination that the housing meets the statutory criteria applicable to the type of housing provided prior to the date on which the Secretary is required to make a certification determination under Sec. 218(c)(4) of the INA. SWAs shall not adopt rules or restrictions on housing inspections that unreasonably prevent inspections from being completed in the required time frame, such as rules that no inspections will be conducted where the housing is occupied or is not yet leased. If the employer has attested to and met all other criteria for certification, and the employer has made a timely request for a housing inspection under paragraph (d)(6), and the SWA has failed to complete a housing inspection by the statutory deadline of 30 days prior to

date of need, the certification will not be withheld on account of the SWA's failure to meet the statutory deadline. The SWA must in such cases inspect the housing prior to or during occupation to ensure it meets applicable housing standards. If, upon inspection, the SWA determines the supplied housing does not meet the applicable housing standards, the SWA must promptly provide written notification to the employer and the CO. The CO will take appropriate action, including notice to the employer to cure deficiencies. An employer's failure to cure substantial violations can result in revocation of the temporary labor certification.

(7) Certified housing that becomes unavailable. If after a request to certify housing (but before certification), or after certification, such housing becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with the local, State, or Federal housing standards applicable under paragraph (d)(1)(ii) of this section and for which the employer is able to submit evidence of such compliance. The employer must notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance from the appropriate local or State agency responsible for determining compliance with applicable local, State or Federal safety and health standards. The SWA should make every effort to inspect such accommodations prior to occupation but may also conduct inspections during occupation, to ensure that they meet applicable housing standards. The SWA must notify the CO of all housing changes and of the results of any housing inspections by written notification. If the new housing fails inspection, the CO will take appropriate action, including notice to the employer to cure

deficiencies. An employer's failure to cure substantial violations can result in revocation of the temporary labor certification.

(e) Workers' compensation. The employer must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment. The employer must retain for 3 years from the date of certification of the application, the name of the insurance carrier, the insurance policy number, and proof of insurance for the dates of need, or, if appropriate, proof of State law coverage.

(f) Employer-provided items. Except as provided in this paragraph, the employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. The employer may charge the worker for reasonable costs related to the worker's refusal or negligent failure to return any property furnished by the employer or due to such worker's willful damage or destruction of such property. Where the employer has shown that at least 25 percent of workers for the crop activity and occupation in the particular area are required by their employers to provide tools and equipment, with or without the employer reimbursing the workers for the cost of providing them, such an arrangement will be permitted, provided that the requirements of section 3(m) of the Fair Labor Standards Act, 29 U.S.C. 203(m) (FLSA),

are met. Section 3(m) does not permit deductions for tools or equipment that reduce an employee's wage below the wage required under the minimum wage, or, where applicable, the overtime provisions of the FLSA.

(g) Meals. The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.114.

(h) Transportation; daily subsistence. (1) Transportation to place of employment. If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has departed for the employer's place of employment to the place of employment. For an H-2A worker coming from outside of the U.S., the place from which the worker has departed is the place of recruitment, which the Department interprets to mean the appropriate U.S. consulate or port of entry. When it is the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to U.S. workers. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence payment must be at least as

much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under paragraph (g) of this section.

(2) Transportation from place of employment. If the worker completes the work contract period, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer, or, if the worker has contracted with a subsequent employer who has not agreed in that contract to provide or pay for the worker's transportation and daily subsistence expenses from the current employer's worksite to such subsequent employer's worksite, the employer must provide or pay for such expenses. For an H-2A worker coming from outside of the U.S., the place from which the worker has departed will be considered to be the appropriate U.S. consulate or port of entry.

(3) Transportation between living quarters and worksite. The employer must provide transportation between the worker's living quarters (i.e., housing provided or secured by the employer directly or through a voucher pursuant to paragraph (d) of this section) and the employer's worksite at no cost to the worker, and such transportation must comply with all applicable Federal, State or local laws and regulations, and must provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500. If workers' compensation is used to cover such transportation, in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation.

(i) Three-fourths guarantee. (1) Offer to worker. The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any. For purposes of this paragraph (i)(1), a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and has been approved by the CO. The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect. Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (e.g., 10 weeks x 48 hours/week = 480-hours x 75 percent = 360). If a Federal holiday occurred during the 10-week span, the 8 hours would be deducted from the total guarantee. A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than

the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If the employer affords the U.S. or H-2A worker during the total work contract period less employment than that required under this paragraph (i)(1), the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days.

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

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

(4) Displaced H-2A Worker. The employer is not liable for payment under paragraph (i)(1) of this section to an H-2A worker whom the CO certifies is displaced because of the employer's compliance with §655.105(d).

(5) Obligation to provide housing and meals. Notwithstanding the three-fourths guarantee contained in paragraph (i), employers are obligated to provide housing and subsistence for each day of the contract period up until the day the workers depart for other H-2A employment, depart to the place outside of the U.S. from which the worker

came, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.

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

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

(3) Upon reasonable notice, which shall not be considered to be less than 5 days, the employer must make the records available, including field tally records and supporting summary payroll records, for inspection and copying by representatives of the Secretary of Labor, and by the worker and representatives designated by the worker, as evidenced by appropriate documentation (an Entry of Appearance as Attorney or Representative,

Form G-28, signed by the worker or an affidavit signed by the worker confirming such representation); and

(4) The employer must retain the records for not less than 3 years after the completion of the work contract.

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

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

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

(3) The hours of employment offered to the worker (broken out by offers in accordance with, and over and above, the guarantee);

(4) The hours actually worked by the worker;

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

and

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

(l) Rates of Pay. (1) If the worker is paid by the hour, the employer must pay the worker at least the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the Federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period; or

(2)(i) If the worker is paid on a piece rate basis and the piece rate does not result at the end of the pay period in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate, the worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay

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

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

(iii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and not be unusual for workers performing the same activity in the area of intended employment.

(m) Frequency of Pay. The employer must state in the job offer the frequency with which the worker will be paid, which must be in accordance with the prevailing practice in the area of intended employment, or at least twice monthly, whichever is more frequent.

(n) Abandonment of employment or termination for cause. If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the Department and DHS in writing or by any other method specified by the Department or DHS not later than 48 hours after such abandonment or termination is discovered by the employer, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under paragraph (h) of this section, and that worker is not entitled to the "three-fourths guarantee" described in paragraph (i) of this section. An abandonment shall be deemed to begin upon clear notice to the employer of the abandonment, or after a worker fails to report for work at the regularly scheduled time for 3 consecutive days. Employees may be terminated for cause however, for shorter unexcused periods of time.

(o) Contract impossibility. If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the CO. In the event of such termination of a contract, the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination as described in paragraph (i)(1) of this section. The employer must:

(1) Offer to return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or to the next employer,

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

(3) Pay the worker for any costs incurred by the worker (including deductions made from the worker's pay) for transportation and daily subsistence from the place outside the U.S. from which the worker departed to work for the employer to the employer's place of employment. Daily subsistence will be computed as set forth in paragraph (h) of this section. The amount of the transportation payment will be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(4) For an H-2A worker coming from outside of the U.S., the place from which the worker has departed is the appropriate U.S. consulate or port of entry.

(p) Deductions. The employer must make all deductions from the worker's paycheck 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 which would violate the FLSA.

(q) Copy of work contract. The employer must provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. The work contract must contain all of the provisions required by paragraphs (a) through (p) of this section. In the absence of a separate, written work contract entered into between the employer and the worker, the job order, as provided in 20 CFR 653, Subpart F, will be the work contract.

§ 655.105 Assurances and obligations of H-2A employers.

An employer seeking to employ H-2A workers must attest as part of the Application for Temporary Employment Certification that it will abide by the following conditions of this subpart:

(a) 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 and will continue to conduct the required recruitment, in accordance with regulations, and has been unsuccessful in locating sufficient numbers of qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied or apply for the job were or will be rejected only for lawful, job-related reasons, and the employer must retain records of all rejections as required by § 655.119.

(b) The employer is offering terms and working conditions normal to workers similarly employed in the area of intended employment and which are not less favorable than those offered to the H-2A worker(s) and are not less than the minimum terms and conditions required by this subpart.

(c) 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.

(d) The employer will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the date that, for the first 5 years after the effective date of this rule, is 30 days after the first date the employer requires the services of the H-2A worker, and thereafter until the employer's date of need, unless prior to the expiration of the 5 years period the Department conducts a study that determines that the benefits of the role outweighs its costs and publishes a notice in the Federal Register to that effect.

(e) During the period of employment that is the subject of the labor certification application, the employer will:

(1) Comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;

(2) Provide for or secure housing that complies with the applicable local, State, or Federal standards and guidelines for housing without charge to the worker;

(3) Where required, has timely requested a preoccupancy inspection of the housing and, if one has been conducted, received certification;

(4) Provide insurance, without charge to the worker, under a State workers' compensation law or otherwise, that meets the requirements of § 655.104(e).

(4) Provide transportation in compliance with all applicable Federal, State or local laws and regulations between the worker's living quarters (i.e., housing provided by the employer under § 655.104(d)) and the employer's worksite without cost to the worker.

(f) Upon the separation from employment of H-2A 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) of the separation from employment not later than 48 hours after such separation is discovered by the employer.

(g) The offered wage rate is the highest of the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly or piece rate, or the Federal or State minimum wage, and the employer will pay the offered wage during the entire period of the approved labor certification.

(h) The offered wage is not based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the adverse effect wage rate, prevailing hourly or piece wage rate, or the legal Federal or State minimum wage, whichever is highest.

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

(j) 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 60 days before the date of need, 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 for lawful, job-related reasons.

(k) The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has with just cause:

(1) Filed a complaint under or related to Sec. 218 of the INA (8 U.S.C. 1188), or this subpart or any other Department regulation promulgated under Sec. 218 of the INA;

(2) Instituted or caused to be instituted any proceeding under or related to Sec. 218 of the INA, or this subpart or any other Department regulation promulgated under Sec. 218 of the INA;

(3) Testified or is about to testify in any proceeding under or related to Sec. 218 of the INA or this subpart or any other Department regulation promulgated under Sec. 218 of the INA;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to Sec. 218 of the INA or this subpart or any other Department regulation promulgated under Sec. 218 of the INA; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by Sec. 218 of the INA, or this subpart or any other Department regulation promulgated under Sec. 218 of the INA.

(l) The employer has not and will not discharge any person for the sole reason of that person's taking any action listed in paragraphs (k)(1) through (k)(5) of this section.

(m) All fees associated with processing the temporary labor certification will be paid in a timely manner.

(n) The employer will inform H-2A workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under § 655.111, unless the H-2A worker is being sponsored by another subsequent employer.

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

(p) The employer has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2A workers to seek or receive payments from prospective employees.

(q) Each applicant providing housing through the use of a housing voucher must also attest to the following:

(1) For any facility which has agreed to accept the voucher meets the applicable local, State or Federal standards for such housing and that the facility has agreed to provide DOL and SWA staff access to housing for the purpose of conducting housing safety and health inspections;

(2) The monetary amount of the voucher is sufficient to fully cover the cost of the room rental rate plus any taxes, deposits, utilities or other costs required by the owner/lessor of the housing accepting the voucher and that each owner/lessor that has agreed to accept the voucher has also agreed that it will not charge workers fees or costs in excess of the amount of the housing voucher; and

(3) The employer will furnish housing through employer-provided housing, rental or public accommodations or other substantially similar class of housing to any worker who is unable to obtain housing meeting the applicable safety and health standards with the voucher.

(r) The applicant is either a fixed-site employer, an agent or recruiter, an H-2A Labor Contractor (as defined in these regulations), or an association.

§ 655.106 Assurances and obligations of H-2A Labor Contractors.

In addition to the assurances and obligations listed in § 655.105, H-2A Labor Contractor applicants are also required to:

(a) Provide the MSPA Farm Labor Contractor (FLC) certificate of registration number and expiration date if required under MSPA, 1801 U.S.C. et seq., to have such a certificate;

(b) Identify the farm labor contracting activities the H-2A Labor Contractor is authorized to perform as an FLC under MSPA as shown on the FLC certificate of registration, if required under MSPA, 1801 U.S.C. et seq., to have such a certificate of registration;

(c) List the name and location of each fixed-site agricultural business to which the H-2A Labor Contractor expects to provide H-2A workers, the approximate beginning and ending dates when the H-2A Labor Contractor will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site;

(d) Provide proof of its ability to discharge financial obligations under the H-2A program by attesting that it has obtained a surety bond as required by 29 CFR 501.8, stating on the application the name, address, phone number, and contact person for the surety, and providing the amount of the bond (as calculated pursuant to29 CFR 501.8) and any identifying designation utilized by the surety for the bond;

(e) Attest that it has engaged in, or will engage in within the timeframes required by § 655.102, recruitment efforts in each area of intended employment in which it has listed a fixed-site agricultural business; and

(f) Attest that it has obtained from each fixed-site agricultural business that will provide housing or transportation to the workers a written statement stating that:

(1) All housing used by workers and owned and/or operated by the fixed-site agricultural business complies with the applicable local, State or Federal standards and guidelines for such housing; and

(2) All transportation between the worksite and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and will provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500.

§ 655.107 Processing of applications.

(a) Processing. Upon receipt of the application, the CO will promptly review the application for completeness and 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 Notice of Deficiency prior to making a Final Determination on the application. Criteria for certification, as used in this subpart, include, but are not limited to whether the employer has: established the need for the agricultural services or labor to be performed on a temporary or seasonal basis; made all the assurances and met all the obligations required by § 655.105, or, if an H-2A Labor Contractor, by § 655.106; and complied with the timeliness requirements in § 655.102.

(b) Notice of Deficiencies. (1) If the CO determines that the employer has made all necessary attestations and assurances and that the recruitment report reflects compliance with the recruitment obligations of § 655.102, but the application fails to comply with one or more of the criteria for certification in paragraph (a) of this section, the CO will promptly notify the employer (by means normally assuring next day delivery) within 7 calendar days.

(2) The notice will:

(i) State the reason(s) why the application fails to meet the criteria for temporary labor certification, citing the relevant regulatory standard(s);

(ii) Offer the applicant an opportunity to submit a modified application within 5 calendar days from date of receipt, stating the modification that is needed for the CO to accept the application for consideration;

(iii) State that the CO's determination on whether to grant or deny the Application for Temporary Employment Certification will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification to the application within 5 calendar days and in a manner specified by the CO;

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

(v) State that if the employer does not submit a modified application or request an expedited administrative judicial review or a de novo hearing before an administrative law judge within the 5 calendar days the application will be denied

(c) Submission of Modified Applications. (1) If the CO notifies the employer of any deficiencies within the 7 calendar day timeframe set forth in paragraph (b)(1) of this section, the date by which the CO's Final Determination is required by statute to be made will be postponed by 1 day for each day that passes beyond the 5 day period allowed under paragraph (b)(2)(ii) of this section to submit a modified application.

(2) Where the employer submits a modified application as required by the CO, and the CO approves the modified application, the CO will not deny the application based solely on the fact that it now does not meet the timeliness requirements for filing applications.

(3) If the modified application is not approved, the CO will deny the application in accordance with the labor certification determination provisions in § 655.109.

(d) Notice of Deficient Recruitment. (1) If the CO determines that the employer's recruitment does not comply with the recruitment obligations set forth in sections 655.102 and 655.103, the CO will promptly notify the employer (by means normally assuring next-day delivery) within 7 calendar days with a copy to the SWA serving the area of intended employment of any deficiencies. The notice will state the reasons the recruitment was deficient and cite the relevant regulatory standards, and offer the employer an opportunity to context the finding in accordance with 655.107(b)(iv).

(2) The notice shall also offer the employer the opportunity to correct its recruitment and to run it on an expedited schedule. No earlier than 7 days after the employer has run a corrected advertisement in each area in which positive recruitment is required, the employer shall prepare a new recruitment report in accordance with the requirements of section 655.102(k) and submit it to the CO. The CO will make a determination on the application within 7 calendar days of receiving the new recruitment report, which may be a date later than 30 days before the date of need.

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

commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(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 approved 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. If a request for a change in the start date of the period of employment is made after workers have departed for the employer's place of work, the CO may only approve the change if the request is accompanied by a written assurance signed and dated by the employer that all such workers will be provided housing and subsistence, without cost to the workers, until work commences.

(3) Other minor technical amendments to the application, including the job offer, may be approved 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 § 655.109.

(f) Appeal procedures. With respect to either a Notice of Deficiency issued under paragraph (b) of this section or a notice of denial issued under § 655.109(e), if the employer timely requests an expedited administrative review or de novo hearing before an administrative law judge, the procedures set forth in § 655.115 will be followed.

§ 655.108 Offered Wage Rate.

(a) Highest wage. To comply with its obligation under § 655.105(g), an employer must offer a wage rate that is the highest of the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly or piece wage rate, or the Federal or State minimum wage.

(b) Wage rate request. The employer must request a wage rate from the NPC, on a form prescribed by ETA, before commencing any recruitment under this subpart.

(c) Validity of wage rate. The recruitment must begin within the validity period of the wage obtained from the NPC.

(d) Wage offer. The employer must offer and advertise in its recruitment a wage at least equal to the wage rate required by paragraph (a) of this section.

(e) Adverse effect wage rate. The adverse effect wage rate (AEWR) will be based on published wage data for the occupation, skill level, and geographical area from the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) survey. The NPC will obtain wage information on the AEWR using the On-line Wage Library (OWL) found on the Foreign Labor Certification Data Center Web site (http://www.flcdatacenter.com/).

(f) Wage determination. The NPC must enter the wage determination on the form submitted by the employer for these purposes, indicate the source, and return the form with its endorsement to the employer.

(g) Skill level.

(1) Level I wage rates are assigned to job offers for beginning level employees who have a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and

familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy.

(2) Level II wage rates are assigned to job offers for employees who have attained, through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

(3) Level III wage rates are assigned to job offers for employees who have a sound understanding of the occupation and have attained, through education, experience or special skills. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be an indicator that a Level III wage should be considered. Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as "lead," "senior," "crew chief," or "journeyman" would be indicators that a Level II wage should be considered.

(4) Level IV wage rates are assigned to job offers for employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures

and techniques. Such employees receive only minimal guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

§ 655.109 Labor certification determinations.

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

(b) Determination. No later than 30 calendar days before the date of need, as identified in the Application for Temporary Employment Certification, except as provided for under § 655.107(e) for modified applications, or applications not otherwise meeting certification criteria by that date, 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 the requirements of this subpart, including the criteria for certification defined in § 655.107(a), and thus the employment of the H-2A workers will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.

(c) Notification. The CO will notify the employer in writing (either electronically or by 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. 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 and to continue to cooperate with the SWA by accepting all referrals of eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the date, for the first 5 years after the effective date of this rule, that is 30 days after the first date the employer requires the services of the H-2A worker, and thereafter until the employer's date of need, unless prior to the expiration of the 5 years period the Department conducts a study that determines that the benefits of the rule outweigh its costs and publishes a notice in the Federal Register to that effect. However, the employer will not be required to accept referrals of eligible U.S. workers once it has hired or extended employment offers to eligible U.S. workers equal to the number of H-2A workers sought.

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

(1) State the reasons 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 applicant an opportunity to request an expedited administrative review, or a de novo administrative hearing before an administrative law judge, of the denial. The notice must state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, must file by facsimile (fax), telegram, or other means normally assuring next day delivery, a written request to the Chief Administrative Law Judge of the Department of Labor (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO's action; and

(4) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an administrative law judge within the 7 calendar days, the denial is final and the Department will not further consider that application for temporary alien agricultural labor certification.

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

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

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

(3) Offer the applicant an opportunity to request an expedited administrative review, or a de novo administrative hearing before an administrative law judge, of the decision. The notice will state that in order to obtain such a review or hearing, the employer, within 7 calendar days of the date of the notice, will file by facsimile or other means normally assuring next day delivery a written request to the Chief Administrative Law Judge of the Department of Labor (giving the address) and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the CO's action; and

(4) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an administrative law judge within the seven calendar days, the denial is final and the Department will not further consider that application for temporary alien agricultural labor certification

(g) Appeal Procedures. If the employer timely requests an expedited administrative review or de novo hearing before an administrative law judge under paragraphs (e)(3) of (f)(3) of this section, the procedures at § 655.115 will be followed

(h) Payment of Processing Fees. A determination by the CO to grant an Application for Temporary Employment Certification in whole or in part under paragraphs (d) or (f) of this section will include a bill for the required fees. Each employer (except joint employer associations) of H-2A workers under the Application for Temporary

Employment Certification must pay in a timely manner a non-refundable fee upon issuance of the certification granting the application (in whole or in part), as follows:

(1) Amount. The application fee for each employer receiving a temporary agricultural labor certification is $100 plus $10 for each H-2A worker certified under the Application for Temporary Employment Certification, provided that the fee to an employer for each temporary agricultural labor certification received will be no greater than $1,000. In the case of a joint employer association receiving a temporary agricultural labor certification, each employer-member receiving a temporary agricultural labor certification must pay an application fee of $100 plus $10 for each H-2A worker certified, provided that the fee to any employer for each temporary agricultural labor certification received will be no greater than $1,000. There is no additional fee to the association filing the application. The fees must be paid by check or money order made payable to "United States DOL." In the case of H-2A employers that are members of a joint-employer association applying on their behalf, the aggregate fees for all employers of H-2A workers under the application must be paid by one check or money order.

(2) Timeliness. Fees received by the CO no more than 30 days after the date the temporary labor certification is granted will be considered timely. Non-payment of fees by the date that is 30 days after the issuance of the certification will be considered a substantial program violation and subject to the procedures in § 655.115.

§ 655.110 Validity and scope of temporary labor certifications.

(a) Validity Period. A temporary labor certification is valid for the duration of the job opportunity for which certification is granted to the employer. Except as provided in

paragraph (c) of this section, the validity period is that time between the beginning and ending dates of certified employment, as listed on the Application for Temporary Employment Certification. The certification expires on the last day of authorized employment.

(b) Scope of Validity. Except as provided in paragraphs (c) and (d) of this section, a temporary labor certification is valid only for the number of H-2A workers, the area of intended employment, the specific occupation and duties, and the employer(s) specified on the certified Application for Temporary Employment Certification and may not be transferred from one employer to another.

(c) Scope of Validity--Associations. (1) Certified Applications. If an association is requesting temporary labor certification as a joint employer, the certified Application for Temporary Employment Certification will be granted jointly to the association and to each of the association's employer members named on the application. Workers authorized by the temporary labor certification may be transferred among its certified employer members to perform work for which the temporary labor certification was granted, provided the association controls the assignment of such workers and maintains a record of such assignments. All temporary agricultural labor certifications to associations may be used for the certified job opportunities of any of its employer members named on the application. If an association is requesting temporary labor certification as a sole employer, the certified Application for Temporary Employment Certification is granted to the association only.

(2) Ineligible employer-members. Workers may not be transferred or referred to an association's employer member if that employer member has been debarred from participation in the H-2A Program.

(d) Extensions on Period of Employment. (1) Short-term extension. An employer who seeks an extension of 2 weeks or less of the certified Application for Temporary Employment Certification must apply for such extension to DHS. If DHS grants the extension, the corresponding Application for Temporary Employment Certification will be deemed extended for such period as is approved by DHS.

(2) Long-term extension. For extensions beyond two weeks, an employer may apply to the CO for an extension of the period of employment on the certified Application for Temporary Employment Certification for reasons related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will grant or deny the request for extension of the period of employment on the Application for Temporary Employment Certification based on the available information, and will notify the employer of the decision in writing. The CO will not grant an extension where the total work contract period under that application and extensions would be 12 months or more, except in extraordinary circumstances.

(e) Requests for determinations based on nonavailability of able, willing, and qualified U.S. workers.—(1) Standards for requests. If a temporary labor certification has been partially granted or denied based on the CO's determination that able, willing, and

qualified U.S. workers are available, and, on or after 30 calendar days before the date of need, some or all of those U.S. workers are, in fact, no longer able, willing, qualified, or available, the employer may request a new temporary labor certification determination from the OFLC Administrator. Prior to making a new determination the OFLC Administrator will promptly ascertain (which may be through the SWA or other sources of information on U.S. worker availability) whether able, willing, and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received. The OFLC Administrator will expeditiously, but in no case later than 72 hours after the time a complete request is received (including the signed statement included in paragraph (e)(2)(i) of this section), make a determination on the request.

(2) Filing requests. The employer's request for a new determination must be made directly to the OFLC Administrator by telephone or electronic mail, and must be confirmed by the employer in writing as required by paragraphs (e)(2)(i) or (ii) of this section.

(i) Workers not able, willing, qualified, or eligible. If the employer asserts that any worker who has been referred by the SWA or by any other person or entity is not an eligible worker or is not able, willing, or qualified for the job opportunity for which the employer has requested H-2A workers, the burden of proof is on the employer to establish that the individual referred is not able, willing, qualified or eligible because of lawful job-related reasons. The employer's burden of proof must be met by the employer's submission to the OFLC Administrator, within 72 hours of the OFLC Administrator's receipt of the request for a new determination, of a signed statement of

the employer's assertions, which must identify each rejected worker by name and must state each lawful job-related reason for rejecting that worker.

(ii) U.S. workers not available. If the employer telephonically or via electronic mail requests the new determination by asserting solely that U.S. workers are not available, the employer must submit to the OFLC Administrator a signed statement confirming such assertion. If such signed statement is not received by the OFLC Administrator within 72 hours of the OFLC Administrator's receipt of the telephonic request for a new determination, the OFLC Administrator may make the determination based solely on the information provided telephonically or via electronic mail.

(3) SWA Statement. The OFLC Administrator may request a signed statement from the SWA to support the employer's assertion that U.S. workers are not available or that referred U.S. workers are not able, willing, or qualified because of lawful job-related reasons.

(4) Notification of determination. If the OFLC Administrator cannot identify sufficient able, willing, and qualified U.S. workers who are or who are likely to be available, the OFLC Administrator will grant the employer's request for a new determination and the Department will not further examine the employer's request. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful job-related reasons.

§ 655.111 Required departure.

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

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

§ 655.112 Audits and Referrals.

(a) Discretion. The Department will conduct audits of temporary labor certification applications. The applications selected for audit will be chosen within the sole discretion of the Department and without regard to whether the Department has issued a certification of the application.

(b) Audit letter. Where an application is selected for audit, the CO will issue an audit letter to the employer/applicant. The audit letter will:

(1) State the 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, 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) Revoke the labor certification as provided in § 655.117 and/or

(ii) Debar the employer from future filings of H-2A temporary labor certification applications as provided in § 655.118.

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

(d) Audit violations. If, as a result of the audit, the CO determines the employer failed to produce 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's labor certification may be revoked under § 655.117 and/or the employer may be referred for debarment under § 655.118. The CO may determine to provide the audit findings and underlying documentation to DHS 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.

§ 655.113 H-2A applications involving fraud or willful misrepresentation.

(a) Referral for investigation. If the CO discovers possible fraud or willful misrepresentation involving an Application for Temporary Employment Certification the CO may refer the matter to the DHS and the Department's Office of the Inspector General for investigation.

(b) Terminated processing. If a court or the DHS determines that there was fraud or willful misrepresentation involving an Application for Temporary Employment Certification, the application will be deemed invalid. The determination is not appealable. If a certification has been granted, a finding under this paragraph will be cause to revoke the certification.

§ 655.114 Setting meal charges; petition for higher meal charges.

(a) Meal charges. Until a new amount is set under this paragraph an employer may charge workers up to $9.90 for providing them with three meals per day. The maximum charge allowed by this paragraph (a) will be changed annually by the same percentage as the 12 month percentage change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments will be effective on the date of their publication by the Administrator as a Notice in the Federal Register.

(b) Filing petitions for higher meal charges. The employer may file a petition with the CO to charge more than the applicable amount for meal charges if the employer justifies the charges and submits to the CO the documentation required by paragraph (1) of this section.

(1) Required documentation. Documentation submitted must include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: food; kitchen supplies other than food, such as lunch bags and soap; labor costs that have a direct relation to food service operations, such as wages of cooks and dining hall supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead and similar charges may not be included. Receipts and other cost records for a representative pay period shall be available for inspection by the CO for a period of one year.

(2) Effective date for higher charge. The employer may begin charging the higher rate upon receipt of a favorable decision from the CO unless the CO sets a later effective date in the decision.

(c) Appeal. In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal the denial. Appeals will be filed with the Chief Administrative Law Judge. Administrative law judges will hear such appeals according to the procedures in 29 CFR part 18, except that the appeal will not be considered as a complaint to which an answer is required. The decision of the administrative law judge is the final decision of the Secretary.

§ 655.115 Administrative review and de novo hearing before an administrative law judge.

(a) Administrative review. (1) Consideration. Whenever an employer has requested an administrative review before an administrative law judge of a decision by the CO (i) not to accept for consideration an Application for Temporary Employment Certification, (ii) to deny an Application for Temporary Employment Certification, or (iii) to revoke a certified Application for Temporary Employment Certification, the CO will send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge will immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by 20 CFR part 656, which will hear and decide the appeal as set forth in this section) to review the record for legal sufficiency. The administrative law judge may not remand the case and may not receive evidence in addition to what the CO used to make the determination.

(2) Decision. Within 5 business days after receipt of the ETA case file the administrative law judge will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision by written decision. The decision of the administrative law judge must specify the reasons for the action taken and must be immediately provided to the employer, the CO, the Administrator, and DHS by means normally assuring next-day delivery. The administrative law judge's decision is the final decision of the Secretary except, in the case of debarment decisions under § 655.118, any party may within 30 days seek review

of the decision of the administrative law judge with the Administrative Review Board in accordance with Department policies.

(b) De novo hearing. (1) Request for hearing; conduct of hearing. Whenever an employer has requested a de novo hearing before an administrative law judge of a decision by the CO (i) not to accept for consideration an Application for Temporary Employment Certification, (ii) to deny an Application for Temporary Employment Certification, or (iii) to revoke a certified Application for Temporary Employment Certification, the CO will send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge will immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by 20 CFR part 656 of this chapter, but which will hear and decide the appeal as provided in this section) to conduct the de novo hearing. The procedures in 29 CFR part 18 apply to such hearings, except that:

(i) The appeal will not be considered to be a complaint to which an answer is required;

(ii) The administrative law judge will ensure that the hearing is scheduled to take place within 5 calendar days after the administrative law judge's receipt of the ETA case file, if the employer so requests; and

(iii) The administrative law judge's decision must be rendered within 10 calendar days after the hearing.

(2) Decision. After a de novo hearing, the administrative law judge must affirm, reverse, or modify the CO's determination, and the administrative law judge's decision

must be provided immediately to the employer, CO, Administrator, and DHS by means normally assuring next-day delivery. The administrative law judge's decision is the final decision of the Secretary, except, in the case of debarment decisions under § 655.118, any party may within 30 days seek review of the decision of the administrative law judge with the Administrative Review Board in accordance with Departmental procedures.

§ 655.116 Job Service Complaint System; enforcement of work contracts.

(a) Complaints arising under this subpart may be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E. Complaints which involve worker contracts must be referred by the SWA to ESA for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process, ESA may report the results of its investigation to the Administrator for consideration of employer penalties or such other action as may be appropriate.

(b) Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same, will be referred to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC), in addition to any activity, investigation, and/or enforcement action taken by ETA or an SWA. Likewise, if OSC becomes aware of a violation of these regulations, it will provide such information to the appropriate SWA and the CO.

§ 655.117 Revocation of approved labor certifications.

(a) Basis for DOL revocation. The CO, in consultation with the Administrator, may revoke a temporary agricultural labor certification approved under this subpart, if, after notice and opportunity for a hearing (or rebuttal):

(1) The CO finds that issuance of the temporary agricultural labor certification was not justified based on the criteria set forth in the INA;

(2) The CO finds that the employer willfully violated the terms and conditions of the approved temporary agricultural labor certification; or

(3) Upon recommendation of the WHD ESA

(b) DOL procedures for revocation. (1) The CO will send to the employer a Notice of Intent to Revoke by means ensuring next-day delivery an approved temporary agricultural labor certification, which will contain a detailed statement of the grounds for the proposed revocation and the time period allowed for the employer's rebuttal. The employer may submit evidence in rebuttal within 14 calendar days of the date the notice was received. The CO must consider all relevant evidence presented in deciding whether to revoke the temporary agricultural labor certification.

(2) If rebuttal evidence is not timely filed by the employer, the Notice of Intent to Revoke 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 CO determines the temporary agricultural labor certification should be revoked, the CO will notify the employer, within 14 calendar days after receiving such timely filed rebuttal evidence, of this final determination and of the employer's right to appeal. The employer may file an administrative appeal under § 655.115 within 10 calendar days after the date of receiving

notice of the revocation. The timely filing of an administrative appeal will stay the revocation pending the outcome of the appeal.

(4) If the revocation of the temporary agricultural labor certification is affirmed after appeal, the CO will also send a copy of the notification to DHS and DOS.

(c) Employer's obligations in the event of revocation. If an employer's temporary agricultural labor certification is revoked under this section, and the workers have departed for the worksite, the employer will be responsible for:

(1) reimbursement of actual inbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.104(h)(1);

(2) the worker's outbound transportation expenses, as if the worker meets the requirements for payment under § 655.104(h)(2);

(3) payment to the worker of the amount due under the three-fourths guarantee as required by § 655.104(i); and

(4) any other wages, benefits, and working conditions due or owing to the worker under these regulations.

§ 655.118 Debarment.

(a) No later than 2 years after an employer has substantially violated a material term or condition of its temporary agricultural labor certification, the work contract, or the H-2A regulations with respect to the employment of domestic or nonimmigrant workers, the Administrator shall on that basis make a determination denying the employer and any successor in interest to the debarred employer (or the employer's attorney or agent) future

labor certifications under this subpart for a period of up to 3 years from the date of the determination.

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

(1) One or more 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, or working conditions of a significant number of an employer's U.S. or H-2A worker or workers;

(ii) Reflect a significant failure to offer employment to all qualified domestic workers 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 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);

(v) Reflect action(s) impeding an investigation of an employer under Sec. 218 of the INA (8 U.S.C. 1188), this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(vi) Reflect the employment of an H-2A 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;

(2) The employer's failure to pay the necessary fee in a timely manner; or

(3) Fraud involving the Application for Temporary Employment Certification or the employer knowingly making a material misrepresentation of fact during the application process.

(c) 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 must identify administrative appeal rights under § 655.115 and a timeframe under which such rights must be exercised. 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 of receipt of the Notice of Debarment. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal.

(d) Debarment involving members of associations. If the Administrator determines a substantial violation has occurred, and if an individual employer-member of a joint employer association is determined to have committed the violation, the debarment determination will apply only to that member of the association unless the Administrator determines that the association or other association members participated in, had knowledge of, or had reason to know of the violation, in which case the debarment may be invoked against the complicit association or other association members.

(e) Debarment involving associations acting as joint employers. If the Administrator determines a substantial violation has occurred, and if an association acting as a joint

employer with its members is found to have committed the violation, the debarment determination will apply only to the association, and will not be applied to any individual employer-member of the association unless the Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, in which case the debarment will be invoked against any complicit association members as well. An association debarred from the H-2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(f) Debarment involving associations acting as sole employers. If the Administrator determines a substantial violation has occurred, and if an association acting as a sole employer is determined to have committed the violation, the debarment determination will apply only to the association and any successor in interest to the debarred association.

(g) In determining whether a violation is significant for purposes of debarment, the factors that may be considered include, but are not limited to, the following:

(1) Previous history of the applicant's violation or violations of the H-2A provisions of the Act and these regulations;

(2) Whether a substantial number of the employer's U.S. or H-2A workers were and/or are affected by the violation or violations;

(3) Whether the gravity of the violation (or violations are) is substantial;

(4) Efforts made in good faith to comply with the H-2A provisions of the Act and these regulations;

(5) Explanation of persons charged with the violation or violations;

(6) Commitment to future compliance, taking into account the public health or safety interest;

(7) Extent to which the violator achieved a substantial financial gain due to the violation or whether the actual financial loss or injury to the employer's U.S. or H-2A worker or workers was substantial.

§ 655.119 Document retention requirements

(a) Entities required to retain documents. All employers filing the Application for Temporary Employment Certification for agricultural workers under this subpart are required to retain the documents and records as provided in the regulations cited in paragraph (c) of this section.

(b) Period of required retention. Records and documents must be retained for a period of 3 years from the date of certification of the Application for Temporary Employment Certification.

(c) Documents and records to be retained. (1) All applicants must retain the following documentation:

(i) Proof of recruitment efforts including:

(A) Job order placement as specified in § 655.102(e)(1);

(B) Advertising as specified in § 655.102(g)(3), or, if used, professional, trade, or ethnic publications;

(C) Contact with former U.S. workers as specified in § 655.102(h);

(D) Multi-state recruitment efforts (if required under § 655.102(i)) as specified in § 655.102(g)(3);

(ii) Substantiation of information submitted in the recruitment report prepared in accordance with § 655.102(k)(2);

(iii) The supplemental recruitment report as specified in § 655.102(k) and any supporting resumes and contact information as specified in § 655.102(k)(3);.

(iv) Proof of workers' compensation insurance or State law coverage as specified in § 655.104(e);

(v) Records of each worker's earning as specified in § 655.104(j);

(vi) The work contract or copy of the Application for Temporary Employment Certification as defined in 29 CFR 501.9(d) and specified in § 655.104(q);

(vii) The wage determination provided by the NPC as specified in § 655.108;

(viii) Copy of the request for housing inspection submitted to the SWA as specified in §655.104(d); and

(ix) Copies, if any, of agreements with housing owners/lessors for the acceptance of the housing voucher and copies, if any, of agreements with employees concerning the terms and conditions related to the use of the housing voucher.

(2) In addition to the above, H-2A Labor Contractors must also retain:

(i) Statements of compliance with the housing and transportation obligations for each agricultural business which provided housing or transportation and to which the H-2A Labor Contractor provided workers during the validity period of the certification [See § 655.101(a)(4)];

(ii) Proof of surety bond coverage which includes the name, address, and phone number of the surety, the bond number of other identifying designation, the amount of coverage, and the payee; [See 29 CFR 501.8] and

(3) Associations filing applications as either the employer or an agent must also retain documentation substantiating their status. [See § 655.101(a)(2)].

Subpart C--[Removed]

5. Subpart C is removed and reserved.

6. Amend and revise Title 29 CFR part 501 to read as follows:

Title 29--Labor

PART 501_ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

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Subpart A General Provisions

Subpart B_Enforcement of Work Contracts

Record

501.46 Retention of official record.
501.47 Certification.

Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.

Subpart A General Provisions

§ 501.0 Introduction.

These regulations cover the enforcement of all contractual obligation provisions applicable to the employment of H-2A workers under section 218 of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA). These regulations are also applicable to the employment of United States (U.S.) workers newly hired by employers of H-2A workers in the occupations during the period of time set forth in the labor certification approved by the Employment and Training Administration (ETA) as a condition for granting H-2A certification, including any extension thereof. Such other U. S. workers hired by H-2A employers are hereafter referred to as engaged in corresponding employment.

§ 501.1 Purpose and scope.

(a) Statutory standard. Section 218(a) of the INA provides that--

(1) A petition to import an alien as an H-2A worker (as defined in subsection (i)(2)) may not be approved by the Secretary of the Department of Homeland Security unless the petitioner has applied to the Secretary of Labor for a certification that--

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

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

(b) Role of the ETA. The issuance and denial of labor certification under section 218 of the INA has been delegated by the Secretary of Labor to the Employment and Training Administration (ETA). In general, matters concerning the obligations of an employer of H-2A workers related to the labor certification process are administered and enforced by ETA. Included within ETA's jurisdiction are issues such as whether U.S. workers are available, whether adequate recruitment has been conducted, whether there is a strike or lockout, the methodology for establishing adverse effect wage rates, whether workers' compensation insurance has been provided, whether employment was offered to U.S. workers as required by Section 218 of the INA and regulations at 20 CFR part 655, Subpart B, and other similar matters. The regulations pertaining to the issuance and denial of labor certification for temporary alien workers by the ETA are found in 20 CFR part 655, Subpart B.

(c) Role of the Employment Standards Administration (ESA), Wage and Hour Division. (1) The Secretary of Labor is authorized to take actions that assure compliance with the terms and conditions of employment under Section 218 of the INA, the

regulations at 20 CFR part 655, Subpart B, or these regulations, including the assessment of civil money penalties and seeking injunctive relief and specific performance of contractual obligations. (See 8 U.S.C. 1188(g)(2).)

(2) Certain investigatory, inspection, and law enforcement functions to carry out the provisions of Section 218 of the INA have been delegated by the Secretary of Labor to the ESA, Wage and Hour Division (WHD). In general, matters concerning the obligations under a work contract between an employer of H-2A workers and the H-2A workers and U.S. workers hired in corresponding employment by H-2A employers are enforced by ESA, including whether employment was offered to U.S. workers as required under Section 218 of the INA or 20 CFR part 655, Subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. The Wage and Hour Division has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances impose penalties, recommend revocation of existing certification(s), or debarment from future certifications, and seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages (either directly from the employer or in the case of an H-2ALC, from the H-2ALC directly or also from the insurer who issued the surety bond to the H-2ALC as required by 20 CFR part 655, Subpart B and 29 CFR 501.8).

(d) Effect of regulations. The amendments to the INA made by title III of the IRCA apply to petitions and applications filed on and after June 1, 1987. Accordingly, the enforcement functions carried out by the WHD under the INA and these regulations

apply to the employment of any H-2A worker and any other U.S. workers hired by H-2A employers in corresponding employment as the result of any application filed with the Department on and after June 1, 1987.

§ 501.2 Coordination of intake between DOL agencies.

Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H-2A labor standards between the employer and the employee will be immediately forwarded to the appropriate WHD office for appropriate action under these regulations.

§ 501.3 Discrimination prohibited.

(a) No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(1) Filed a complaint under or related to Section 218 of the INA or these regulations;

(2) Instituted or caused to be instituted any proceedings related to Section 218 of the INA or these regulations;

(3) Testified or is about to testify in any proceeding under or related to Section 218 of the INA or these regulations;

(4) Exercised or asserted on behalf of himself or others any right or protection afforded by Section 218 of the INA or these regulations; or

(5) Consulted with an employee of a legal assistance program or an attorney on matters related to Section 218 of the INA, or to this subpart or any other Department regulation promulgated pursuant to Section 218 of the INA.

(b) Allegations of discrimination against any person under paragraph (a) will be investigated by the WHD. Where the WHD has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. The WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, and may recommend to ETA/initiate action to debar any such violator from future labor certification. Complaints alleging discrimination against U.S. workers and immigrants based on citizenship or immigration status may also be forwarded by the WHD to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices.

§ 501.4 Waiver of rights prohibited.

No person shall seek to have an H-2A worker, or other U.S. worker hired in corresponding employment by an H-2A employer, waive any rights conferred under Section 218 of the INA, the regulations at 20 CFR part 655, Subpart B, or under these regulations. Any agreement by an employee purporting to waive or modify any rights inuring to said person under the Act or these regulations shall be void as contrary to public policy, except that a waiver or modification of rights or obligations hereunder in favor of the Secretary shall be valid for purposes of enforcement of the provisions of the Act or these regulations. This does not prevent agreements to settle private litigation.

§ 501.5 Investigation authority of Secretary.

(a) General. The Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate and, in connection therewith, enter and inspect such places

(including housing) and vehicles and such records (and make transcriptions thereof), question such persons and gather such information as deemed necessary by the Secretary to determine compliance with contractual obligations under Section 218 of the INA or these regulations.

(b) Failure to cooperate with an investigation. Where any employer (or employer's agent or attorney) using the services of an H-2A worker does not cooperate with an investigation concerning the employment of H-2A workers or U.S. workers hired in corresponding employment, the WHD shall report such occurrence to ETA and may recommend that ETA revoke the existing certification that is the basis for the employment of the H-2A workers giving rise to the investigation, and the WHD may recommend to ETA/debar the employer from future certification for up to three years. In addition, the WHD may take such action as may be appropriate, including the seeking of an injunction and/or assessing civil money penalties, against any person who has failed to permit the WHD to make an investigation.

(c) Confidential investigation. The Secretary shall conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(d) Report of Violations. Any person may report a violation of the work contract obligations of Section 218 of the INA or these regulations to the Secretary by advising any local office of the SWA, the ETA, the U.S. DOL's WHD, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of the U.S. DOL, WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 501.6 Prohibition on interference with DOL officials.

No person shall interfere with any official of the DOL assigned to perform an investigation, inspection, or law enforcement function pursuant to the INA and these regulations during the performance of such duties. The WHD will take such action as it deems appropriate, including seeking an injunction to bar any such interference with an investigation and/or assessing a civil money penalty therefore. In addition, the WHD will report the matter to ETA, and the WHD may recommend to ETA/debar the employer from future certification and/or recommend that the person's existing labor certification be revoked. In addition, Federal statutes prohibit persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 1114.

§ 501.7 Accuracy of information, statements, data.

Information, statements and data submitted in compliance with provisions of the Act or these regulations are subject to Title 18, Sec. 1001, of the U.S. Code, which provides:

> Section 1001. Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the U.S. knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or

makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[52 FR 20527, June 1, 1987]

§ 501.8 Surety bond.

(a) H-2A Labor Contractors (H-2ALCs) shall obtain a surety bond to assure compliance with the provisions of this part and 20 CFR part 655, Subpart B for each labor certification being sought. The H-2ALC shall attest on the application for labor certification that such a bond meeting all the requirements of this section has been obtained and shall provide on the labor certification application form information that fully identifies the surety, including the name, address and phone number of the surety, and which identifies the bond by number or other identifying designation.

(b) The bond shall be payable to the Administrator, Wage and Hour Division, U.S. DOL. It shall obligate the surety to pay any sums to the Administrator, for wages and benefits owed to H-2A and U.S. workers, based on a final decision finding a violation or violations of this part or 20 CFR part 655, Subpart B relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond shall be written to cover liability incurred during the term of the period listed in the application for labor certification made by the H-2ALC, and shall be amended to cover any extensions of the labor certification requested by the H-

2ALC. Surety bonds may not be canceled or terminated unless 30 days' notice is provided by the surety to the Administrator.

(c) The bond shall be in the amount of $10,000 for a labor certification for which a H-2ALC will employ fewer than 50 employees and $20,000 for a labor certification for which a H-2ALC will employ 50 or more employees. The amount of the bond may be increased by the Administrator after notice and an opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet potential liabilities.

§ 501.10 Definitions.

(a) Act and INA mean the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), with reference particularly to Section 218.

(b) Administrative Law Judge (ALJ) means a person within the Department of Labor Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

(c) Administrator means the Administrator of the Wage and Hour Division, ESA, U.S. DOL, and such authorized representatives as may be designated to perform any of the functions of the Administrator under this part.

(d) Work contract means all the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those terms and conditions attested to by the H-2A employer and required by the applicable regulations in subpart B of 20 CFR part 655, Labor Certification for Temporary Agricultural Employment of H-2A Aliens in the U.S. (H-2A Workers), and those contained in the Application for Temporary Employment Certification and job offer under that subpart,

which contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum shall be the terms of the job order included in the application for temporary labor certification, and shall be enforced in accordance with these regulations.

(e) Adverse effect wage rate (AEWR) means the minimum wage rate that the ETA Office of Foreign Labor Certification Administrator has determined must be offered and paid to every H-2A worker employed under the DOL-approved Application for Temporary Employment Certification in a particular occupation and/or area, as well as to U.S. workers hired by employers into corresponding employment during the H-2A recruitment period, to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

(f) Agent means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, that

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

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

(g) Agricultural association means any non-profit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable state law, that is an employer subject to Section 218 of the INA. Agricultural associations may act as

agents of an employer for purposes of filing an H-2A Application for Temporary Employment Certification.

(h) Application for Temporary Employment Certification means the form submitted by an employer to secure a temporary agricultural labor certification determination from the DOL. An Application for Temporary Employment Certification consists of the form, the job offer, and the initial recruitment report.

(i) Department of Homeland Security (DHS) through the U.S. Citizenship and Immigration Services (USCIS) means the Federal agency making the determination under the INA on whether to grant visa petitions filed by employers seeking H-2A workers to perform temporary agricultural work in the U.S..

(j) DOL means the U.S. Department of Labor.

(k) 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 part) with respect to the employment in which the worker is engaging.

(l) 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; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

(m) Employer means a person, firm, corporation or other association or organization that:

(1) Has a location within the U.S. to which U.S. workers may be referred for employment;

(2) Has an employer relationship with respect to H-2A employees or related U.S. workers under this part as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and

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

(n) Employment Service (ES) refers to the system of Federal and state entities responsible for administration of the labor certification process for temporary and seasonal agricultural employment of nonimmigrant foreign workers. This includes the SWAs and the Office of Foreign Labor Certification (OFLC), including the National Processing Centers (NPCs).

(o) Employment Standards Administration (ESA) means the agency within the Department that includes the Wage and Hour Division, and which is charged with carrying out certain investigative and enforcement functions of the Secretary under the INA.

(p) Employment and Training Administration (ETA) means the agency within the Department that includes the Office of Foreign Labor Certification (OFLC).

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

(r) Fixed site employer means any person engaged in agriculture who meets the definition of an employer as those terms are defined in this part who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are

performed and who recruits, solicits, hires, employs, houses, or transports any worker subject to section 218 of the INA or these regulations as incident to or in conjunction with the owner's or operator's own agricultural operation. For purposes of this part, person includes any individual, partnership, association, corporation, cooperative, joint stock company, trust, or other organization with legal rights and duties.

(s) H-2A Labor Contractor (H-2ALC) means any person who meets the definition of employer under paragraph (m) and is other than a fixed site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to section 218 of the INA or these regulations.

(t) H-2A worker means any temporary foreign worker who is lawfully present in the U.S. to perform agricultural labor or services of a temporary or seasonal nature under INA Section 101(a)(15)(H)(ii)(a), as amended. (8 U.S.C. 1101(a)(15)(H)(ii)(a).)

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

(v) Job offer means the offer made by an employer or potential employer of H-2A workers to eligible workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

(w) Job opportunity means a job opening for temporary, full-time employment at a place in the U.S. to which U.S. workers can be referred.

(x) Joint employment. Where two or more employers each have the definitional indicia of employment with respect to an employee and they would each separately

qualify as the employee's "employer," those employers shall be considered to jointly employ that employee.

(y) Office of Foreign Labor Certification (OFLC) means the organizational component of the Employment and Training Administration 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 the admission of foreign workers to the U.S. in order to work under Section 101(a)(15)(H)(ii)(a) of the INA, as amended.

(z) Positive recruitment means the active participation of an employer or its authorized hiring agent in recruiting through newspaper ads and SWA job postings qualified and eligible individuals in the area where the employer's job opportunity is located and any other area designated by the Secretary as a state of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers. Except that such term does not include efforts by the SWA…?

(aa) Prevailing means with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that:

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

(ii) This 50 percent or more of employers also employs in aggregate 50 percent or more of U.S. workers in the occupation and area (including H–2A and non-H–2A employers for purposes of determinations concerning the provision of family housing,

frequency of wage payments, and workers supplying their own bedding, but non-H–2A employers only for determinations concerning the provision of advance transportation and the utilization of H-2A Labor Contractors).

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

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

(dd) State Workforce Agency (SWA) means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer the public labor exchange delivered through the state's one-stop delivery system in accordance with the Wagner-Peyser Act. 29 U.S.C. 49, et seq. Separately, SWAs receive ETA grants, administered by the OFLC, to assist them in performing certain activities related to foreign labor certification--including conducting housing inspections.

(ee) Successor in interest: In determining whether an employer is a successor in interest, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same facilities;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

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

(7) Similarity of products and services; and

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

When considering whether an employer is a successor for purposes of section 501.20, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violations resulting in debarment.

(ff) Temporary agricultural labor certification means the certification made by the Secretary of Labor with respect to an employer seeking to file with DHS a visa petition to employ a foreign national as an H-2A worker, pursuant to Sections 101(a)(15)(H)(ii)(a), 214(a) and (c), and 218 of the INA that:

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

(2) The employment of the foreign worker in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1188).

(gg) Temporary agricultural labor certification determination means the written determination made by the OFLC Administrator to approve or deny, in whole or in part, an application for a temporary agricultural labor certification to import a foreign worker(s).

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

(ii) U.S. worker means any worker who is:

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

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

(jj) Wages means all forms of cash remuneration to a worker by an employer in payment for personal services.

(kk) Definition of Agricultural labor or services of a temporary or seasonal nature. For the purposes of this part, agricultural labor or services of a temporary or seasonal nature means the following:

(1) Agricultural labor or services. Pursuant to Section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), agricultural labor or services is defined as:

(i) Agricultural labor as defined and applied in Section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g));

(ii) Agriculture as defined and applied in Section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f));

(iii) The pressing of apples for cider on a farm;

(iv) Logging employment; or

(v) Handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity where no H-2B workers are employed to perform the same work at the same establishment and while in the employ of the operator of a farm; or

(vi) Other work typically performed on a farm that is not specifically listed on the Application for Temporary Employment Certification and is minor (i.e., less than 20 percent of the total time worked on the job duties and activities that are listed on the Application for Temporary Employment Certification) and incidental to the agricultural labor or services for which the worker was sought.

(2) An occupation included in either of the statutory definitions cited in paragraphs (kk)(1)(i) and (ii) of this section is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition.

(i) Agricultural labor for purposes of paragraph (kk)(1)(i) of this section means all services performed:

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

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

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

(D)(1) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(2) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (kk)(2)(i)(A) of this section, but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph, any unincorporated group of operators will be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(3) The provisions of paragraphs (kk)(2)(i)(A) and (B) of this section do not apply to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

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

(E) As used in this subsection, the term farm includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. (See Section 3121(g) of the Internal Revenue Code of 1986 (26 U.S.C. 3121(g).)

(ii) Agriculture. For purposes of paragraph (kk)(1)(ii) of this section agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in Section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. (See Section 203(f) of Title 29, U.S.C. (Section 3(f) of the FLSA of 1938, as amended.)).

(iii) Agricultural commodity. For purposes of paragraph (kk)(1)(ii) of this section, agricultural commodity includes, in addition to other agricultural commodities, crude

gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as processed by the original producer of the crude gum (oleoresin) from which derived. Gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine. (See Section 1141j(g) of Title 12, U.S.C.(Section 15(g) and 7 U.S.C. 92.)

(3) Of a temporary or seasonal nature

(i) On a seasonal or other temporary basis. For the purposes of this part, of a temporary or seasonal nature means on a seasonal or other temporary basis, as defined in the ESA's WHD's regulation at 29 CFR part 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) MSPA definition. The definition of on a seasonal or other temporary basis found in MSPA, summarized as follows, is:

(A) Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

(B) A worker is employed on other temporary basis where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

(C) On a seasonal or other temporary basis does not include (i) the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis; or (ii) the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(iii) Temporary. For the purposes of this part, the definition of temporary in paragraph (kk)(3) of this section refers to any job opportunity covered by this part where the employer needs a worker for a position for a limited period of time, such as a peakload need, which is generally less than 1 year except in exceptional circumstances, or unless the original temporary agricultural labor certification is extended pursuant to 20 CFR part 655.110.

§ 501.15 Enforcement.

The investigation, inspections and law enforcement functions to carry out the provisions of Section 218 of the INA, as provided in these regulations for enforcement by the Wage and Hour Division, pertain to the employment of any H-2A worker and any other U.S. worker hired in corresponding employment by an H-2A employer. Such enforcement includes those work contract provisions as defined in Section 501.10(d). The work contract enforced includes the employment benefits which must be stated in the job offer, as prescribed in 20 CFR 655.104.

§ 501.16 Sanctions and Remedies -- General.

Whenever the Secretary believes that the H-2A provisions of the INA or these regulations have been violated such action shall be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a) Denial of a labor certification for a violation of the H-2A obligations of the INA or DOL regulations. ETA has responsibility to make all determinations regarding the issuance or denial of a labor certification in connection with the attestation process as described in section 501.1(b) of this subpart. The WHD has responsibility to make all determinations regarding the enforcement functions as described in section 501.1(c) of this subpart and as listed in paragraphs (b) through (d) of this section. ETA and the Wage and Hour Division will coordinate their activities when considering debarment, so that a specific violation for which debarment is imposed is cited in a single proceeding.

(b) Institute appropriate administrative proceedings, including: the recovery of unpaid wages (either directly from the employer, a successor in interest, or in the case of an H-2ALC also by claim against any surety who issued a bond to the H-2A Labor Contractor),; the enforcement of any other contractual obligations; the assessment of a civil money penalty; or denial of future certification(s) for up to three years against any person for a violation of the H-2A work contract obligations of the INA, 20 CFR part 655, Subpart B, or these regulations. In the event of a denial of future certification, notice is provided to OFLC.

(c) Petition any appropriate District Court of the U.S. for temporary or permanent injunctive relief, including the withholding of unpaid wages, to restrain violation of the

H-2A provisions of the INA, 20 CFR part 655, Subpart B, or these regulations by any person.

(d) Petition any appropriate District Court of the U.S. for specific performance of contractual obligations.

§ 501.17 Concurrent actions.

The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by the H-2A provisions of the Act and these regulations, or the regulations of 20 CFR part 655.

[52 FR 20527, June 1, 1987]

§ 501.18 Representation of the Secretary.

(a) Except as provided in Section 518(a) of Title 28, U.S. Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under the Act.

(b) The Solicitor of Labor, through the authorized representatives shall represent the Administrator and the Secretary in all administrative hearings under the H-2A provisions of the Act and these regulations.

[52 FR 20527, June 1, 1987]

§ 501.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the Administrator for each violation of the work contract or these regulations.

(b) In determining the amount of penalty to be assessed for any violation of the work contract as provided in the H-2A provisions of the Act or these regulations the Administrator shall consider the type of violation committed and other relevant factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of violation, or violations of the H-2A provisions of the Act and these regulations;

(2) The number of H-2A employees, corresponding U.S. employees or those U.S. workers individually rejected for employment affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made in good faith to comply with the H-2A provisions of the Act and these regulations;

(5) Explanation of person charged with the violation or violations;

(6) Commitment to future compliance, taking into account the public health or safety interest;

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

(c) A civil money penalty for violation of the work contract will not exceed $1,000 for each violation committed against each worker, with the following exceptions:

(1) For a willful failure to meet a condition of the work contract, or for willful discrimination, the civil money penalty shall not exceed $5,000 for each worker affected by the violation;

(2) For a violation of a housing or transportation safety and health provision of the work contract that causes the death or serious injury of any worker, the civil money

penalty shall not exceed $50,000 per worker, unless the violation is a repeat or willful violation, in which case the penalty shall not exceed $100,000 per worker.

(3) For purposes of paragraph (c)(2) of this section, the term serious injury means:

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(d) A civil money penalty for interference with a WHD investigation shall not exceed $5,000 per investigation;

(e) For a willful layoff or displacement of 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 60 days of the date of need, except that such layoff shall be permitted where the employer offered the opportunity to the laid-off U.S. worker(s) and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons, the civil penalty shall not exceed $15,000 per violation per worker.

§ 501.20 Debarment.

(a) No later than 2 years after an employer has substantially violated a material term or condition of its temporary agricultural labor certification, the work contract, or the H-2A

regulations with respect to the employment of domestic or nonimmigrant workers, the Wage and Hour Division shall on that basis make a determination denying the employer and any successor in interest to the debarred employer (or the employer's attorney or agent) future labor certifications under 20 CFR 655, Subpart B for a period of up to 3 years from the date of the determination.

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

(1) One or more 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, or working conditions of a significant number of an employer's U.S. or H-2A worker or workers;

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

(iii) Reflect a significant failure to comply with one or more sanctions or remedies imposed by the Employment Standards Administration, WHD for violation(s) of contractual obligations, or with one or more decisions or orders of the Secretary or a court under Section 218 of the INA (8 U.S.C. 1188), 20 CFR 655, Subpart B, or these regulations;

(iv) Reflect action(s) impeding an investigation of an employer under Section 218 of the INA (8 U.S.C. 1188), 20 CFR part 655, or this subpart;

(v) Reflect the employment of an H-2A worker outside the area of intended employment, or in an activity/activities listed in the job order (other than an activity that

is 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 violation of any of the provisions listed in section 501.3 of this subpart.

(c) 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 must identify appeal opportunities under 29 CFR part 501.33 and a time frame under which such rights must be exercised. The debarment will take effect on the start date identified in the Notice of Debarment, unless a request for review is properly filed within 30 days from the issuance of the Notice of Debarment. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal.

(d) Debarment involving members of associations. If after investigation, the Wage and Hour Division determines a substantial violation has occurred, and if an individual employer-member of a joint employer association is determined to have committed the violation, the debarment determination may also apply only to that member of the association unless the Wage and Hour Division Administrator determines that the association or other association member participated in, had knowledge of, or had reason to know of the violation, in which case the debarment will be invoked against the complicit association or other complicit association members as well.

(e) Debarment involving associations acting as joint employers. If after investigation, the Wage and Hour Division determines a substantial violation has occurred, and if an association acting as a joint employer with its members is determined to have committed the violation, the debarment determination will apply only to the association, and will not be applied to any individual employer-member of the association unless the Wage and

Hour Division Administrator determines that the member participated in, had knowledge of, or had reason to know of the violation, in which case the debarment may be invoked against the complicit association member as well. An association debarred from the H-2A temporary labor certification program will not be permitted to continue to file as a joint employer with its members during the period of the debarment.

(f) Debarment involving associations acting as sole employers. If after investigation, the Wage and Hour Division determines a substantial violation has occurred, and if an association acting as a sole employer is determined to have committed the violation, the debarment determination will apply only to the association and any successor in interest to the debarred association.

(g) In determining whether a violation is significant for purposes of debarment, the factors that may be considered include, but are not limited to, the following:

(1) Previous history of violation or violations of the H-2A provisions of the Act and these regulations;

(2) The number of H-2A employees, corresponding U.S. employees or those U.S. workers individually rejected for employment affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made in good faith to comply with the H-2A provisions of the Act and these regulations;

(5) Explanation of persons charged with the violation or violations;

(6) Commitment to future compliance, taking into account the public health or safety interest;

(7) The extent to which the violator achieved a substantial financial gain due to the violation or the actual financial loss to the worker or workers.

§ 501.21 Referral to ETA of interference with or refusal to permit investigation

Sections 501.5 through 501.7 of this part describe the investigation authority conferred by the Secretary upon the WHD for the purpose of enforcing the contractual obligations relating to wages, benefits, and working conditions of employers of H-2A workers and U.S. workers hired in corresponding employment. The following sections describe the actions which may be taken by the WHD when a person fails to cooperate or interferes with an investigation concerning the employment of H-2A workers or U.S. workers hired in corresponding employment. The WHD shall report such occurrence to ETA and may recommend revocation of an existing labor certification. No person shall interfere with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority. As stated in section 501.6 and 501.19 of this part, a civil money penalty may be assessed for each failure to permit an investigation or interference therewith, and other appropriate relief may be sought. In addition, the WHD shall report each such occurrence to ETA, and ETA may debar the employer from future certification. The WHD may also recommend to ETA that an existing certification be revoked. The taking of any one action shall not bar the taking of any additional action.

§ 501.22 Civil money penalties--payment and collection.

Where the assessment is directed in a final order by the Administrator, by an Administrative Law Judge, or by the Administrative Review Board, the amount of the

penalty is immediately due and payable to the U.S. Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator by certified check or by 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 Regional Office for the area in which the violations occurred.

§ 501.30 Applicability of procedures and rules.

The procedures and rules contained herein prescribe the administrative process that will be applied with respect to a determination to impose an assessment of civil money penalties or debarment, and which may be applied to the enforcement of contractual obligations, including the collection of unpaid wages due as a result of any violation of the H-2A provisions of the Act or of these regulations. Except with respect to the imposition of civil money penalties or debarment, the Secretary may, in the Secretary's discretion, seek enforcement action in Federal court without resort to any administrative proceedings.

Procedures Relating to Hearing

§ 501.31 Written notice of determination required.

Whenever the Administrator decides to assess a civil money penalty, to debar, or to proceed administratively to enforce contractual obligations, including the recovery of unpaid wages, the person against whom such action is taken shall be notified in writing of such determination.

§ 501.32 Contents of notice.

The notice required by section 501.31 shall:

(a) Set forth the determination of the Administrator including the amount of any unpaid wages due or actions necessary to fulfill a contractual obligation, the amount of any civil money penalty assessment, whether to recommend debarment and the length of the debarment, and the reason or reasons therefore.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Administrator shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in section 501.33.

§ 501.33 Request for hearing.

(a) Any person desiring review of a determination referred to in section 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the Wage and Hour Division address appearing on the determination notice, no later than 30 days after issuance of the notice referred to in section 501.32.

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

(1) Be typewritten or legibly written;

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

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

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

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

(c) The request for such hearing must be received by the official who issued the determination, at the Wage and Hour Division address appearing on the determination notice, within the time set forth in paragraph (a) of this section. For the affected person's protection, if the request is by mail, it should be by certified mail.

(d) The determination shall take effect on the start date identified in the determination, unless an administrative appeal request for review is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings.

[52 FR 20527, June 1, 1987, as amended at 71 FR 16665, Apr. 3, 2006]

Rules of Practice

§ 501.34 General.

Except as specifically provided in these regulations, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings described in this part.

[52 FR 20527, June 1, 1987]

§ 501.35 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with section 501.33.

[52 FR 20527, June 1, 1987]

§ 501.36 Caption of proceeding.

(a) Each administrative proceeding instituted under the Act and these regulations shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In the Matter of ----, Respondent.

(b) For the purposes of such administrative proceedings the Administrator shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

[52 FR 20527, June 1, 1987]

Referral for Hearing

§ 501.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with section 501.33 the Administrator, by the Associate Solicitor for the Division of Fair

Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall, by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or by the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under these regulations or 29 CFR part 18.

(b) A copy of the Order of Reference, together with a copy of these regulations, shall be served by counsel for the Administrator upon the person requesting the hearing, in the manner provided in 29 CFR part 18.3.

[52 FR 20527, June 1, 1987]

§ 501.38 Notice of docketing.

Upon receipt of an Order of Reference, the Chief Administrative Law Judge shall appoint an Administrative Law Judge to hear the case. The Administrative Law Judge shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 days from the date on which the Order of Reference was filed.

[52 FR 20527, June 1, 1987]

§ 501.39 Service upon attorneys for the Department of Labor--number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided herein shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

[52 FR 20527, June 1, 1987]

Procedures Before Administrative Law Judge

§ 501.40 Consent findings and order.

(a) General. At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Administrative Law Judge, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) Content. Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Submission. On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the Administrative Law Judge; or

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) Disposition. In the event an agreement containing consent findings and an order is submitted within the time allowed therefore, the Administrative Law Judge, within 30 days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

[52 FR 20527, June 1, 1987]

Post-Hearing Procedures

§ 501.41 Decision and order of Administrative Law Judge.

(a) The Administrative Law Judge shall prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the Administrator.

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

(c) The decision shall be served on all parties and the Administrative Review Board in person or by certified mail. The decision when served by the Administrative Law Judge shall constitute the final order of the Administrator unless the Administrative Review Board, as provided for in section 501.42 below, determines to review the decision.

Review of Administrative Law Judge's Decision

§ 501.42 Procedures for initiating and undertaking review.

(a) A respondent, the Administrator, or any other party wishing review, including judicial review, of the decision of an administrative law judge shall, within 30 days of the decision of the administrative law judge, petition the Administrative Review Board (ARB) to review the decision. Copies of the petition shall be served on all parties and on the administrative law judge. If the ARB does not issue a notice accepting a petition for review within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the administrative law judge shall be deemed the final agency action. If a petition for review is filed, the

decision of the administrative law judge shall be inoperative unless and until the ARB issues an order affirming the decision, or declining review.

(b) Whenever the Administrative Review Board, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an Administrative Law Judge, a notice of the same shall be served upon the Administrative Law Judge and upon all parties to the proceeding in person or by certified mail.

§ 501.43 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the Administrative Review Board's Notice pursuant to section 501.42 of these regulations, the Office of Administrative Law Judges shall promptly forward a copy of the complete hearing record to the Administrative Review Board.

§ 501.44 Additional information, if required.

Where the Administrative Review Board has determined to review such decision and order, the Administrative Review Board shall notify each party of:

(a) The issue or issues raised;

(b) The form in which submissions shall be made (i.e., briefs, oral argument, etc.); and the time within which such presentations shall be submitted.

§ 501.45 Final decision of the Administrative Review Board.

The Administrative Review Board's final decision shall be issued within 90 days from the notice granting the petition and served upon all parties and the administrative law judge, in person or by certified mail.

Record

§ 501.46 Retention of official record.

The official record of every completed administrative hearing provided by these regulations shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

[52 FR 20527, June 1, 1987]

§ 501.47 Certification.

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a U.S. District Court, after the administrative remedies have been exhausted, the Chief Administrative Law Judge shall promptly index, certify and file with the appropriate U.S. District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings

[52 FR 20527, June 1, 1987]

Signed in Washington this __ day of _____, 2008.

_____

Brent R. Orrell,
Deputy Assistant Secretary for Employment and Training

_____

Alexander J. Passantino,

Acting Administrator, Wage and Hour Division

Billing code: 4510-FP-P